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THE PUBLIC INTEREST DEFENCE AND DAMAGES FOR DEFAMATION

COMPARATIVE THEORETICAL AND CONSTITUTIONAL PERSPECTIVES FOR IRISH LAW

Submitted for examination in the degree of Ph.D.

Trinity College Dublin

June 2009

Sarah Fennell

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THE PUBLIC INTEREST DEFENCE AND DAMAGES FOR DEFAMATION: COMPARATIVE THEORETICAL AND CONSTITUTIONAL PERSPECTIVES FOR IRISH LAW

ABSTRACT

SARAH FENNELL

The thesis examines the Irish constitutional relationship between the Article 40.6.1°(i) right to freedom of expression and Article 40.3.2° right to good name in the context of defamation law. It is argued that defamation law is required to serve the values of the Constitution, yet, to date, does not adequately reflect the values underlying speech and reputation rights. This necessitates constitutional re-balancing in defamation law to more appropriately reflect these values. This re-balancing exercise is considered in two areas of defamation law; the public interest defence and damages awards. The conflict between the competing rights of expression and good name must to some extent remain unresolved in individual cases. However, the establishment of a theoretical constitutional framework based on the underlying values of each of the rights should assist in more principled resolution of conflicts.

Comparative jurisprudence within the thesis demonstrates the potential for constitutional guarantees in shaping the relationship between speech and reputation rights in defamation law. Despite similar democratic ideals underlying systems of representative government, jurisdictions approach the tensions between freedom of speech and reputation differently. The resolution of rights clashes in other systems of democratic governance can prove both informative and instructive for Ireland. Developments in the foreign jurisdictions selected for discussion in the thesis have tended towards increased protection of public interest speech. This carries implications for the traditional values associated with reputation.

The thesis concludes that the areas of Irish defamation law singled out require fundamental reconsideration in light of both domestic constitutional values and foreign jurisprudential and legislative developments. The manner in which political or public interest speech is regulated vis-à-vis protection of reputation carries wider implications for democratic society. Conclusions on the relationship between these two rights are arrived at following examination of domestic constitutional values, foreign developments and against the wider background of an evolving domestic model of self-governance.

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SUMMARY

From the early 1990s onwards, there has been much debate on the appropriate accommodation of the right to freedom of expression protected under Article 40.6.1°(i) of the Irish constitution and the Article 40.3.2° right to good name in the context of the law of defamation.[1] Recent legislative developments in the form of the Defamation and Privacy Bills 2006 indicate that the debate continues. Those active in the debate include politicians,[2] journalists,[3] academics,[4] reform bodies[5] and non-governmental organisations[6] both within and outside Ireland.[7] Even in the absence of enactment of these pieces of legislation, the extent of protection for the constitutionally guaranteed rights of freedom of expression and good name will be increasingly informed by the jurisprudence of the European Court of Human Rights (hereafter the ECtHR) following the incorporation of the European Convention of Human Rights and Fundamental Freedoms into Irish law (hereafter the Convention).

At a general level, it is argued by some that the tort of defamation had unduly restricted the communication of material in the public interest contrary to the demands of the Article 5 guarantee of democratic governance, resulting in what is commonly referred to as the

---

[1] For a general introduction to the flavour of this debate, see *inter alia*, Law Reform Commission *Consultation Paper on the Civil Law of Defamation* (March 1991), *Report on the Civil Law of Defamation* (LRC-38-1991) and the *Report of the Legal Advisory Group on Defamation* (March 2003). This last report is available at http://www.justice.ie

[2] One of Fine Gael's 10 points for restoring trust in politics is reform of existing domestic libel law. See, Restoring Trust in Politics – Fine Gael's 10-point programme for good government, 14th May 2002, <www.finegael.ie>. For an earlier party document on reform of Irish libel law, see 'Press for Change – a Thorough Overhaul of the Laws of Libel' at <www.finegael.com/policydocs/pressforchange.htm>.

[3] *Report of the Commission on the Newspaper Industry* (Stationery Office, 1996).

[4] The various academics involved in writing on this area of law are too numerous to mention at this point in the thesis, but will feature regularly throughout.

[5] Above, n.1.

[6] Irish Council for Civil Liberties, *Submission Paper on Report of the Legal Advisory Group on Defamation*, 30th January 2004, <www.iccl.ie/constitution/fos/defamationsubmission_04.pdf>.

[7] In a statement of 11th September 2003, the Alliance of Independent Press Councils of Europe (AIPCE), referred to Irish libel law as representing '...the most outdated libel laws in the European Union....' See <www.presscouncils.org.html.frameset.php?page=news>. For similar views, see the Irish mission Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, E/CN.4/2000/63Add.2, paras. [41-46]. At para.[41], the author of the report, Mr. Abid Hussain, noted the lack of a defence when a media outlet publishes false statements of fact that defame a politician or other public figure, even if the defendant has taken reasonable care to verify the truth of the statement and it was reasonable to publish the matter as part of a discussion of a matter of public interest. In its 2001 World Press Freedom Review, the International Press Institute described Ireland's libel laws as a '...long-standing thorn in the side of Freedom of Expression in Ireland.' See <www.freemedia.at/wprf/Europe/ireland.htm.

chilling effect.[8] By others, it is submitted that any reduction in the level of protection afforded to the right to good name would leave media organs free to pursue commercial and perhaps even political agendas at the cost of this constitutionally guaranteed right. However, more often than not, these arguments are made from pre-conceived standpoints with little apparent effort to truly consider the other side's arguments. Despite the recurrence of these arguments in domestic cases, the Irish courts have more often than not failed to accept that the clash of these rights extends beyond tort and into constitutional law, with consequent lack of application of the constitutional values underpinning the expression and good name guarantees. This thesis is an attempt to engage in a process of constitutional analysis whereby the two constitutional rights are not mechanically balanced but are reconciled based on their underlying values. Although more recent case law has attempted to explain Article 40.6.1°(i), this effort has been limited; firstly in respect of detailed application of its underlying values and secondly as regards the clash and reconciliation of the different sets of values involved in the competing rights. It is submitted that the interpretative constitutional exercise has yet to materialise for the constitutional right of good name. This thesis analyses the respective constitutional guarantees and in light of this exercise, sets out a principled set of constitutional values for use in the defamation context.

This thesis does not set out to exhaustively cover the Irish civil law of defamation.[9] Firstly, this exercise has been ably completed by others in leading textbooks, and secondly such a broad focus would leave little scope for detailed analysis. Instead, two principal areas of defamation law have been selected, firstly, the absence up to relatively recently of a defence for the media where publications on matters of public interest are at issue and secondly, the largely unregulated system for damages awards. It will be argued that these two particular aspects of the Irish defamation regime constitute the strongest source of the constitutional imbalance of the competing rights of freedom of expression and good

---

[8] Empirical research to this effect is referenced in the thesis. In fact, even in an article by a defamation practitioner which makes as its central point that the protection of reputation has received inadequate protection, it is nonetheless accepted that '[W]hat is undeniable is that litigants who have sought to restrain the honest reporting of journalists have misused the defamation law. Unfortunately, this misuse succeeded in creating within the media a culture of subservience to any threatened claim, particularly, in the 1980s and 1990s.' See J.O'Callaghan, 'The right to one's good name is as important as freedom of expression', *Irish Times*, 30th October 2003.

[9] The use of the term political libel is used throughout the thesis in the context of the civil law of defamation and not criminal defamation. See the Irish Law Reform Commission, *Consultation Paper on the Crime of Libel*, (August 1991), pp.10-22, for its distinction between political libels consisting of seditious and blasphemous libels and private libels.

name.[10] A combination of the strict liability principle and the lack of centrality of the public interest concept in the operation of the traditional defamation defences of justification, fair comment and qualified privilege, resulted in ineffective defences for the media in the dissemination of public interest material. In respect of damages awards, the almost complete lack of acknowledgment by the judiciary of the link between high and unregulated damages awards and that of the chilling effect on the publication of matters in the public interest convincingly demonstrates the lack of application of the democratic values of Article 40.6.1°(i).

The thesis is divided into three parts. In Part I, analysis of the values of the constitutional rights of expression and good name is undertaken. As part of this critical assessment, a constitutional framework within which the values may be applied is proposed. It is argued that the absence of a rights-based constitutional framework to assist in the resolution of conflicts between these two competing constitutional guarantees has resulted in imbalance in elements of Irish defamation law. The commitment in some recent domestic jurisprudence to the democratic rationale of free speech is explored and its potential for assisting in the re-balancing of the two rights is considered.

Part II considers some foreign developments which have occurred in the re-balancing of speech and reputation rights. The European Court of Human Rights and the courts of the United Kingdom, United States and Australia have engaged in processes of constitutionalisation in respect of these two rights. Interestingly, the United Kingdom, United States and Australian approaches have revealed a move away from the traditional common law position in defamation, yet have employed different methodologies and achieved different results.

The domestic and comparative analysis conducted in Parts I and II is applied in Part III which suggests re-appraisal of existing domestic defamation law as regards the dissemination of public interest material by the media and the system for calculation and regulation of damages awards. The evolving constitutional framework identified in Part I is considered for its implications in the balancing of rights of expression and good name.

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[10] Of course, clearly, there are therefore other areas also in need of reform, such as, for example, the lack of alternative remedies to damages.

The fundamental hypothesis advanced throughout this thesis is that the two elements of Irish defamation law considered, namely the absence up to relatively recently of a defence for the media where publications on matters of public interest are at issue and secondly, the largely unregulated system for damages awards represent the clearest examples of the under-constitutionalisation of the tort of defamation. This thesis argues for this under-constitutionalisation to be addressed and reform of the two selected issues must be the starting point of practical reform.

PART I

INTRODUCTION

Part I is divided into three chapters. Chapter 1 sets out to address the values which underpin the constitutional guarantee of freedom of expression. The central argument of the chapter is two-fold; firstly, that Article 40.6.1°(i) supports the democratic model of free speech and secondly, that this theory has only recently been adopted, so that its late development has affected the operation of the constitutional guarantee generally and more specifically for this thesis, defamation law. As part of the discussion of the democratic theory, the role of the media is addressed. It is argued that the media is not entitled to institutional protection *per se*, but in so far as it serves an instrumental role in the education of public opinion. To ensure appropriate application of the democratic free speech theory, a constitutional framework is suggested. As part of the operation of this framework, the chapter explains that the process of constitutionalisation should entail application of the values which underpin the constitutional rights of speech and reputation. The brief discussion which follows outside the defamation law context on the protection of speech in the areas of privacy and political dissent, is conducted for a number of reasons. Firstly, it reveals that the traditionally limited level of protection for public interest and political speech applied in other areas just as much as in defamation law, with little in the way of opportunity for the borrowing of developed free speech principles. In this respect, it also demonstrates the lack of any meaningful focus on the role of the media in the dissemination of public interest and political material. The chapter concludes with some discussion of the potential for future development of Article 40.6.1°(i) in two ways; firstly, increased judicial scrutiny of legislative restrictions on free speech rights and secondly, stronger use of the proportionality principle. The proportionality principle has assumed greater significance recently with the introduction of the Convention, as this forms one of the foundational principles in the jurisprudence of the European Court of Human Rights. The proportionality principle is returned to throughout the thesis.

Chapter 2 engages in a relatively similar constitutional exercise in respect of the Article 40.3.2° right to good name, as that completed in the previous chapter on freedom of expression. Given the limited nature of the discussion of the right of good name in areas

outside of defamation law, it is necessary to largely focus the chapter on defamation jurisprudence. The comparatively lower level of focus on defamation jurisprudence in Chapter 1 on the freedom of expression right, is accounted for on the basis that this right has been discussed in greater detail than good name, in a number of areas beyond defamation law. Therefore, it appeared more appropriate to postpone the discussion of Article 40.6.1°(i) within defamation law to the chapter on Irish defamation law (Chapter 3). Constitutional analysis of the good name guarantee is conducted using the classification of reputation proposed by Post in his seminal article.[1] Post divided reputation into property, honour and dignity. The chapter then attempts to ascertain which of Post's reputational values have been used in support of the constitutional guarantee. It seeks to establish whether those values used can be supported by reference to the constitutional guarantee itself, but also with regard to how they fit within the constitutional framework of balancing rights of reputation and expression. It will be argued that the general application of honour and dignity concepts in preference to that of property is misconceived and has contributed to the lack of appropriate constitutional balancing of speech and reputation rights.

The lack of application of firstly, the democratic values of freedom of expression and secondly, the property concept of reputation, are discussed in the context of Irish defamation law in Chapter 3. This chapter is to some extent functional for its explanation of the traditional level of protection for freedom of expression in the two areas of defamation law which are the subject of this thesis; namely the absence until relatively recently of a public interest defence and the lack of proper regulation in the operation and scope of damages awards. The traditional defamation defences of justification, fair comment and qualified privilege have never served as public interest defences. This position may be explained on a number of grounds. Primarily, the lack of centrality of the concept of the public interest in the operation of the defences has ensured they have not been developed to accord with changing democratic demands. Another significant contribution to the weakness of the traditional defences in this respect is the strict liability principle which has served to discourage the dissemination of material of public importance by the media. The recent High Court cases of *Hunter v. Duckworth and Co. Ltd & Anor*[2] and *Leech v. Independent Newspapers (Ireland) Ltd*[3] have indicated a re-

[1] R.C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *Cal. L. Rev.* 691.
[2] [2003] I.E.H.C. 81.

balancing of speech and reputation in the context of defamation law. Both judgments have supported English developments in *Reynolds v. Times Newspapers Ltd*[4] (discussed in detail in Chapter 5) which liberalised defamation law through the introduction of a public interest defence centred on the standard of responsible publication. The implications of these domestic developments are analysed in Chapter 8. Finally, as regards the public interest defence, section 24 of the Defamation Bill 2006 proposes a defence of fair and reasonable publication on a matter of public interest. This piece of legislation is also discussed in Chapter 3. The second part of Chapter 3 addresses damages awards in defamation cases as regards lack of guidelines to assist juries and appropriate appellate review of jury awards. It also refers to the position of exemplary damages in defamation law. The compelling observation on the domestic jurisprudence in this area is the lack of constitutionalisation, such that the values supporting the rights of expression and good name in Chapters 1 and 2 have little, if any, application. This position is particularly unsatisfactory in light of the potential consequences of libel damages for both rights as set out in Chapter 3. These points are returned to for further analysis in Chapter 9.

[3] [2007] I.E.H.C. 223.
[4] [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010.

CHAPTER 1

FREEDOM OF EXPRESSION AND THE CONSTITUTIONAL GUARANTEE

INTRODUCTION

[1-01] This thesis is concerned with whether the protection of public interest speech within certain elements of Irish defamation law represents the appropriate constitutional balance between the right of freedom of expression as protected in Article 40.6.1°(i) and of good name as protected in Article 40.3.2°.[1] Assessment of the relationship between these two rights requires analysis of their respective constitutional guarantees, for any reform of Irish defamation law in the absence of analysis of the values which underpin the relevant constitutional guarantees, carries with it the danger that it fails to reflect the values underlying the rights.

[1-02] This chapter is intended to illustrate the under-development of Article 40.6.1°(i). Despite development of this constitutional provision in recent case law[2] and the publication of sections 24 and 29 of the Defamation Bill 2006, which creates a defence of fair and reasonable publication on a matter of public interest and regulates to some extent the award of damages respectively, this thesis argues that the constitutional guarantee of free speech carries further potential in the two principal areas addressed.[3] This chapter is not intended

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[1] Article 40.3.2° provides that '[T]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the...good name...of every citizen.' It is explained further in Chapter 2 on the constitutional guarantee of good name that this right has been held to form the constitutional foundation for the tort of defamation.

[2] See *inter alia*, *Hunter v. Duckworth and Co. Ltd & Anor* [2003] I.E.H.C 81, *Dillon v. Attorney General*, (Unreported, High Court, 15th March 2007) and *Mahon v. Post Publications Ltd* [2007] I.E.S.C. 15. McGonagle notes the increased reliance on the constitutional guarantee as '...one of the biggest developments in media law in Ireland over the last two decades.' See M. McGonagle *Media Law* (Thomson Round Hall, 2003), p. 22, n.14.

[3] For material to this effect, see B.F. Conroy, 'Constitutionalising the Tort of Defamation: Bunreacht Na hEireann as a Framework for the Reform of Ireland's Libel Laws' (2002) 5 *Trinity.C.L. Rev.* 1, S. Frazier, 'Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation' (1999) 32 *Vand. J. Transnat'l L.* 391, E. O'Dell 'Does Defamation Value Free Expression? The Possible Influence of *New York Times v. Sullivan* on Irish Law' (1990) 12 *D.U.L.J.* 50 and K. Boyle and M. McGonagle, *Press Freedom and Libel* (National Newspapers of Ireland, 1988), pp. 9, 12 and 13. See the views of the Constitution Review Group for their conclusion that not much would be lost if the constitutional provision were to be replaced with text modelled on Article 10 of the European Convention on Human Rights and Fundamental Freedoms; *Report of the Constitution Review Group* (Government of Ireland, 1996), p. 292.

to function as one on Irish defamation law, for such is the purpose of Chapter 3. Although some references are included to defamation jurisprudence, the material discussed in Chapter 1 extends beyond defamation law in an effort to understand Article 40.6.1°(i) as a constitutional guarantee more generally. In order to conduct any exercise in constitutional balancing in defamation law, it is firstly necessary to '...characterise the interest, in order to ascertain its constitutional importance.'[4] This characterisation commences with freedom of expression in this chapter and the constitutional right to good name in Chapter 2.

[1-03] The role of the freedom of expression guarantee[5] in the protection of public interest speech is central when weighing speech and reputation rights in order to calibrate the appropriate constitutional balance. The level of constitutional protection for the media is a central theme of the thesis in the areas of the public interest defence and damages. It is argued in Chapter 3 that the traditional defamation defences have operated largely in the absence of the protection offered to the media through the constitutional free speech guarantee. It is necessary to consider whether the constitutional text itself may carry responsibility for this position or whether the guarantee has simply been underdeveloped. The chapter then considers which free speech theory most closely aligns with Article 40.6.1°(i) and in Chapters 8 and 9, this theory is applied in the two areas of defamation law addressed in the thesis. The next section of the chapter examines the constitutional framework within which Irish defamation law must operate. Recent jurisprudence which includes *Mahon v. Post Publications Ltd*,[6] *Dillon v. Attorney Genera* [7] and *Hunter v.*

Even by the late 1990s, Irish politicians discussed Article 40.6.1°(i) with no attention to the interaction between the Constitution, legislation and the common law; see, for example, the All-Party Oireachtas Committee on the Constitution, *First Progress Report* (Dublin Stationery Office, 1997).

[4] M. B. Margulies 'Standards of Review and State Action under the Irish Constitution' (2002) 37 *Ir. Jur.* (n.s.) 23, 24.

[5] On the 'constitutionalisation' of free speech rights, see E. Barendt, *Freedom of Speech*, 2nd ed., (Oxford University Press, 2005), I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitution* (Hart, 2002), chapter 4, Fleming, J., *'Libel and Constitutional Free Speech'* in P. Cane and J. Stapleton, (eds) Essays for Patrick Atiyah, (Clarendon Press, Oxford, 1991), pp. 333-349, A. Stone 'The Common Law and the Constitution: A Reply' (2002) 26 *Melb. U. L. Rev.* 646 and P. E. Quint 'Free Speech and Private Law in German Constitutional Theory' (1989) 48 *Maryland L. Rev.* 247.
In terms of the obligation which the Constitution produces for legal practitioners, it is worth noting the general remarks of Skweyiya J. in the South African defamation case of *Dikoko v. Mokhatla* (2007) (1) B.C.L.R. 1 (CC). Although issue may be taken with his conclusion that the quantum of damages did not raise a constitutional matter, he noted at para. [46] that '[T]he hallow status of the Constitution has particular consequences for legal practitioners. They must approach all law with the Constitution foremost in their minds. The values which find expression in the Constitution permeate our entire legal fabric. No area of law is left untouched by their reach. Thus when preparing legal argument and strategies, the Constitution is the starting place. Constitutional arguments are not an alternative strategy should the standard common-law arguments fail.'

[6] Above, n.2.

[7] Above, n.2.

Duckworth and Co. Ltd & Anor[8] have afforded Article 40.6.1°(i) greater weight than previously in the areas of confidentiality, begging legislation and defamation, when assessing it against competing rights. This chapter therefore proposes a constitutional framework within which this process of constitutionalisation may develop in the defamation context and by which the level of protection for constitutional rights vis-à-vis one another may be measured. It is necessary to explain what is proposed by the process of constitutionalisation and this point is returned to in the section on the constitutional framework. Paragraphs [1-27] to [1-39] consider two areas beyond defamation law which often involve public interest expression, namely privacy and political dissent. These two areas have been selected for brief focus in order to establish whether there are any underlying values which may also be applied to public interest expression in defamation law. Finally, the last section proposes stronger reliance on judicial review and proportionality principles in the development of the freedom expression guarantee. The proportionality principle is a strong feature of much of the comparative jurisprudence in Part II and is increasingly relied on by the Irish courts in free speech jurisprudence.

THE FORMULATION OF ARTICLE 40.6.1°(i) [9]

[1-04] Article 40.6.1°(i) provides:

'The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

i. The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.'

[1-05] The Ireland of the 1930's was a distinctly different state to the modern nation of the twenty first century.[10] The 1937 Constitution was written against the backdrop of political

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[8] Above, n.2.

[9] For a history of the drafting process, see G. W. Hogan, *The development of judicial review of legislation and Irish constitutional law 1929-1941*, Ph.D Thesis, (Trinity College Dublin, 2001), chapter 4.

revolution and the close Catholic Church and State relationship.[11] The resulting 'paternalism' produced a distorting effect on the level of protection afforded to individuals,[12] with greater emphasis on the protection of community rights through the mechanism of the 'common good'. It is perhaps this constitutional promotion of community values rather than individual autonomy[13] which contributed to the late development of a self-fulfillment free speech theory[14] in the interpretation of Article 40.6.1°(i).[15] The self-fulfillment theory values speech for its own sake[16] as part of

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[10] For accounts of this period in Irish history, see *inter alia*, J.J. Lee, *Ireland 1912-1985: Politics and Society* (Cambridge University Press, 1989) and D. Keogh, *Twentieth Century Ireland: Nation and State* (Gill and Macmillan, 1994).

[11] As Chubb has observed '[T]he procedures followed by de Valera in drafting the Constitution, which involved consultation with clerics and the Vatican on matters which concerned the Church were thoroughly in keeping with the cultural climate of the twenty-six counties at the time.' See B. Chubb, *The Politics of the Irish Constitution* (Dublin, Institute of Public Administration, 1991), p.33. To similar effect, see J. Lydon, *The Making of Ireland: From Ancient Times to the Present* (London, Routledge, 1998), p. 373. For a general review of the drafting of the 1937 Constitution, see Hogan, G., *'The Constitution Review Committee of 1934'* in F. O'Muircheartaigh, (ed) Ireland in the Coming Years: Essays to Celebrate TK Whitaker's 80 Years (Institute of Public Administration, 1997).

[12] By way of contrast, the potential for use of libertarian utilitarian values in the promotion of individual rights is clear from the United States Supreme Court decision of *Lawrence v. Texas* (2003) 539 U.S. 558. For discussion, see D.A.J. Richards, *The Case for Gay Rights – From Bowers to Lawrence and Beyond* (University Press of Kansas, 2005).

[13] The operation of moral censorship through regulation of blasphemous and indecent matter is a good example of the promotion of perceived communal benefits at the expense of individual rights of artistic and religious expression. In the English context, one writer has advocated a better appreciation by the courts of the distinct nature of artistic expression, and proposes that such expression should be immune from the reach of the law of blasphemy. See P. Kearns, 'The Uncultured God: Blasphemy Law's Retrieve and the Art Matrix' (2000) 5 *E.H.L.R.R.* 512. On blasphemy in Irish law, see N. Cox, *Blasphemy and the Law in Ireland* (Edwin Mellen Press, 2000) and by the same author, 'Sacrilege and Sensibility: The Value of Irish Blasphemy Law' (1997), 19 *D.U.L.J.* 87. See also S. Ranalow, 'Bearing a Constitutional Cross – Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers'* (2000) 3 *T.C.L.R.* 95, P. O'Higgins, 'Blasphemy in Irish Law' (1960) 23 *M.L.R.* 151, Law Reform Commission, *Consultation Paper on the Crime of Libel*, (August, 1991) and *Report on the Crime of Libel* (LRC 41-December, 1991).
On censorship generally in Ireland, see M. Adams, *Censorship – The Irish Experience*, (University of Alabama Press, 1968), K. Boyle and M. McGonagle, 'Censorship of Publications – Irish Style' (1989) 10 *Journal of Media Law and Practice* 87, J. Carlson, *Banned in Ireland,* (Routledge, 1990) and Kelly, M., *'Censorship and the Media'* in A. Connelly, (ed.), Gender and the Law in Ireland, (Oak Tree Press, 1993), pp. 185-211.

[14] On the self-fulfillment theory of free speech, see generally M.H.Redish, 'The Value of Free Speech' (1982) 130 *U.Pa. L. Rev.* 591, D.A.J., Richards, 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment' (1974) 123 *U. Pa. L. Rev.* 45, T. Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Phil. And Pub. Aff.* 204, E.C. Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *U.C.L.A. L. Rev.* 964 and Campbell T., *'Rationales for Freedom of Communication'* in T. Campbell and W. Sadurski (eds.), Freedom of Communication, (Aldershot, 1994), pp. 17-44.

[15] There are some authorities in Irish law which endorse the self-fulfillment theory of freedom of expression. Kelly J. in *Mahon v. Post Publications Ltd* [2005] I.E.H.C. 307 and McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573, 605, cited with approval the observations of Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte, Simms* [1999] 3 All E.R. 400, 408; [2002] 2 A.C. 115, 126 which read as follows: 'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society.'
This theory was held intrinsic to the right to communicate in Article 40.3 in *Murphy v. IRTC* [1999] 1 I.R. 12; [1998] 2 I.L.R.M. 360.

[16] Redish, *loc. cit.*, n. 14.

individual autonomy[17] so that it is recognised as a distinct right regardless of '...its political context and cognitive context.'[18]

[1-06] Many commentators have found the text of Article 40.6.1°(i) problematic due to its limitations[19] and qualifications.[20] The libertarian values underpinning the first paragraph were diluted with restrictions in subsequent paragraphs. For many years, the constitutional guarantee remained insufficiently developed in free speech jurisprudence. The identification and development of unenumerated constitutional rights served as evidence of judicial willingness to adopt an activist approach to constitutional interpretation in the context of some rights,[21] in contrast to the passive approach[22] taken towards the development of some Article 40.6.1°(i) rights.

[1-07] Article 40.6.1°(i) forms part of the fundamental rights provisions of the Constitution. According to a leading Irish constitutional lawyer, these rights were left deliberately vague, for '[H]ad the framers of the Constitution intended to lay down particular conceptions of these principles, they could easily have done so.'[23] In the absence of plain and unambiguous wording,[24] with the use of quite general phrases[25] such as 'the education of public opinion', 'grave import', 'common good', 'endeavour to ensure' and

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[17] Scanlon, *loc. cit.*, n. 14.

[18] Campbell, *loc. cit.*, n. 14 p. 34.

[19] M. McGonagle, *op. cit.*, n. 2, p.21 and by the same author, 'Freedom of Expression and Freedom of Information', (1995) *Irish Human Rights Yearbook* 31.

[20] D. Clarke, 'Section 31 and Censorship: A Philosophical Perspective' (1994) 12 *I.L.T.* 53. The wording has also recently been criticised by the Joint Committee on the Constitution, *First Report - Article 40.6.1.i Freedom of Expression* (July 2008).

[21] See B. Dickson, 'The Role of Judges in the Development of Constitutions' (2006) 57 (2) *N.I.L.Q.* 332 and particularly for discussion of the Irish situation, pp. 340-341.

[22] Cox, for example, referred to the Supreme Court's passive activism in declining to define blasphemy in *Corway v. Independent Newspapers* [1999] 4 I.R. 484; [2000] 1 I.L.R.M. 426. See N. Cox, 'Case and Comment' (2000) 22 *D.U.L.J.* 201.

[23] Hogan G., *'Constitutional Interpretation'* in The Constitution of Ireland 1937-1997, F. Litton, (ed) (Institute of Public Administration, 1988), pp. 173-191, 176. Similarly, Dworkin draws a distinction between '...appealing to a concept and laying down a conception....'. See R. Dworkin, *Taking Rights Seriously*, (London, Duckworth, 1977) p. 148.

[24] Even if the wording of Article 40.6.1°(i) had been free of all ambiguity, there remain critics of a strictly literal reading of the Constitution. See, *inter alia*, D. G. Morgan, 'Constitutional Interpretation: Three Cautionary Tales' (1988) 10 *D.U.L.J.* 24 and R. Humphreys, 'Constitutional Interpretation' (1993) 15 *D.U.L.J.* 59.

[25] The Irish Law Reform Commission in its *Report on the Civil Law of Defamation* (LRC-38-1991), p. 114 likewise noted of Article 40.6.1° that '...words are not used very precisely and that the literal approach may not be helpful.' Even at the time of drafting, the dangers of general phrases were alerted to. During the Dáil Debates, Mr. Norton described the term 'to undermine the authority of the State' as 'vague', 'empty' and '...capable of being used by any Government in any kind of situation.' 68 Dáil Debates, Col. 190, (9th June, 1937).

'rightful liberty of expression', Article 40.6.1°(i) demands a purposive interpretation taking account of contemporary democratic values.[26]

THE PARAMETERS OF ARTICLE 40.6.1°(i)

What is Protected?

[1-08] It remained unclear for some time whether Article 40.6.1°(i) is restricted to the expressions of convictions and opinions or whether it also extends to the dissemination of factual information.[27] Even if the constitutional guarantee offers a *restricted* version of the 'marketplace of ideas'[28] model of free speech espoused by Mill,[29] limiting the constitutional guarantee to convictions and opinions runs counter to this interpretation of the guarantee. The early interpretative approach to the scope of Article 40.6.1°(i) is illustrated by Costello J. in *Attorney General v. Paperlink*,[30] where despite an acknowledgment that the Constitution should be interpreted in a purposive rather than literal manner,[31] he considered that in the absence of express constitutional reference in Article 40.6.1°(i) to the communication of information,[32] it was not the appropriate source

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[26] As Hogan opined, to adopt a historical approach to interpretation of the Constitution '...would tend to fossilise the Constitution by applying 1937 values and beliefs to the very different Ireland of 1987.' See G. Hogan, *loc. cit.*, n. 23, p.174.

[27] According to Hall, '[I]t is perhaps somewhat artificial to separate conviction and opinion totally from the realm of fact.' See E. G. Hall, *The Electronic Age: Telecommunications in Ireland*, (Oak Tree Press, Dublin, 2003) p. 348.

[28] The concept of the marketplace of ideas was made famous in the celebrated dissent of Holmes J. in *Abrams v. United States* (1919) 250 U.S. 616. Although Holmes J. favoured a free 'marketplace of ideas', he offered his approval on the opposite reasoning to that of Mill. Unlike Mill, he opined that absolute truth could not be determined and that to regulate expression amounted to arrogance as it implied that the regulator was more cognisant of what constituted truth than those regulated.

[29] The 'search for truth' formed the central tenet of John Stuart Mill's seminal work, *On Liberty* (1859); see J.M. Robson (ed.), *Essays and Politics and Society* (Toronto and Buffalo, 1977), pp. 213-310. For discussion of Mill's theory, see *inter alia*, H. J. McCloskey, *John S. Mill: A Critical Study*, (Macmillan, 1971), G. Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill*, (Knopf, 1974), B. Mitchell, *Why social policy cannot be morally neutral: the current confusion about pluralism*, (Social Affairs Unit, London, 1989), Sir J. Fitzjames Stephen, *Liberty, Equality, Fraternity*, (Cambridge University Press, 1967), Sir. P. Devlin, *The Enforcement of Morals*, (Oxford University Press, 1965), R. Dworkin, *op. cit.*, n. 23 and E. Barendt, *op. cit.*, n.5.
The argument had been made two centuries previously by Milton. See Milton, J Aeropagitica: A Speech for the Liberty of Unlicensed Printing (1644) in *Prose Writings* (Everyman, 1958).

[30] [1984] I.L.R.M. 373.

[31] He explained in the context of Article 40.6.1°(i) that '[T]he Constitution is a political instrument as well as a legal document and in its interpretation the courts should not place the same significance on differences of language used in two succeeding sub-paragraphs as would, for example be placed on differently drafted sub-sections of a *Finance Act*. A purposive rather than a strictly literal approach to the interpretation of the sub-paragraphs is appropriate.' *Ibid.*, p. 385.

[32] The right to receive and impart information is protected internationally under Article 10 of the ECHR, Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant for the Protection of Civil and Political Rights, 1966.

of this right. Costello J. went on to hold the right to communicate as '...one of those personal unspecified rights of the citizen protected by Article 40.3.1.'[33]

[1-09] This remained the approach[34] until the Supreme Court decision of the late 1990s in *Irish Times Ltd. v. Ireland*[35] in which Barrington J. held that:

> '[A] constitutional right which protected the right to comment on the news but not the right to report it would appear to me to be a nonsense. It therefore appears to me that the right of the citizens "to express freely their convictions and opinions" guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them.'[36]

[1-10] This approach to Article 40.6.1°(i) was endorsed in *Murphy v. IRTC*.[37] The applicant was a pastor who sought to challenge a refusal by the Independent Radio and Television Commission to broadcast an advertisement on the ground that it was religious in nature and thereby came within the ban on religious advertising provided for in s.10(3) of the Radio and Television Act 1988.[38] Despite upholding the legislation,[39] the Supreme Court took the opportunity to clarify and develop the scope of the constitutional protection of freedom of speech.[40]

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[33] Above, n. 30, p. 381.
It may be noted that judicial inference of a personal right derived from Article 40.3.1° rather than a more specific constitutional provision is not specific to free speech. For example, the right to procreate and the right to marry were sourced from this constitutional provision rather than from articles on family and marriage: see *Murray v. Ireland* [1985] I.R. 532; [1991] 1 I.L.R.M. 465 and *Ryan v. Attorney General* [1965] I.R. 294 respectively.

[34] See *inter alia*, *Kearney v. Minister for Justice* [1986] I.R. 116, *Oblique Financial Services Limited v. The Promise Production Company Limited* [1994] I.L.R.M. 74 and *Carragaline Company Limited v. Minister for Transport* [1997] 1 I.L.R.M. 241.

[35] [1998] 1 I.R. 359; [1998] 2 I.L.R.M. 161.

[36] *Ibid.*, p. 405.

[37] [1999] 1 I.R. 12,24; [1998] 2 I.L.R.M. 360. For discussion of the High Court case, see R. Cannon, 'Does Expression have any Freedom Left? *Murphy v. Independent Radio and Television Commission*' [1998] 1 *T.C.L.R.* 128.

[38] S. 10(3) provides: '[N]o advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute.'

[39] The legislation was upheld by the European Court of Human Rights in *Murphy v. Ireland* (2004) 38 E.H.R.R. 13. The Court relied heavily on the doctrine of the margin of appreciation to afford wide discretion in respect of protection of religious expression. According to one author, the culturally-specific risk of harm arising from religious expression to justify the ECtHR's decision to accord contracting states a wider margin of appreciation when regulating this form of speech as contrasted with its treatment of political expression cannot be sustained. See A. Geddis, 'You can't say God on the radio: freedom of expression, religious advertising and the broadcast media after *Murphy v. Ireland*' (2004) 2 *E.H.R.L.R* 181.

[40] The importance of the constitutional right to freedom of expression had been acknowledged in earlier case law such as *Attorney General for England and Wales v. Brandon Book Publishers Ltd* [1986] I.R. 597, *Desmond v. Glackin (No.1)* [1993] 3 I.R. 1 and *McKenna v. An Taoiseach* [1995] 2 I.R. 10.

[1-11] The Court clarified the relationship between Article 40.6.1°(i) and Article 40.3. According to Barrington J.[41] the right to communicate centers on the '...right to convey one's needs and emotions by words or gestures as well as by rational discourse....'[42] in contrast to the focus of the right to freedom of expression upon '...the public activities of the citizen in a democratic society...'.[43] Despite the self-fulfillment theory underlying communication rights and the importance of political participation harnessing freedom of expression rights, the Supreme Court accepted that there might be a degree of overlap between the two rights. More recently, Fennelly J. in *Mahon v. Post Publications Ltd* [44] declared the rights as 'inseparable'.[45]

[1-12] While holding that the applicant was entitled to invoke the protection of Articles 40.3 and Article 40.6.1°(i) and recognising the principal purpose of the advertisement as being the communication of information,[46] the Supreme Court adopted a narrower approach when addressing the legislative restriction. Although one observer welcomed Barrington J.'s approach as '...the clearest indication yet of a doctrine of political speech in Article 40.6.1° i...'[47] the application of the doctrine to the facts of the case belied the strength of the Court's constitutional language. Although the Court held that any restriction on freedom of speech '...must relate to concerns pressing and substantial in a free and democratic society',[48] it upheld the blanket ban as proportionate and minimalist given that Mr. Murphy remained free to communicate his ideas by any means other than such broadcasts. It held that the Oireachtas had been entitled to enact the legislation on the ground that advertisements directed towards any of the matters addressed in s.10(3), which

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[41] Barrington J. delivered a unanimous Supreme Court judgment.
[42] [1999] 1 I.R. 12, 24; [1998] 2 I.L.R.M. 360, 372.
[43] [1999] 1 I.R. 12, 24; [1998] 2 I.L.R.M. 360, 372.
[44] Above, n. 2.
[45] *Ibid.*, para [51].
[46] In the High Court, Geoghegan J. had adopted a more discriminatory approach when he had reasoned that Article 40.6.1°(i) would not seem to apply to every expression of opinion. It would not seem to have any application to the right of a private person to express private opinions with a view to influencing some other private person or persons. Instead, it is mainly directed at protecting the expression of opinions whether deriving from groups or otherwise with a view to influencing public opinion. In contrast, Barrington J. took the approach that '...an advertisement, though apparently directed at an individual consumer, may also be intended to influence consumers generally. One could not say that the advertisement in the present case, with its opening question 'What think ye of Christ?', is directed exclusively at individuals and not the citizenry at large.' [1998] 2 I.L.R.M. 360, 372; [1999] 1 I.R. 12, 24. As noted by Doolan, '[T]he expression of convictions and opinions is only meaningful in the context of the ability of those exercising this right to inform and influence others. Freedom of expression has as much to do with the freedom to hear the opinions of others as it has with the right to propagate one's own convictions.' See B. Doolan, *Constitutional Law and Constitutional Rights in Ireland*, 3rd ed., (Gill and Macmillan, 1994), p. 235.
[47] E.O'Dell, *'Article 40.6.1°I: What's It All About After Murphy v. IRTC? A Personal Exercise of the Right to Express Convictions and Opinions'*, Freedom of Expression Symposium, Trinity College Dublin, 5th and 6th December 2003.
[48] [1999] 1 I.R. 12, 26; [1998] 2 I.L.R.M. 360,

had proved extremely divisive in Irish society in the past, might lead to resentment and unrest. The Supreme Court did not limit the free speech rights of the applicant by any need to balance these rights against a competing constitutional right. Instead, it unconvincingly used the potential for resentment and unrest among citizens, terms not elucidated, to restrict a constitutionally guaranteed right. In an unexacting method of constitutional review, it considered the blanket ban proportionate despite acceptance that it would have been possible, as argued by counsel for the applicant, to have had a more selective administrative system whereby religious advertisements would be permitted and those likely to cause offence banned.[49]

[1-13] That the scope of the constitutional guarantee of freedom of expression in respect of whether it extended to cover the dissemination of factual information was not firmly established until *Irish Times Ltd v. Ireland*[50] is strong evidence of its under-development. As one of its key themes, this thesis addresses the public interest defence in Irish defamation law which now appears to operate in certain circumstances to protect false defamatory statements. The late development of constitutional protection for communication of factual information contributed to the lack of constitutionalisation of free speech rights over many years, a point returned in the specific context of defamation law in Chapter 3.

A 'Favoured Status'[51] for the Media?

[1-14] Article 40.6.1° protects freedom of the press.[52] This is clear merely from a literal reading of the text, which refers to 'the press' and its role in the 'the education of public opinion'. Although the constitutional text does not reveal the extent of the 'rightful liberty of expression' of the press, it does make clear that press freedom is not absolute. It may be

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[49] In contrast, see the robust approach of the European Court of Human Rights to information which offends in *Handyside v. United Kingdom* (1979-80) 1 E.H.R.R. 737. The jurisprudence of the Court is discussed in Chapter 4.

[50] [1998] 1 I.R. 359.

[51] Loveland used this phrase when discussing section 12 of the United Kingdom's Human Rights Act 1998. Section 12(4) requires English courts, *inter alia*, to '...have particular regard to the importance of the Convention right to freedom of expression....' See I. Loveland, *Constitutional Law, Administrative Law and Human Rights, A Critical Introduction*, 3rd ed., (LexisNexis, 2003), p.636.

[52] The concept of 'freedom of the press' was referred to during the drafting debates on the Constitution. See 68 Dail Debates, Col. 184, (9th June, 1937) as was the right of press liberty to criticise, see 68 Dail Debates, Col. 191, (9th June, 1937). The phrase 'organs of public opinion' had been used by Baron Fitzgerald in *Murphy v. Halpin* (1874-75) 8 IRCL 127.
For writings on the early press, see Nowlan, *'The Origins of the Press in Ireland'* in Communications and Community in Ireland (ed.), B. Farrell, (Mercier Press, 1984) and B. Inglis, *The Freedom of the Press in Ireland 1784-1841*, (Faber and Faber, 1954).

restricted to protect other constitutional rights.[53] Although Article 40.6.1°(i) speaks in qualified terms, the Irish courts have confirmed the importance of freedom of expression and the role of the media on a number of occasions. In the mid 1980s, Higgins C.J. said in *Cullen v. Toibin*[54] that '[T]he freedom of the press and of communication which is guaranteed by the Constitution...cannot be lightly curtailed.'[55] More recently, Barrington J. in the Supreme Court decision of *Irish Times Ltd. v. Ireland*[56] acknowledged that '[T]he press is in effect the eyes and ears of the public.'[57] Despite these and other statements on press protection at a constitutional level,[58] whether the press is entitled to greater protection than the 'citizens' referred to in Article 40.6.1°(i) remains unresolved. Notwithstanding consideration by numerous domestic commentators,[59] there are those who maintain that the media and citizens are to be treated equally,[60] in contrast to others who contend that Article 40.6.1°(i) appears to place the media in a special position[61] and yet others who submit that the text could be read as providing a lower level of protection for the media than for individuals.[62]

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[53] Some of the restrictions on press freedom are located within Article 40.6.1°(i) itself such as public order and morality and the authority of the state, while some competing rights have their basis in other constitutional provisions such as the Article 40.3.2° right to a good name and the guarantee of the proper administration of justice in Article 34.1.

[54] [1984] I.L.R.M. 577.

[55] *Ibid.*, p. 582. This decision has recently been cited and approved in numerous decisions. See, *inter alia*, *Irish Times Ltd. v. Ireland*, above, n. 50, *per* O'Flaherty J., *Kelly v. O'Neill* [2000] 1 I.R. 354; [2000] 1 I.L.R.M. 507, *per* Denham J. and *Judge Mahon and Others (Members of the Tribunal of Inquiry into Certain Planning Matters and Payments) v. Post Publications Ltd (trading as the Sunday Business Post)* [2005] IEHC 307, *per* Kelly J.

[56] Above, n. 50.

[57] [1998] 1 I.R. 359, 401; [1998] 2 I.L.R.M. 161, 189.

[58] See, *inter alia*, *Hunter v. Duckworth and Co. Ltd*, above, n.2, *Mahon v. Post Publications Ltd*, above, n.2, *Mahon v. Keena*, (Unreported, High Court, 23rd October 2007) and *People (DPP) v. Redmond*, (Unreported, Circuit Court, Matthews J., 25th April 2007).
These developments follow an ongoing maturation of the relationship between the judiciary and the media evident in contempt of court cases. See *Desmond v. Glackin (No. 1)* [1993] 3 I.R. 1, *Weeland v. RTE* [1987] I.R. 662 and *DPP v. Independent Newspapers* [2003] 2 I.R. 367. See generally, Sir G. Brennan, 'The Third Branch and the Fourth Estate' (1997) *Ir. Jur.* Vol XXXII 62 and Rt. Hon. Lord Irvine of Lairg, 'Reporting the Courts: The Media's Rights and Responsibilities' (1999) *Ir. Jur.* (n.s.) 1.

[59] See, J.M.Kelly, *The Irish Constitution*, 4th ed.,(Butterworths, Dublin, 2003) p.1729, J.Casey, *Constitutional Law in Ireland*, (Sweet and Maxwell, London, 2000) p.545, Law Reform Commission, *Report on the Civil Law of Defamation, op. cit.*, n. 25, pp.116-120 and Appendix A of Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, (1991), E.O'Dell *'Does Defamation Value Free Expression?' loc. cit.*, n.3, A. O'Neill, 'Corporate Freedom of Expression' (2005) 27 *D.U.L.J.* (ns) 184, 185-189, E. O'Dell, 'Reflections on a Revolution in Libel' (1991) 9 *I.L.T.* 214, M. McDonald, 'Defamation Report – A Response to the LRC Report' (1992) *I.L.T* 270, M. McDonald, *Irish Law of Defamation*, (Round Hall Press, Dublin, 1989) p.169 and E. Carolan, 'Defamation and Privacy Reform: a Democratic Model of Media Freedom?' (2006) 12(5) *B.Rev.* 147.

[60] Casey, *ibid.*, p. 545 and O'Dell, *loc. cit.*, p. 61.

[61] McDonald, Irish Law of Defamation, *op. cit*, n. 59.

[62] O'Neill, *loc. cit.*, n. 59.

Citizens and Organs of Public Opinion in Article 40.6.1°(i)

[1-15] The political philosopher Meiklejohn is the leading exponent of the theory that protection of free speech is a vital cornerstone of intelligent self-government.[63] The limited manner in which this free speech theory has impacted on public interest speech in Irish defamation law is addressed in Chapter 3. Other jurisdictions are addressed in this respect in Chapters 4-7. Citizens need to engage in free discussion on matters of public interest in order to participate effectively in the democratic process.[64] The protection of free speech places citizens in the position to make informed voting decisions,[65] to communicate their wishes to and criticisms of the government and ensures that public wrongdoing is exposed.[66] In the Irish context, Barrington J. in *Irish Times Ltd v. Ireland*[67] linked the Article 5 guarantee of democratic governance to Article 40.6.1°(i) to collectively protect the public activities of the citizen in a democratic society.[68] The link between the role of the press and democratic governance guaranteed by Article 5 of the Constitution is perhaps even more significant in recent years, given the last decade of commissions of inquiry and

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[63] See, *inter alia*, by A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, (Kennikat Press, 1972), *Political Freedom*, (Oxford University Press, 1965) and 'The First Amendment is an Absolute' (1961) *Sup. Ct. Rev.* 245.
His theory had been somewhat represented judicially thirty years previously by Justice Brandeis in *Whitney v. California* (1927) 274 U.S. 357, 375-8. For discussion, see V. Blasi, 'The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*' (1988) 29 *William & Mary L. Rev.* 653.

[64] Of course, this also supports the self-fulfilment and autonomy rationales for freedom of expression. See R. Post, 'Equality and Autonomy in First Amendment Jurisprudence' (1997) 95 *Michigan L. Rev.* 1517. For a general article on freedom of expression as an intrinsic feature of any genuine constitutional democracy, see Allan, T.R.S *'Common Law Constitutionalism and Freedom of Speech'* in Beatson, J and Cripps, Y (eds), Freedom of Expression and Freedom of Information: Essays in Honour of Sir David William, (Oxford University Press, 2000), pp. 17-34.

[65] 'If there is one characteristic for a democratic system (besides the ballot itself) that is theoretically required, it is the capacity for and the practice of discussion.' B. Berelson, P. Lazarfeld and W. Mc Phee, (1954) *Voting* 307.

[66] See V. Blasi, 'The Checking Value in First Amendment Theory' (1977) *Am. B. Found. Res. J.* 521. This free speech scholar considers free expression as important for providing a check on the abuse of power by public officials. See also M.K. Curtis, 'Monkey Trials: Science, Defamation, and the Suppression of Dissent' (1995-1996) 4 *Wm. & Mary Bill Rts. Journal* 507, 557, for the point that libel law can undermine scrutiny. As the South African Supreme Court explained in *Mthebi-Mahanyele v. Mail & Guardian Ltd and Anor* (2004) 6 SA 329, para. [65] 'Freedom of expression in political discourse is necessary to hold members of government accountable to the public.'

[67] Above, n. 50.

[68] Although in the context of privacy rather than freedom of expression, Schauer has written of the right to vote carrying with it the '...accessory right to obtain the information that is relevant to a voter's decision....' See Schauer, F*'Can Public Figures Have Private Lives?'* in E.F. Paul, F.D. Miller Jr., and J. Paul, (eds), The Right to Privacy (Cambridge University Press, 2000), pp. 293-309, 307.

tribunals[69] in respect of alleged wrongdoing by, amongst others, the church and politicians.[70]

[1-16] Article 40.6.1°(i) recognises, in what has been described as a 'public freedom',[71] protection for the organs of public opinion in their criticism of, *inter alia*, government policy and in their function as a channel of communication to the public. The previous section addressed whether the press is entitled to greater protection than citizens under Article 40.6.1°(i). However, it is submitted that rather than construing the clauses of Article 40.6.1°(i) in respect of citizens and the organs of public opinion separately, a purposive interpretation of the text serves to emphasise the link between the two. In *Irish Times v. Ireland*[72] Hamilton C.J. recognised this link when he stressed the importance of the right of the public to be informed by the media.[73] The constitutional guarantee recognises the role of the media in 'the education of public opinion' including 'criticism of government policy.' Although the press is expressly referred to in a separate clause from citizens, this is not to suggest that it is institutionally protected *per se*,[74] but instead, is afforded constitutional protection by virtue of fulfilling roles of importance. The press acts as a

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[69] As Denham J. observed in *O'Brien v. Moriarty* [2006] 2 I.R. 415, at para. [2]: '[A] feature of public life in Ireland over the past two decades has been the establishment of Tribunals of Inquiry.'

[70] As Chubb has explained, '[C]ertainly it is clear that the kind of politics carried on in a country depends in part at least on the channels of communication that are available and how they are used. See Chubb, B.,*'The Political Role of the Media in Contemporary Ireland'* in B. Farrell, (ed), Communications and Community in Ireland', *op. cit.*, n. 52, pp. 78-85, 75.

[71] Boyle, K.,*'Freedom of Expression and Democracy'* in L. Heffernan (ed), Human Rights: A European Perspective, (Round Hall Press, 1994), pp. 211-219, 217.

[72] Above, n. 50.

[73] The importance of the public's right to know has been noted in a number of Irish judgments. In *Attorney General for England and Wales v. Brandon Book Publishers Limited* [1986] I.R. 597, 601, the late Carroll J. endorsed the dicta of Mason J. in the Australian case of *The Commonwealth of Australia v. John Fairfax & Sons Ltd.* [1980] 147 C.L.R. 39, 51-52 as follows: '[I]t is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.' See also *National Irish Bank v. Radio Telefis Eireann* [1998] 2 I.R. 479, *Desmond v. Glackin* (No.1), above, n.40 and *McKenna v. An Taoiseach*, above, n..40.

[74] For commentary in favour of freedom of the press as a distinct right, see M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1975) 26 *Hastings L. J.* 639 and P. Stewart, 'Or of the Press' (1975) 26 *Hastings L. J.* 631. See also W.E. Lee, 'The Priestly Class: Reflections on a Journalists' Privilege' (2006) 23 *Cardozo Arts & Ent. L. J.* 635, 657, for the argument that even where the Court finds the press is not entitled to a First Amendment based exemption from generally applicable laws, it acknowledges that legislatures are free to craft special protections for the press e.g. limited exemption from anti-trust laws and shield laws permitting journalists to resist subpoenas. For a reply to Nimmer's article, see D. Lange, 'The Speech and Press Clauses' (1975) 23 *U.C.L.A. Rev.* 77. For a good summary of the arguments in favour of not drawing a distinction between media and non-media defendants, see R. Smolla, 'Let the Author Beware: The Rejuvenation of the American Law of Libel' (1983-1984) 132 *U. Pa. L. Rev.* 1, 90.
The Irish jurisprudence on the revelation of journalists' sources (see *Re Kevin O'Kelly* (1974) 108 I.L.T.R. 97) shows that there is no institutional privilege against disclosure. Barendt makes the point that '...this aspect of press freedom should be understood as serving the overall values of free speech rather than as an exercise of a distinct institutional right.' *Op. cit.*, n.5, p.440. See also A. Lewis, 'A Preferred Position for Journalism?' (1979) *Hofstra L. Rev.* 595.

disseminator of information of public interest, a watchdog on the affairs of public life and a host-provider for public debate and thereby serves an instrumental value[75] such that the press clause should not be construed in isolation from the remaining clauses of Article 40.6.1°(i). Thus, in *Cogley v. RTE*,[76] Clarke J. said that:

> '[T]he form of parliamentary democracy enshrined in the Constitution requires that there be a vigorous and informed public debate on issues of importance. Any measures which would impose an excessive or unreasonable interference with the conditions necessary for such debate would require very substantial justification.'[77]

[1-17] Although the constitutional guarantee has not been interpreted to offer wider protection to the media than citizens, for if anything, Article 40.6.1°(i) imposes an added restriction on the former not to 'undermine the authority of the state', the jurisprudence recognises the significant daily role the media plays in the education of public opinion and criticism of government policy.[78] The development of the democratic model of free speech in recent jurisprudence such as *Cogley v. RTE*,[79] *Hunter v. Duckworth and Co. Ltd & Anor*,[80] *Dillon v. Attorney General*[81] and *Leech v. Independent Newspapers (Ireland) Ltd*,[82] re-inforces the constitutional guarantee of freedom of expression for the press, without stretching to draw a media/non-media distinction.[83]

THE CONSTITUTIONAL FRAMEWORK FOR IRISH DEFAMATION LAW

[1-18] The interpretation of Article 40.6.1°(i) values increasingly point towards the democratic model of free speech. However, to ensure that these democratic values are

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[75] The instrumental value of the press has been considered both in Ireland and abroad. See, *inter alia*, O'Neill, *loc. cit.*, n. 59, Lichtenberg, J.,*'Foundations and Limits of Freedom of the Press'* in J. Lichtenberg, (ed.), Democracy and the Mass Media, (Cambridge University Press, 1990), chapter 3, in particular. pp. 102-105 and Posner, R.A.,*'The Speech Market and the Legacy of Schenck'* in L.C. Bollinger and G.R. Stone (eds.) Eternally Vigilant: Free Speech in the Modern Era, (University of Chicago Press, 2002), pp. 121-151.

[76] [2005] 4 I.R. 79; [2005] 2 I.L.R.M. 529.

[77] *Ibid.*, p. 543.

[78] Media and citizens' speech performs different functions, see, for example, s. 18(1) of the Defamation Act 1961 which protects the media's right to contemporaneously report court proceedings.

[79] Above, n. 76.

[80] Above, n.2.

[81] Above, n.2.

[82] [2007] I.E.H.C. 223.

[83] On this point generally, see M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1975) *Hastings L. J.* 639.

protected when weighed against the values which underpin competing rights, it is imperative that an appropriate constitutional rights-based framework exists within which competing rights are assessed.[84] Despite express constitutional protection for freedom of expression and reputation, the relationship between these rights in the context of defamation law was long considered a matter of tort rather than constitutional law. As recently as the late 1990s, Barrington J. in *McDonnell v. Ireland* [85] explained:

> 'If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action. Thus the Constitution guarantees the citizen's right to his or her good name but the cause of action to defend his or her good name is the action for defamation. The injured party, it appears to me, has to accept the action for defamation with all its *incidents* including the time limit within which the action must be commenced.'[86]

[1-19] While this holding appears to preclude the use of Article 40.3.2° as a cause of action to protect reputation, arguably the judge intended that if a plaintiff is forced to rely on the *incidents* of the action for defamation and not the constitutional right to good name, so too is a defendant limited.[87] The reconciliation of the rights of parties in tort law must however operate within the framework of the relevant constitutional provisions, namely Articles 40.6.1°(i), 40.3.2°, and the Article 5 guarantee of democratic governance. Some judicial indication of the necessity of balancing rights in a constitutional framework appeared in the judgment of Henchy J. in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd.*[88] In addressing the relationship between constitutional and tort law,[89] the judge explained that:

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[84] The South African case of *Holomisa v. Argus Newspapers Ltd*, 1996 (2) SA 588 (W), 607B, per Cameron J. contains a useful mechanism for determining the resolution of a conflict between two competing rights which are both recognised and specially protected, but one is shielded by common-law rules which bear on the enjoyment and exercise of the other. The mechanism was explained as follows: '[T]he Court must determine the meaning and content of the right sought to be asserted. It must then assess whether rules, of the common law or otherwise, which protect the one right, curtail or infringe upon the enjoyment of the other. If so, it must determine whether, in the light of the constitutional scheme overall, and the relative place of each competing right in it, that infringement can be justified under the limitation provision.'

[85] [1998] 1 I.R. 141. The case concerned an action for compensation for infringement of the constitutional right to earn a livelihood and to property.

[86] Emphasis added.

[87] Thus, Professor Heuston's question of whether nominate torts such as assault, battery, libel and false imprisonment might disappear to be replaced by an innominate claim for infringement of personal rights appears not to have occurred. See R.V.F. Heuston, 'Personal Rights under the Irish Constitution' (1976) 11 *Ir. Jur.* (n.s.) 205, 222.

[88] [1988] I.L.R.M. 629.

> 'So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only where there has been a failure to implement or, where the implementation relied on is plainly inadequate to effectuate, the constitutional guarantee in question....It might be different if it could be shown that the tort in question is basically *ineffective* to protect his constitutional right.' [90]

[1-20] Focusing on this concept of the ineffectiveness of a tort, Professor Binchy[91] has observed:

> 'It should not be thought that Henchy J's criterion of a tort's basic ineffectiveness is necessarily limited to cases where the *plaintiff's* constitutional rights are in issue: it surely must also apply to cases where a tort, traditionally defined, fails in a fundamental way to protect the *defendant's* constitutional rights. Thus, for example, it would be open to a defendant to challenge what he or she considers to be overbroad principles of liability or unduly narrow defences.'[92]

[1-21] It will be argued in Chapter 2 that the protection of reputation within defamation law has traditionally failed to reflect the democratic credentials of the constitutional free speech guarantee and in this respect meets Professor Binchy's ineffectiveness test by its failure '...in a fundamental way to protect the defendant's constitutional rights.' As the discussion of Article 40.6.1°(i) in this chapter reveals, there has been increased use of stricter constitutional scrutiny of restrictions on the right of freedom of expression in some recent case law. Such developments support the constitutional obligation to extend reconciliation of the clash of speech and reputation rights beyond the contours of tort law and into the constitutional area, in recognition of Article 40.6.1°(i) and Article 40.3.2°

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[89] On the relationship between tort law and infringements of constitutional rights, see B. McMahon and W. Binchy, *Law of Torts*, (3rd ed., Butterworths, 2000), pp. 7-25, T.A.M. Cooney and T. Kerr, 'Constitutional Aspects of Irish Tort Law' (1981) 3 *D.U.L.J.* 1 and A. S. Butler, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 *Anglo-Am. L. Rev.* 1, in particular, pp. 17-40.

[90] Above, n. 88, p. 36. Emphasis added.

[91] Binchy, W *'Constitutional Remedies and the Law of Torts'*, in J. O'Reilly, (ed) Human Rights and Constitutional Law (Round Hall Press, 1992), pp. 201-205.

[92] *Ibid.*, p. 209.

values.[93] Professor Binchy's ineffectiveness test will be returned throughout this work to assist in the exercise of the process of the constitutionalisation of defamation law.

[1-22] However, even within the framework explained above, it remains necessary within a chapter on the constitutional free speech guarantee to establish the traditional weight afforded to Article 40.6.1°(i). Despite the endorsement in Irish jurisprudence of a constitutional rights hierarchy,[94] the reality of subsequent Irish case law has shown that the courts have generally engaged in what has been referred to as 'an individuated balancing process.'[95] Within this process however, on occasion there was little effort to explain the values of the constitutional guarantee of freedom of expression or ensure that any restrictions on the right were not disproportionate. Hamilton P. in *Attorney General (SPUC) v. Open Door Counselling*[96] relegated freedom of speech to a 'lesser right'. Having adopted this approach, he concluded that: '... freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland.'[97] Similarly, according to Keane J. in *Carrigaline Community Television Broadcasting v. Minister for Transport, Energy and Communications*,[98] the rights of freedom of expression and of communication[99] '...cannot be allowed to abrogate or significantly to erode other rights protected by the Constitution.'[100]

[1-23] The third factor for resolving a clash between constitutional rights set out by Kenny J. in *The People v. Shaw*,[101] namely a system of constitutional parliamentary democracy,

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[93] See further I. Loveland, 'Reforming Libel Law: The Public Interest Dimension' (1997) 46 *I.C.L.Q.* 561.
[94] See *The People v. Shaw* [1982] I.R. 1, 63. According to Kenny J. '[T]here is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail.' See generally, Kelly, *op. cit.*, n. 59, pp. 14-15 and 1283-1289.
[95] O'Dell, E.,*'When Two Tribes go to War: Privacy Interests and Media Speech'* in M. McGonagle (ed.) Law and the Media: Views of Journalists and Lawyers, (Round Hall Sweet and Maxwell, Dublin, 1997), pp. 181-256 and p. 253. As such, see Costello J. in *Murray v. Ireland* [1985] I.R. 532, 539; [1985] I.L.R.M. 542, 548 and McCarthy J. in *Attorney General v. X* [1992] I.R. 1.
[96] [1988] I.R. 593 (HC); [1989] I.L.R.M. 19 (SC).The same approach was adopted by the Supreme Court. For a critique of the High Court decision, see J. Friedman, 'On the Dangers of Moral Certainty and Sacred Trusts' (1988) 10 *D.U.L.J.* 71. The absence of a constitutional rights-based framework creates dangers of 'judicial viewpoint discrimination', a concept used by J. Weinstein, 'Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination' (1996) *U.C. Davis. L. Rev.* 471. Even in the United States, with its strong commitment to freedom of expression, this danger in the sensitive abortion context has proven itself very real. In this respect, see L.D. Wardle, 'The Quandary of Pro-Life Speech: A Lesson from the Abolitionists' (1999) 62 *Alb. L. Rev.* 853.
[97] *Ibid.*, p. 617.
[98] [1997] 1 I.L.R.M. 241.
[99] Reference was also made to the Article 40.3.2° right to property in the above respect.
[100] Above, n. 98, p. 288.
[101] Above, n.94.

carries the potential to assist in the development of the constitutional freedom of expression guarantee. In *Hunter v. Duckworth and Co. Ltd. & Anor*,[102] O'Caoimh J., while endorsing a harmonious interpretation of the rights to freedom of expression and a good name, proposed that '...in certain cases in the context of the democratic nature of the State, primacy may have to be given to freedom of expression.' More recently, in the context of a prior restraint application by a tribunal to prevent media publication of information contained in briefs, Fennelly J. in *Mahon v. Post Publications Ltd.*[103] adopted the right to freedom of expression as the starting point. He placed the burden on the tribunal to show that its reliance on the confidentiality of the documents circulated justified the restriction on freedom of expression.[104] The cases of *Hunter* and *Mahon* signal a move away from the earlier cases of *Attorney General (SPUC) v. Open Door Counselling*[105] and *Carragaline Community Television Broadcasting v. Minister for Transport, Energy and Communications.*[106] While *Hunter* and *Mahon* do not afford freedom of expression any presumptive entitlement to prevail over other constitutional rights, they strongly support the importance of public interest speech in a democracy. It is submitted that the cases propose that in a clash of rights involving freedom of expression, the value of Article 40.6.1°(i) weighs very heavily and restrictions on the right must undergo rigorous constitutional scrutiny.

[1-24] The final but very important issue to be addressed is the process of constitutionalisation itself. It is an incomplete proposition to simply argue for constitutionalisation in the absence of explanation of what it is suggested this process should entail.[107] What is proposed is the application of constitutional values to the two areas of defamation law in this thesis; the public interest defence and regulation of damages awards,[108] as distinct from, for example, the creation of new constitutional

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[102] Above, n.2.
[103] Above, n. 2.
[104] He held the proposed form of restraint a disproportionate interference with freedom of expression.
[105] Above, n. 96.
[106] Above, n. 98.
[107] See A. Stone, 'The Common Law and the *Constitution*: A Reply' (2002) 26 *Melb. U. L. Rev.* 646, 648 who describes two possible ways of understanding the relationship between the common law and the Constitution – (i) the 'mandatory effect' model under which the Constitution requires that the common law change in certain ways so that where a change is made to the common law in response to some aspect of the Constitution, those changes are 'constitutionalised' and immune from subsequent legislative restriction (ii) under the 'guidance' or 'mere influence' model, the Constitution is a guide to the direction of the common law but does not require change so that where a change is made to the common law in response to some aspect of the Constitution, the Parliament remains free to change the new doctrine even where it has been developed to conform to the Constitution.
[108] For the proposition that the continued recognition of constitutional protection for political communications and a judicial willingness to engage more seriously with the constitutional limitations

defences or remedies.[109] Should a public interest defence or regulation of damages awards be introduced in legislation, then the constitutional values must be applied in this context.[110] This thesis suggests how this method of constitutionalisation should result in recalibration of the constitutional rights of speech and reputation. It is submitted that the lack of engagement with and application of these values over many decades resulted in ineffective defamation defences for the media and an incorrectly regulated system for damages awards. The determination of conflicts between these two constitutional rights must occur within a constitutional framework so that increased judicial scrutiny occurs in a manner proportionate to the values of each right.

MEDIA FREEDOM AND PUBLIC INTEREST SPEECH: PRIVACY AND POLITICAL DISSENT

[1-25] This section briefly examines free speech protection beyond the defamation law context, namely in the areas of privacy and political dissent, for a number of reasons. The treatment of political or public interest speech in defamation law cannot be isolated from its treatment in other areas, so that its protection in these areas is relevant to the potential for development of the democratic discourse theory of freedom of expression in Irish defamation law. The clash of privacy and free speech rights has arisen on a number of occasions and although there remains no judicial template to determine the rights conflict, the case law discussed in this section reveals the increased recognition of the need to offer meaningful protection to the media in its communication of matters of public interest.[111] Further, given that a good name may be damaged just as badly by truths as by falsehoods, the protection of reputation as an aspect of privacy is also relevant in the context of balancing speech and reputation in the defamation law context. It will also be seen in

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depends upon the development of a firmer constitutional foundation, see J. Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melb. U. L. Rev.* 239. See further T.R.S. Allan, 'Constitutional Rights and Common Law' (1991) 11(4) *O.J.L.S.* 453, 474, for the argument that '[A] charter of rights needs a liberal and purposive construction if it is truly to safeguard basic liberties.'

[109] For a similar position outside the Irish context, see G. Hill and A. Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adel. L. Rev.* 67, 91. See also S. Fischer, 'Rethinking *Sullivan*: New Approaches in Australia, New Zealand and England' (2002-2003) 34 *Geo. Wash. Int'l L. Rev.* 101 for criticism of *New York Times v. Sullivan* (1964) 376 U.S. 254, for ignoring the existing defence of qualified privilege and unnecessarily creating a new constitutional defence. Similarly, see R. Epstein, 'Was *New York Times v. Sullivan* Wrong' (1983) 53 *U. Chi. L. Rev.* 782 and for a domestic article on point, B. F. Conroy, *loc. cit.*, n. 3, p.8.

[110] This approach was recently endorsed by Ó'Caoimh J. in *Hunter v. Duckworth and Co. Ltd & Anor*, above, n. 2, where it was explained: 'It is, however, necessary, to assess whether the common law of defamation as traditionally interpreted in this jurisdiction meets the requirements of the Constitution.'

[111] See generally, *Desmond v. Moriarty* [2004] 1 I.R. 334, paras. [47] and [48], *per* Denham J.

Chapter 4 that the European Court of Human Rights has recently began to consider the right to reputation as an aspect of privacy within its defamation jurisprudence. Finally, the question of the public/private figure divide in defamation law, discussed from a comparative perspective in Chapters 4-7 and analysed in the Irish context in Chapter 8, would be incomplete in the absence of consideration of the distinction, if any, in Irish privacy law.

[1-26] The level of protection afforded to political dissent speech in a democratic constitutional democracy tests the level of commitment to the right of free speech.[112] Given the tensions that emerged in this jurisdiction over many years between rights of speech and the authority of the state, many opportunities were afforded to engage in constitutional balancing. This necessarily brief focus on the leading cases on political dissent reveals minimal engagement with Article 40.6.1°(i) values. As noted above, the lack of constitutionalisation of free speech rights for this type of political expression does not stand isolated from the level of protection for press activity in other areas of public interest speech.

Privacy[113]

[1-27] The 'marked cultural reticence around free speech'[114] in Irish society partly explains the tendency on the part of Irish people to guard against the disclosure of private facts.[115] Given this feature of Irish life, it seems surprising that a constitutional right of privacy[116] remained ungrounded by the mid 1970s,[117] until its recognition as an

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[112] Although in the context of possession of child pornography, the words of Brennan J., dissenting in *Osborne v. Ohio*, 495 U.S. 103, 109, L Ed 2d 98, are also worth noting in respect of political expression: '[W]hen speech is eloquent and the ideas lofty, it is easy to find restrictions on them invalid.'

[113] See, J.M.Kelly, *op. cit.*, n.59, J. Casey, *op. cit.*, n. 59, M. McGonagle, *op. cit.*, n.2 , Law Reform Commission *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57-1998); *Report of Working Group on Privacy*, 31st March 2006, (available at www.justice.ie); O'Dell, E.*'When Two Tribes go War': Privacy Interests and Media Speech'* , *loc. cit.*, n. 95, pp. 181-256 and G. Hogan, 'Privacy and the Press in Ireland' [1987] *P.L.* 509.

[114] F Ryan, *'Talk About Choice: Abortion Information and the Dilemmas of Free Speech'*, Freedom of Expression Symposium, Trinity College Dublin, 5th and 6th December 2003, p.6.

[115] See the views of a former Irish Taoiseach, Dr. Garret Fitzgerald in *'Government and Business Secrecy'*, in E. Hazelkorn and P. Smyth, (eds) Let in the Light: Censorship, Secrecy and Democracy, (eds.) (Brandon Book Publishers, 1993), pp. 48-58 and those of B.Farrell, 'Opening a chink in the shutters', *Irish Times*, 8th January, 1994.

[116] Privacy interests are protected by a variety of legislative enactments and torts. For further detail, see B.E.Mc Mahon and W. Binchy, *op. cit.* n.89, pp. 992-998.

[117] The Irish position stands in stark contrast to that in the United States, which has seen the discussion of privacy rights for over a century. See T. Cooley, *A Treatise on the Law of Torts*, 2nd ed.,(Chicago Callaghan, 1888), S. D. Warren and L. D. Brandeis, 'A Right to Privacy' (1890) 4 *Harvard L. Rev.* 193 and more recently, W.L. Prosser, 'Privacy' (1960) 48 *Cal. L. Rev.* 383.

unenumerated right in the context of marital privacy[118] and arguably has remained underdeveloped.[119] Despite the subsequent recognition of the right in respect of individual privacy[120] and written or telephonic communications,[121] a theoretical and analytical framework[122] for privacy rights did not follow.

[1-28] Privacy is protected in a disparate fashion by the Constitution, the ECHR, the common law breach of confidence action,[123] data protection provisions,[124] trespass, the tort of private nuisance, defamation and the tort of intentional infliction of emotional harm. Such patchy protection contributed in part to the lack of proper development of principles in the protection of privacy rights.[125] Despite judicial attempts to develop the constitutional

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[118] *McGee v. Attorney General* [1974] I.R. 284.

[119] Other factors which may have hampered the development of Irish constitutional privacy law include the costs and uncertainty associated with proceedings and the willingness of both plaintiffs and newspapers to settle cases. One commentator has referred to the '...fog over the parameters of this unenumerated constitutional right.' See H. Hannigan, 'From catwalk to courtroom – Privacy struts her stuff' (2004) 11(8) *CLP* 194. For an example of the lack of judicial engagement with the constitutional right to privacy, see *Madigan v. AG* [1986] I.L.R.M. 136.

[120] Although the plaintiff's challenge to two statutes criminalizing homosexual activity failed before the Supreme Court in *Norris v. Attorney General* [1984] I.R. 36, it is worth noting the dissenting judgment of Henchy J. where he acknowledged an inherent right of privacy '...in each citizen by virtue of his human personality, and that such a right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40.3.'

[121] [1987] I.R. 587, 593. Hamilton P. in the High Court made clear that '[T]he dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.' In *Haughey v. Moriarty* [1999] 3 I.R. 1, 58, the same judge noted that '[F]or the purposes of this case, and not so holding, the Court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions.'

[122] In its Report on Privacy, *op. cit.*, n. 113, the Irish Law Reform Commission divided privacy into invasion by physical intrusion and invasion by publication. Publication of private facts may result from information obtained from physical intrusion. This division has recently been approved in the context of an interlocutory application by Clarke J. in *Cogley v. RTE*, above, n. 76.

[123] The common law breach of confidence action has been extended somewhat artificially in England to cover situations of invasion of privacy. For a leading English article, see G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66(5) *M.L.R.* 726. See also H. Delany, 'Breach of Confidence or Breach of Privacy: The Way Forward' (2005) 12(1) *D.U.L.J.* 151. In the Irish context, a practitioner in this field has observed that: 'While it is possible that the Irish courts would develop the equitable action for breach of confidence in the same way as it has been developed in England, it is more likely that the Irish courts will derive a private law cause of action from the provisions of article 40.3 of the Constitution.' See E.McCullough, *'Defamation & Privacy Law, What do Privacy Laws Protect?,* Bar Council of Ireland Conference on Defamation, 14th July 2006, para. [10]. The *Report of the Working Group on Privacy*, (March, 2006), reached the same conclusion para. [2.19]. This report is available at www.justice.ie

[124] See Data Protection Acts 1988-2003.

[125] For recent discussion of the 'significant limitations' attaching to some of the existing torts in protecting privacy interests, see E.McCullough S.C. *'Privacy: Future Directions in Practice'*, Irish Centre for European Law Conference on Privacy: Developments in the European Court of Human Rights, 13th December 2006, pp. 4-6.

right to privacy,[126] there remains no constitutional template for reconciling a conflict between press freedom and individual privacy.[127]

[1-29] There is a conflict of approach in the two mid 1990s cases in which a clash between these rights emerged[128] in the context of applications for interlocutory injunctions. In the first of these cases, *M. v. Drury*,[129] an injunction was sought to prevent further publication by a husband of allegations of his wife's affair. [130] With specific reference to freedom of the press, the injunction was refused. Recognising the necessity of balancing freedom of speech against other interests, O'Hanlon J. endorsed the following principle to resolve the conflict:

> 'Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous and irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.'[131]

[1-30] The principle is not a useful solution to the resolution of the clash of rights given that it appears to offer little more guidance than to indicate that privacy rights, unless protected by common law or statute, are not legitimate restrictions. In the second of the two High Court decisions, *X v. Flynn*,[132] the constitutional privacy guarantee was successfully invoked to convince Costello J. to grant an injunction restraining publication by journalists of any material relating to a rape victim's private and family life save for that already in the public domain. The judge acknowledged yet failed to sufficiently address the difficulty in resolving the conflict between the plaintiff's constitutional right to privacy

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[126] See, for example, *Barry v. The Medical Council* [1998] 3 I.R. 387 (holding of a medical committee inquiry in private), *I.O'T v. B.* [1998] 2 I.R. 321 (whether a child has a legal right to know the identity of its natural mother), *Hanahoe v. Hussey* [1998] 3 I.R. 69 (obtaining of evidence by way of a search warrant), *Haughey v. Moriarty* [1999] 3 I.R. 1(right to confidentiality of banking transactions in the context of a tribunal of inquiry), *Cogley v. RTE*, above, n. 76, (balancing of public interest in disclosure against the right of privacy in the context of secretly filmed footage in a nursing home) and *Caldwell v. Mahon* (Unreported, High Court, 15th February 2006) (extension of tribunal's enquiries into business affairs of the applicant).

[127] This was acknowledged recently by Fennelly J. in *Mahon v. Post Publications Ltd.*, above, n.2, para. [91]. The case of *Redmond v. Flood* [1999] I.L.R.M. 241 shows a privacy action taken against a Tribunal of Inquiry as to whether the right to privacy would be infringed by public hearing of its allegations.

[128] The cases confirm that privacy is not limited to government interference but extends to media activity. As noted by Barendt, '...virtually all privacy claims in the free speech context are made against the press and other media, rather than against individuals asserting free expression rights.' *Op. cit.*, n. 5, p.224.

[129] [1994] 2 I.R. 8, 16; [1995] I.L.R.M. 108, 115.

[130] See the English case of *A v. B plc* [2003] Q.B. 195; [2002] 3 W.L.R. 542; [2002] 2 All E.R. 545.

[131] Hoffman L.J. in *R. v. Central Independent Television plc* [1994] 3 W.L.R. 20, 30.

[132] High Court, 19th May 1994.

and the constitutionally protected right of the individual defendants to communicate and carry on their professions. Given that the issue before him was the granting of an interlocutory injunction, he did not determine in any detail the resolution of the conflict except to observe that '...the plaintiff has been able to establish, not in a shallow or insufficient way that the court will decide in her favour as to the resolution of the conflict.'

[1-31] Such 'mixed results'[133] failed to clarify a method for reconciling a clash between rights of freedom of expression and privacy.[134] The approach in *M v. Drury* [135] appears to endorse the restricted marketplace model of free speech, but *X v. Flynn* [136] revealed little of which theory Article 40.6.1°(i) most closely supports. Although these rights have yet to do battle before the Supreme Court, some recent case law, albeit on interlocutory injunction applications, proposed some determining principles in resolving a clash between media freedom and the right of confidentiality. In *Mahon v. Post Publications*[137] and *Cogley v. RTE*,[138] the significant impact of prior restraints on media freedom was acknowledged. The influence of Strasbourg case law was readily apparent in both cases with Fennelly J. in *Mahon* relying on a test of proportionality[139] and the 'careful scrutiny' test[140] of the ECtHR coming to the fore in Clarke J.'s *Cogley* judgment. Although neither judgment gives freedom of expression 'presumptive precedence',[141] they both make clear that in any balancing exercise where there is a conflict of rights, the weight to be attached to the role of the media in communicating matters of public interest is very significant.

[1-32] In *Cogley v. RTE*,[142] Clarke J. recognised that the availability and parameters of a public interest defence in this jurisdiction have yet to be clearly established. The judgments

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[133] Kelly, *op. cit.*, n. 59 , p.1746.
[134] The recent case of *Gray and ors. v. Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 52 concerned unlawful disclosure of confidential and sensitive information procured by the State. The family sued the State and not the newspaper.
[135] Above, n. 129.
[136] Above, n. 132.
[137] Above, n. 2.
[138] Above, n. 76.
[139] The proportionality test had been used by Kelly J. in the High Court, [2005] I.E.H.C. 307, an approach endorsed by Fennelly J. in the Supreme Court. Kelly J. had criticised the Tribunal for its use of 'a blunderbuss as its weapon of choice' rather than 'a weapon of precision.'
[140] In *Observer and Guardian v. United Kingdom* (1991) 14 E.H.R.R. 153, the ECtHR explained that Article 10 does not mean that all prior restraints are incompatible with the Convention but should be subject to careful scrutiny. This test was endorsed by the ECtHR in *Editions Plon v. France* (2006) E.H.R.R. 36.
[141] This phrase is used by the Working Group on Privacy, *op. cit.*, n.123,at para. [2.27] in the context of discussing the English case of *Thompson and Venables v. Newsgroup Newspapers Ltd* [2001] 2 W.L.R. 1038.
[142] Above, n. 76. For a case note, see R. Walsh, '*Cogley v. RTE* and *Aherne v. RTE*' (2006) 9 *Trinity C. L. Rev.* 137.

in *Cogley* and *Mahon v. Post Publications Ltd* [143] confirmed the availability of a public interest defence to regulation of the nursing home sector involving expenditure out of public funds and corruption in the planning process respectively. Clarke J. cautioned that public interest defences in privacy cases are to undergo 'significant scrutiny'[144] given that 'it is all too easy to dress up very many issues with an exaggerated or unreal public dimension.'[145] According to Clarke J., even public figures are entitled to private lives and any balance between freedom of speech and privacy will shift depending on the significance of the public interest in the material.[146] This approach is evidence of a test based on speech content rather than status.

[1-33] Finally, the Privacy Bill 2006, although it appears to have been shelved, remains worth noting.[147] The potential introduction of this statutory tort[148] serves as a reminder that privacy and free speech rights are liable to conflict,[149] particularly where media defendants

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[143] Above, n. 139.
[144] [2005] 4 I.R. 79, 98; [2005] 2 I.L.R.M. 529, 546.
[145] [2005] 4 I.R. 79, 98; [2005] 2 I.L.R.M. 529, 546.
[146] The ECtHR considered the relationship between freedom of expression and privacy in a media context in *Von Hannover v. Germany* (2005) 40 E.H.R.R. 1. Although judgment was delivered in *Von Hannover* in June 2004, the case does not appear to have been relied upon by Counsel or the Court in *Cogley*, decided in October 2005. According to the ECtHR, where information falls outside the sphere of public debate, the press is not fulfilling its democratic 'watchdog' role. Thus, despite the absence of consideration of *Van Hannover* in *Cogley*, Clarke J. took a similar approach to the Strasbourg bench.
For ECtHR jurisprudence on reputation as an aspect of privacy, see Chapter 4.
[147] It should be noted that the Minister for Justice recently indicated that if the media fails to show respect for the right to privacy in its Code of Practice, the Government would have no choice but to proceed with the privacy legislation. See P. Cullen, *'Lenihan warns media on privacy issue'*, *Irish Times*, 10th January, 2008. The genesis of the Bill is the Report of the Working Group on Privacy, *op. cit.*, n. 123.
See generally, V. Corbett, *'An Overview of the Privacy Bill 2006'*, Defamation, Privacy and Media Regulation, Conference on the Defamation and Privacy Bills 2006, Trinity College, Dublin, 30th September 2006, P. Walshe, *'Privacy: Developments in the European Court of Human Rights'*, Irish Centre for European Law Conference, 13th December 2006; E. McCullough, *'Privacy: Developments in the European Court of Human Rights'*, Irish Centre for Human Rights, 13th December 2006, E.McCullough, *'Developments in Privacy Law'*, Bar Council Conference, 15th July 2006, M.McGonagle, *'A tort of privacy? The Privacy Bill 2006'* (2006), *Qtly. Rev. of Tort Law*, P. O'Callaghan, *'The Privacy Bill 2006 – Comparative Observations on a "Super Tort"* (2006) 24 I.L.T. 251.
[148] No privacy tort exists in Irish law. This is similar to the UK position where rather than developing a privacy tort, the breach of confidence action and the tort of passing off were developed. There have been recent cases which are evidence of an evolving privacy law, see *Douglas v. Hello! Ltd* [2007] UKHL 21, *Campbell v. MGN Ltd (No.2)* [2005] 4 All E.R. 793, *Associated Newspapers Ltd. v. HRH Prince of Wales* [2006] EWCA Civ 1776 and *McKennitt and ors. v. Ash* [2007] 3 W.L.R. 194. For commentary see H. Delany and C. Murphy, 'Towards Common Principles Relating to the Protection of Privacy Rights? An Analysis of Recent Developments in England, France and before the European Court of Human Rights' (2007) 5 *E.H.R.L.R.* 568 and A. McLean and C. Mackey, 'Is There a Law of Privacy in the UK? A Consideration of Recent Legal Developments' (2007) 29(9) *E.I.P.R.* 389.
[149] Of course, there are situations where the rights to freedom of expression and privacy may overlap. An obvious example is the protection of journalists' sources of information where privacy is relied on to protect freedom of expression. A less obvious example, but one that has been discussed in detail in England is personal autonomy as an aspect of privacy that includes a right to speak out. This has been considered in the context of a child giving an interview to the press in *Re Roddy (A Child) (Identification: Restrictions on Publication)* [2004] 2 F.L.R. 949.

are concerned. From a media perspective, the Bill was significant in a number of respects. In determining whether an act constitutes a violation of an individual's privacy, the court was to be guided by a number of factors listed in section 4(1). Significantly, section 4(1)(c) referred to the office or position held by the individual, the functions performed by the holder of such office and the extent, if any, to which the act under challenge pertains to that office or position or any or all of those functions. The Bill recognised that the case for protecting free speech is stronger for those occupying public office than for others, although this is only one factor to be weighed in the balancing exercise. The Bill provided a newsgathering defence which applied where a defendant proved that the act was one of newsgathering,[150] provided that any disclosure of material obtained as a result was (i) done in good faith (ii) for the purpose of discussing a subject of public importance (iii) for the public benefit and (iv) fair and reasonable in all the circumstances. The regulation of publications with these cumulative criteria indicated a move away from the *M v. Drury* [151] marketplace model to the *Cogley* v. *RTE* [152] democratic model.

Political dissent[153]

[1-34] Although the Article 40.6.1°(i) prohibition on seditious speech and other pieces of legislation[154] restricted the scope of press freedom in respect of publications connected with undermining the authority of the State, it was a comparatively more recent statute

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[150] An act of newsgathering was defined in section 5(2) of the Bill as 'an act that is reasonable in all of the circumstances and that consists of, or is necessary or incidental to – (a) the acquisition or preparation of material for publication in a periodical, or (b) the acquisition or preparation of material for broadcasting.'

[151] Above, n. 129.

[152] Above, n. 76.

[153] See generally E. Hall, *The Electronic Age: Telecommunication in Ireland*, *op. cit.*, n. 27, chapter 16 and G. Hogan, 'Federal Republic of Germany, Ireland, and the United Kingdom: Three European Approaches to Political Campaign Regulation' (1992) 21 *Cap. U. L. Rev.* 501, pp. 535-539.

[154] Although repealed after a year, the Public Safety Act, 1927 limited press freedom following the murder of the then Minister for Justice, Kevin O'Higgins. Section 9 made it unlawful to '...print, publish, distribute, sell or offer or expose for sale, without the previous permission of the Minister for Justice any book, newspaper, magazine, periodical, pamphlet, leaflet, circular or other document containing any statement by or on behalf of or emanating from or purporting to be made by or on behalf of or to emanate from an unlawful association or any statement aiding or abetting or calculated to aid or abet an unlawful association.' The Constitution (Amendment No.17) Act 1931 also provided for the outlawing of unlawful organisations, membership of which was punishable by the Constitution (Special Powers) Tribunal. With the passing of the 1937 Constitution, this provision, inserted in the form of Article (2A) into the 1922 Constitution, disappeared. Section 10(1) of the Offences Against the State Act 1939 makes it an offence to 'set up in type, print, publish, send through the post, distribute, sell or offer for sale any document (a) which is or contains or includes an incriminating document; (b) which is or contains or includes a treasonable document; or (c) which is or contains or includes a seditious document.' See also section 4 of the Offences Against the State (Amendment) Act 1972.

which produced a truly 'chilling effect' on broadcast coverage[155] of one of the most significant periods of twentieth-century Irish history. The statute is the Broadcasting Authority Act, 1960 and the period of Irish history that of the Northern Ireland troubles. Section 31(1) of this Act, 1960, as amended,[156] provided that:

> '[W]here the Minister is of the opinion that the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or incite to, crime or would tend to undermine the authority of the State, he may by order direct the Authority to refrain from broadcasting the matter or any matter of the particular class, and the Authority shall comply with the order.'

[1-35] The section 31 form of emergency legislation[157] produced only a handful of cases. The first constitutional challenge was taken in *State (Lynch) v. Cooney*[158] which concerned an Order made in February 1982[159] by the Minister for Posts and Telegraphs directing the broadcasting authority to refrain from broadcasting any matter, whether being a party political broadcast, made by or on behalf of, or inviting support for the Sinn Fein party. One of seven Sinn Fein general election candidates sought an order of *certiorari* quashing the ministerial order. His application succeeded in the High Court but failed in the Supreme Court, the difference in outcome between the two courts resulting from differing interpretations of section 31.

[1-36] Although O'Hanlon J. in the High Court recognised that the right to freedom of expression is not absolute, he believed that the State could only take steps as are

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[155] Although some legislation has governed both the print and broadcast media, the more severe of the restrictions applied to the broadcast media, so as to prevent broadcasts rather than imposing punishment subsequent to the broadcast.

[156] As amended by section 16 of the Broadcasting Authority (Amendment) Act, 1976. Sections 12 and 18 of the Radio and Television Act, 1988 applied the Section 31 ban to privately-owned stations which were licensed by the Irish Radio and Television Commission. See C. Kenny, 'Section 31 and the censorship of programmes' (1994) 12 *I..LT.* (ns) 50, Clarke, *loc. cit.*, n. 20, P. Twomey, 'Freedom of Expression - Talking About "The Troubles"' in T. Murphy and P. Twomey, (eds) Ireland's Evolving Constitution 1937-97, (Hart Publishing, 1998), pp. 199-218 and Horgan, *Broadcasting and Public Life, RTE News and Current Affairs 1926-1997*, (Four Courts Press, 2004).

[157] Clarke explained that Ireland had been in a continuous state of constitutional emergency since 1939 and during this time, Article 28.3.3° has been used to support legislation to limit constitutional rights of citizens. According to the same author, '[I]t is hardly a sign of a mature, confident democracy that Ireland has effectively used an amended, exceptional clause of the Constitution to suspend all constitutional rights of citizens which might be invoked to challenge legislation passed under the rubric of 'Emergency Legislation.' See Clarke, *loc. cit.*, n.20.

[158] [1982] I.R. 337.

[159] (No.2) Order, 1982 (S.I. 21 of 1982).

'reasonably necessary'[160] to protect the authority of the State and that '...the present form of the legislation under which the Minister has purported to act appears...to contain insufficient safeguards for the constitutionally guaranteed rights of freedom for the expression of convictions and opinions....'.[161] The Supreme Court[162] rejected the argument that section 31 conferred on the Minister wide-sweeping powers under which decisions taken by him were unreviewable[163] and declined to quash the Minister's order. The judgment offered little meaningful analysis of Article 40.6.1°(i). Indeed, Henchy J. in a separate judgment did not even refer to Article 40.6.1°(i).

[1-37] It was to prove another ten years, in *O'Toole v Radio Telefis Eireann*,[164] before according to one observer, '...the Supreme Court finally offered a rights-based analysis of the constitutionality of section 31.'[165] Although 'rights-based' in outcome, the judgment failed to discuss the nature of political speech, which types of political speech, if any, are not constitutionally protected and the correct constitutional method for reconciling political free speech and legislative restrictions affecting it. In addressing the section, O'Flaherty J.[166] explained:

> 'Nor is it necessary to engage in any extensive analysis of the liberty of expression clause in the Constitution except to point out that the liberty of expression guaranteed is obviously not such that can be invoked to undermine public order or morality or the authority of the State. However, someone speaking on an innocuous subject on the airwaves, even though he is a member of an organization which includes in its objects a desire to undermine public order or the authority of the State, is neither outside the constitutional guarantee nor is he within the ministerial order.' [167]

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[160] [1982] I.R. 337, 355.
[161] [1982] I.R. 337, 356.
[162] The Supreme Court gave judgment after the general election. It had refused a stay on the Ministerial Order prior to hearing the appeal.
[163] See C.Gearty, 'Administrative Law – Judicial Review of Ministerial Opinion' 4 (1982) (n.s.) *D.U.L.J.* 195 and G. Hogan, 'Practice and Procedure – Challenging the Constitutionality of an Act of the Oireachtas by way of *Certiorari*', (1982) 4 (n.s.) *D.U.L.J.* 150.
[164] [1993] I.L.R.M. 458. The challenge had been successful in the High Court and an appeal was taken by RTE to the Supreme Court. See *O'Toole v. RTE* (No.1), (Unreported, High Court, 31st July 1992).
[165] See Twomey, *loc. cit.*, n. 156.
[166] Egan and Blayney JJ concurring.
[167] Above, n. 164, p. 467.

[1-38] The result of the section 31 case law was the stifling of free political debate on Northern Ireland. The ban created a system of media self-censorship[168] stretching far beyond the political situation in Northern Ireland.[169] The distinguished New York Times columnist, Anthony Lewis, is undoubtedly correct in arguing that section 31 would, 'without a doubt' have been found unconstitutional in the United States.[170] Despite this, section 31 orders were renewed each year by Irish governments[171] until finally lifted in January 1994.[172] The lack of any meaningful judicial review of the relevant legislation pointed away from the existence of a political speech doctrine in Ireland.

[1-39] Paragraphs [1-27] to [1-38] have revealed that domestic jurisprudence in the areas of privacy and political dissent failed to commit to a free speech theory. A factor which contributed to this position appears to be the limited recognition of the important democratic role played by the media in the dissemination of material of public importance. As a result, there was weak constitutional review and an absence of appropriately balancing competing rights. That this position remained until relatively recently also impacted on the protection of media speech rights in the defamation context.

THE POTENTIAL FOR FUTURE DEVELOPMENT OF ARTICLE 40.6.1°(i)

[1-40] As this chapter has revealed, the heightened standard of scrutiny which applies when rights are reviewed through a constitutional lens[173] was absent from the freedom of

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[168] For the wide effects the ban produced on journalists, see, White, A.,' *Political Censorship'* in P. Smyth and E. Hazelkorn, (eds), Let in the Light: Censorship, Secrecy and Democracy (Brandon Books, 1993), pp. 149-155. See also, D. Miller, *Don't Mention the War: Northern Ireland, Propaganda and the Media* (Pluto Press, 1994), p. 56 and McGonagle, *op .cit*, n. 2, p. 345.

[169] According to one commentator, the legislation '...amounted to a disincentive to cover northern issues at all.' Kenny, *loc. cit.*, n. 156. See further B. Purcell, *'The Silence in Irish Broadcasting'* in B. Rolston, (ed) The Media and Northern Ireland', (Macmillan, 1991), pp. 51-68.

[170] A. Lewis, *'Government and Business Secrecy'*, in Let in the Light, *op. cit.*, n. 168, pp. 40-47, p. 45.

[171] During the seventeen years of the ban, no political party with seats in the Dáil put down a motion annulling the orders. The stifling of public discussion by the ban was one of the principal criticisms made by the United Nations Human Rights Committee in its 1993 Report on Ireland. See the Concluding Observations of the Human Rights Committee: Ireland 03/08/93 CCPR/C/79/Add.21. At para.[15], the Committee observed, *inter alia*, that '[T]he prohibition of interviews with certain groups outside the borders by the broadcast media infringes upon the freedom to receive and impart information under article 19, paragraph 2 of the covenant.'

[172] G. Hogan, 'The Demise of the Broadcasting Ban', (1994) *EPL* 69. The responsible Minister during this period of non-renewal was the then Minister for Arts, Culture and the Gaeltacht, Mr. Michael D. Higgins. The section was repealed by the Broadcasting Act, 2001, First Schedule.

[173] See M.J. Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 38 *Wake Forest L. Rev.* 635.

expression landscape in this jurisdiction for a significant time.[174] Despite constitutional authorisation for judicial review[175] in a variety of Articles such as 34.3.2°, 26, 28.2 and 15.4[176] in contrast to other rights,[177] the courts have traditionally taken a passive approach to judicial review of legislation which operated to restrict freedom of speech.[178] Not only did it take seventy years for Article 40.6.1°(i) to be used to declare a statute unconstitutional,[179] but in the review of legislation, it has been argued that '[M]any Irish judges do not even bother to announce a standard.' [180] It seems that for many years the Irish courts relied on the qualified language of Article 40.6.1°(i) to justify unwillingness to develop it.[181] The analysis of Article 40.6.1°(i) values in recent case law, as discussed throughout this chapter, is likely to be accompanied by increased judicial constitutional scrutiny of restrictions on the right of freedom of expression.[182]

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[174] Fleming has made the point that '[C]onversely, direct constitutional review is most needed in order to overcome specific rules of the civil or criminal law stemming from a historical background no longer compatible with modern values.' *Loc. cit.*, n. 5, p. 347.

[175] See generally on judicial review in Ireland, C. Bradley, *Judicial Review*, (Round Hall, 2000) and M. de Blacam, *Judicial Review*, (Butterworths, 2001). See also G. Hogan, *'Judicial Review – The Law of the Republic of Ireland'* in B. Hadfield, (ed) Judicial Review: A Thematic Approach (Gill and Macmillan, 1995), pp. 316-369.

[176] In respect of the latter two constitutional provisions, Hogan has observed that '...the plain language of Article 15.4 and Article 28.2 seems to re-inforce and complement the entire system of judicial review of legislative and executive action. If the drafters had never intended to take the power of judicial review seriously, it seems odd that the Constitution would have contained such novel provisions under-pinning the entire system of judicial review.' See, G. W. Hogan, *op. cit.*, n.9, Vol.1, p. 239.

[177] Having conducted a review of the operation of judicial review in Ireland between 1937-1966, one author reached the following conclusion: '[L]ike most human institutions, judicial review in Ireland can receive only a mixed judgment. But it must be said that the Irish have taken this non-indigenous practice and adapted to it, on the whole, quite as well as its originators have done.' See L. P. Beth, *The Development of Judicial Review in Ireland, 1937-1966* (Institute of Public Administration, Dublin, 1967), p. 66. For a similar conclusion, see G. Fitzgerald, *'The Irish Constitution in its Historical Context'* in Ireland's Evolving Constitution 1937-1997, *op. cit.*, n. 156, pp. 29-40, 39.

[178] See Frazier, *loc.cit.*, n.3 .

[179] *Dillon v. Attorney General*, above, n.2. De Valera J. struck down section 3 of the Vagrancy (Ireland) Act 1847 (as amended by the Public Assistance Act, 1939). The section made begging in a public place an offence. De Valera J. struck the section down as a disproportionate infringement upon the right to freedom of expression and communication. While outside the scope of this thesis, for discussion of free speech rights in the context of begging, see *inter alia*, F. Leoussis, 'The New Constitutional Right to Beg – Is Begging Really Protected Speech' (1994-1995) 14 *St. Louis U. Pub. L. Rev.* 529, J. Mallamud, 'Begging and the First Amendment' (1994-1995) 46 *S.C.L. Rev.* 215 and G. S. Watson, 'Examining the Constitutional Implications of Begging Prohibitions in California' (1998-1999) 20 *Whittier L. Rev.* 547, in particular pp. 560-564, for discussion of the act of begging in the context of free speech theories.

[180] M.B. Margulies, *loc. cit.*, n. 4, p. 30.

[181] Indeed, this justification has also been put forward academically. According to Twomey, '...the formulation of the Article, with the limitations set out prior to what is cumbersomely a *liberty* to exercise a *right*, offers so little that it is perhaps less than surprising that it has, over sixty years, never been the basis for the Supreme Court deeming a statute unconstitutional.' *Loc. cit.*, n. 156, p. 201.

[182] Cram has argued that '...the centrality of political speech forms in modern liberal democracy would seem to require the emboldening of constitutional courts in the scrutiny of legislative/executive restrictions of expression where the latter is made and received as a contribution to political debate.' See I. Cram, *Contested Words* (Ashgate, 2006), p. 211.

[1-41] As pointed out earlier in this chapter, to fully protect the right of freedom of expression and its underlying values, it is necessary to make use of an appropriate constitutional framework within which competing rights are assessed. Within this framework, it is submitted that the constitutionalisation of free speech rights requires use of an interpretative tool which has its origins outside the free speech context. In this respect, there is domestic case law from the early 1990s which has made use of the proportionality doctrine[183] as a tool in assessing restrictions on constitutional rights [184] and a commitment to this doctrine in respect of Article 40.6.1°(i) should herald greater judicial scrutiny of restrictions on the right.[185] Despite endorsements of proportionality in Irish free speech law,[186] its formulation[187] and application[188] in a number of cases has not produced speech protective outcomes.[189] It is imperative that not merely is passing reference made to the proportionality doctrine but that the values of the free speech guarantee inform its use. Significantly, there are signals of a firmer use of the doctrine in this direction in recent case law including *Mahon v. Post Publications Ltd*, [190] *Hunter v. Duckworth and Co. Ltd and Anor*[191] and *Dillon v. Attorney General.* [192]

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[183] The principle of proportionality is well-established in Community law, see Article 5(3) EC Treaty and *R. v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa*, Case C-331/88, [1990] E.C.R. 4023. It is also a key doctrine in Convention jurisprudence, with particularly strict application to restrictions on freedom of expression (see Chapter 4).

[184] *Cox v. Ireland* [1992] 2 I.R. 503. According to Hogan, '[E]ven though the word proportionality does not actually appear in the judgment, this decision is nowadays interpreted as the starting point of contemporary proportionality jurisprudence.' See G. Hogan, 'The Constitution, Property Rights and Proportionality' (1997) 32 *Ir. Jur.* 373, 388. See also *Heaney v. Ireland* [1996] 1 I.R. 580 and *Daly v. The Revenue Commissioners* [1995] 3 I.R. 1.

[185] This a view also held by another writer on the subject who argues that: '[I]n clear rights contexts, such as *political free speech* and criminal justice provisions, the principle needs to be applied with greater rigour.' (emphasis added). See N. Buckley, 'Merging Principles of Public Law: Towards Proportionality in an Irish Context' (2004) xxxix *Ir. Jur.* 161.

[186] *Irish Times v. Ireland*, above, n. 35, *Murphy v. IRTC*, above, n. 37 and *Colgan v. IRTC* [2000] 2 I.R. 490; [1999] 1 I.L.R.M. 22.

[187] The following proportionality test was used by O'Sullivan J. in *Colgan v. IRTC*, [2000] 2 I.R. 490, 512; [1999] 1 I.L.R.M. 22, 44-45, "[I]t appears that the correct approach for this court when considering whether the infringement of a constitutionally protected right impairs that right as little as possible is to refrain from condemning a wider infringement such as a blanket ban notwithstanding that a more selective alternative is admittedly available, if a rational explanation for the wider infringement is available to the court.'

[188] *Murphy v. IRTC*, above, n. 37 and *Colgan v. IRTC*, above, n. 186.

[189] See Buckley, *loc. cit.*, n.185, p. 190 and R. Joyce, 'A New Approach to Freedom of Expression? The Doctrine of Proportionality and Article 40.6.1(i) of the Constitution' (2002) 3(1) *Hib. L. Journal* 85.

[190] Above, n.2.

[191] Above, n.2.

[192] Above, n.2.

CONCLUSION

[1-42] The interpretation of Article 40.6.1°(i) to offer meaningful protection to freedom of expression has developed slowly. The increased rigour with which the right has been examined in recent cases such as *Irish Times v. Ireland*,[193] *Cogley v. RTE*[194] and *Hunter v. Duckworth and Co Ltd & Anor*[195] reflects recognition of the importance of the free flow of information in a democratic society. The emphasis on public interest speech in the jurisprudence, together with some elements of the Defamation Bill 2006 (discussed in Chapter 3), points in the direction of the democratic model of free speech. These developments are significant in the context of defamation law as the traditional balance posited between freedom of expression and reputation may have to be re-balanced to reflect the developing constitutional free speech guarantee. First, however, it is necessary to consider the constitutional guarantee of good name and whether the values developed to support that right withstand scrutiny. Chapter 2 turns to address this question.

[193] Above, n. 35.
[194] Above, n. 76.
[195] Above, n.2.

CHAPTER 2

GOOD NAME AND THE CONSTITUTIONAL GUARANTEE

INTRODUCTION

[2-01] The recent acceptance of the democratic discourse theory in Irish free speech jurisprudence was discussed in Chapter 1. This free speech theory is linked to the instrumental value of the media so that the greater the contribution the speech makes to the Article 40.6.1°(i) guarantee of the education of public opinion, the heavier its weighting against competing rights in the event of conflict. Nonetheless, the democratic model of free speech necessarily imposes limitations on the freedom of expression right, and this chapter turns to explore the competing right which forms the primary countervailing right to freedom of expression for the purpose of a thesis on defamation law, that of the right to good name.

[2-02] The Irish constitution, in contrast to other constitutions or bills of rights, is somewhat unusual in expressly protecting the right to good name.[1] While this right is not included as a limitation in the Article 40.6.1°(i) constitutional guarantee of freedom of expression, the constitutional source of protection for good name in Article 40.3.2° has been read to form the basis for the tort of defamation.[2] Given the connection of Article

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[1] In *Maguire v. Ardagh* [2002] 1 I.R. 385, 619, McGuinness J. highlighted that '[T]his constitutional right to protection of one's good name is not one which is found in by any means all statements of basic human rights. The right to protection of one's life, person and property are much more universal in constitutional statements of rights or bills of rights throughout the world. The right to protection of one's good name is not specifically found, for instances, in the European Convention on Human Rights. It is not included as a right in the United States Constitution; nor is it included in the Canadian Charter of Rights and Freedoms contained in the Constitution Act, 1982, nor in the Commonwealth of Australia Constitution Act, 1900.'

[2] So far as judicial endorsement of the relationship between these constitutional rights is concerned, in *Hynes O'Sullivan v. O'Driscoll* [1988] I.R. 436, 450, Henchy J. explained that the law on qualified privilege must reflect '...a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name.' McCarthy J. in the same case, at p. 454, argued that '[T]he defence of qualified privilege is itself an impairment in the interests of the common good of the right to vindication of one's good name.' See also *Foley v. Independent Newspapers* [1994] 2 I.L.R.M. 61, 67, *per* Geoghegan J. McDonald convincingly puts forward a number of reasons in arguing that the constitutional phrase 'good name' implies reputation and therefore forms the basis of the common law action in defamation. See M. McDonald, *Irish Law of Defamation*, 2nd ed., (Round Hall Press, 1989), p.5. Similarly, see B.E. McMahon and W. Binchy, *Irish Law of Torts*, 3rd ed., (Butterworths, 2000), p. 881. The Law Reform Commission similarly accepts this position, see *Report on the Civil Law of Defamation*, (LRC 38-1991), in particular, pp.

40.3.2° with the defamation tort, the concepts of good name and reputation[3] are adopted interchangeably throughout the thesis.[4] The constitutional relationship between Article 40.3.2°, Article 40.6.1°(i) and the tort of defamation raises three significant questions. The first question is what values are supported by Article 40.3.2° and in this respect, it is important to point out that the recent endorsement of reputation as an aspect of privacy by the European Court of Human Rights, which is discussed in Chapter 4, may impact upon the constitutional guarantee in its future development.[5] The second question is whether the tort of defamation properly reflect the values of the constitutional guarantee of good name and the third is whether the defamation tort allows for an appropriate balance of good name with the constitutional freedom of expression guarantee. The first two of these questions are addressed in this chapter and the third in Chapters 3, 8 and 9.

[2-03] The chapter commences with examination of the guarantee of good name at a macro-constitutional level to establish the significance or otherwise of the jurisprudence for defamation law purposes. The dearth of useful principles at the macro-level force an early turn towards the constitutional guarantee in the specific context of the defamation tort. The next section addresses categories of libel plaintiffs in order to establish the reputational values which have been used. The role of the jury falls for consideration in the following section for its re-enforcement of the community nature of the tort of defamation. The last main section engages in a re-assessment of the reputational values of Article 40.3.2 ° in Irish defamation law.

THE IRISH CONSTITUTIONAL GUARANTEE OF GOOD NAME

[2-04] Article 40.3.2° provides that:

> 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the ...good name...of every citizen.'

110-112. At p.112, the Commission observed that '[T]hus, while the Article does not expressly subject freedom of expression to restrictions in the interest of individual reputation, it is clear that a law of defamation, in the broad sense, is a constitutionally permissible, if not indeed mandated, restriction on freedom of expression.'

[3] In comparision with freedom of expression, there is little in the way of academic discussion, either domestic or abroad, of the meaning of reputation. By way of exception to this, see L. McNamara, *Reputation and Defamation* (Oxford University Press, 2007).

[4] Although there is some evidence that they may be capable of being seen as separate concepts, *(see Vozza v. O'Floinn* [1957] I.R. 227, 245, *per* Lavery J. who refers to 'serious hurt in his reputation and good name'), any such distinction has not been the focus of case law.

[5] See also the English case of *Greene v. Associated Newspapers* [2005] 1 All E.R. 30.

[2-05] Over thirty years ago, O'Dalaigh C.J. in *In Re Haughey*[6] made it clear that '...it is the duty of the Court to underline that the words of Article 40, s.3, are not political shibboleths but provide a positive protection for the citizen and his good name.'[7] Despite the use of strong constitutional language,[8] the right of good name or reputation has not been analysed to any great extent in Irish constitutional jurisprudence.[9]

[2-06] Some case law appeared to connect Article 40.3.2° to 'character' so that in *Vozza v. O'Floinn*,[10] Kingsmill Moore J. spoke of 'a blot on character'[11] in the context of a criminal conviction[12] and Finlay C.J. in *Kennedy v. Hearne* [13] made reference to the plaintiff's 'character and reputation'.[14] More recently however in *Hill v. Cork Examiner Publications Ltd*,[15] in the context of evidence as to bad reputation, Murphy J. made clear that '[T]here is an important difference between reputation and character. One person may have an excellent, but undeserved, reputation; another may be a person of excellent character but the victim of prejudice and thus of poor reputation.'

[2-07] The Irish jurisprudence on the constitutional guarantee of good name has focused to a greater extent on those rights excluded from the scope of its protection rather than engaging the right itself in constitutional analysis. It has been held that the right to good name does not include the right to anonymity in a court case,[16] the prevention of a Parliamentary inquiry,[17] the granting of general orders for prior restraint of publication[18] or

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[6] [1971] I.R. 217.
[7] *Ibid.*, p. 264.
[8] In *Stringer v. The Irish Times* [1995] 2 I.R. 108, 111, in holding that privilege did not attach to documents which had not been opened in Court, Carney J. held that were it otherwise it '...would involve the logical consequence that anybody could be defamed with impunity by the expenditure of the current price of the stamp duty on a plenary summons.'
[9] In *Hillary v. The Minister for Education and Science, Ireland, the Attorney General and the Commission to Inquire into Child Abuse* [2005] 4 I.R. 333, a retired professor of microbiology alleged that her public reputation would be irreparably damaged by association with the Commission because of a public perception that it was concerned solely with the investigation of child sexual abuse. The applicant expressed further concern that the process of public hearing in an adversarial setting would cause irreparable damage to her public reputation and acknowledged that in so far as she had any public reputation, it was only a reflection of her professional reputation. These submissions provided the Court with a missed opportunity to engage the right to good name and reputation in constitutional analysis.
[10] Above, n.4.
[11] *Ibid.*, p.250.
[12] See also *The State (O'Rourke and White) v. Martin* [1984] I.L.R.M. 331.
[13] [1988] I.R. 481.
[14] *Ibid.*, p.492.
[15] [2001] I.E.S.C. 95.
[16] *Ansbacher (Cayman) Ltd, Re* [2002] I.R. 517; [2002] 2 I.L.R.M. 366.
[17] *Maguire v. Ardagh*, above, n. 1.
[18] *Mahon v. Post Publications Ltd* [2007] I.E.S.C. 15.

the automatic entitlement to be joined as a defendant in legal proceedings.[19] Since the early 1990s, the jurisprudence on the activities of various tribunals, commissions and committees established to inquire into alleged wrongdoing, presented opportunities to address the right of good name or reputation.[20] However, the emphasis in such cases has been on the right to protection of natural and constitutional justice in the defence of one's good name. Given the absence of constitutional scrutiny of good name in the case law discussed thus far in this chapter, it remains to be examined whether the Irish courts have addressed the constitutional guarantee of good name in a more rigorous constitutional fashion in the specific context of the defamation tort.

THE TORT OF DEFAMATION AND THE PROTECTION OF GOOD NAME OR REPUTATION

The Classification of Reputation

[2-08] In an effort to understand the values of the Article 40.3.2° right to good name and whether they are correctly applied in defamation law, Post's[21] seminal three-part classification of reputation into 'property, 'honour' and 'dignity' shall be used as a framework throughout this chapter. Post explains the concept of reputation as property '...as a form of intangible property akin to goodwill'.[22] Just as reputation is earned,[23] so

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[19] *Barlow v. Fanning* [2002] 2 I.R. 593; [2003] I.L.R.M. 29.

[20] In one of the earliest of such cases, *Goodman v. Hamilton (No.2)* [1993] 3 I.R. 307, 313, a general statement was set out and has been subsequently followed: 'In each case the tribunal discharges its constitutional obligation by ensuring that there is a fair hearing in which, where appropriate, the protections identified by O'Dalaigh C.J. in *In re Haughey* are afforded, and are reflected in the ultimate report of the tribunal.' See, *inter alia*, *Ansbacher (Cayman) Ltd, Re*, above, n. 16 and *Maguire v. Ardagh*, above, n. 1.

[21] R. C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *Cal. L. Rev.* 691. For further discussion of Post's arguments and an interesting counter-argument that the underlying assumption of the law of defamation that reputation should be protected is unfounded and should be replaced with concern to ensure that individuals are not judged by false information, see T. Gibbons, 'Defamation Reconsidered' (1996) 16 *Oxford J. Legal Stud.* 587.

In the Irish context, one observer made the following argument: 'It is tempting to advocate the reformulation of libel law as the serving of the goal, not of redressing reputation, but of correcting falsehood. However, in Ireland the constitutional right to a good name contained in Article 40.3.2° would appear to preclude any major reformulation of the stated purpose of defamation in Irish law, the protection of reputation.' See U. Ni Raifeartaigh, 'Defences in Irish Defamation Law' (1991) 13 *D.U.L.J.* 76, 80.

[22] *Ibid.*, p. 693. Epstein viewed reputation as one '...of the bundle of property rights and liberty that all individuals enjoy.' R. E. Epstein, 'Was *New York Times v. Sullivan* Wrong?' (1986) 53 *U.Chi. L. Rev.* 782, 801.

According to another writer, the property view of reputation '...signaled a change in the function of defamation from a quasi-criminal punishment for the violation of communal norms to a tort remedy protecting the market value of reputational property'. See M. M. Slaughter, 'The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society' (1992-1993) 14 *Cardozo L. Rev.* 351, 353.

However, even with a move to reputation as property, the market value of reputation remains measured against community norms to continue the communal basis for the defamation tort.

too is damage to it capable of being measured in monetary terms. As regards reputation as honor, Post submits that '[W]hereas reputation as property presupposes the equality of all individuals before the marketplace, honor presupposes that individuals are unequal. An individual's honor is but the personal reflection of the status which society ascribes to his social position'.[24] Finally reputation as dignity is explained by Post in the context of defamation law '... as a method by which society polices breaches of its rules of deference and demeanor, thereby protecting the dignity of its members.'[25]

REPUTATIONS PROTECTED: CATEGORIES OF LIBEL PLAINTIFFS

[2-09] The entitlement to invoke the constitutional guarantee of good name, of itself, reveals values that the tort of defamation protects. That upon invoking the right, [26] the values appear to vary according to the category of plaintiff assists in understanding the objectives of the tort. This section turns to consider four categories of reputation; (i) natural living persons (ii) corporate reputation (iii) government libel and (iv) defamation of the dead.

Natural living persons

[2-10] All natural persons as citizens are entitled to the Article 40.3.2° guarantee of protection and vindication of good name.[27] Unlike the approach of the United States[28] and

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[23] As Veeder explains: 'One's good name is therefore as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness. See V.V. Veeder, 'The History and Theory of the Law of Defamation' (1904) 4 *Colum. L. Rev.* 33. For an argument that reputation is an asset as well as a part of personality, see R.S. Pound, 'Interests of Personality' (1914-1915) 28 *Harv. L. Rev.* 343.

[24] *Loc. cit.*, n.21, p.700. In Germany, Article 5(2) of the Basic Law limits freedom of expression by 'the right to inviolability of personal honour.'

[25] *Loc. cit.*, n. 21, p. 710. Slaughter explains further that '[D]ignity is not a thing possessed by its owner. Rather, the essence of reputation as dignity is found in the social bond between the individual and the community.' *Loc. cit.*, n.22, p.367.

[26] Bezanson found from studies that to libel plaintiffs '...the libel suit represents an official engagement of the judicial system on their behalf, and the act of suing represents a legitimation of their claims of falsehood.' See R.P. Bezanson, 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) 74 *Cal. L. Rev.* 789, 791.

[27] Of course a citizen must have a good name to protect in the first instance. McKechnie J. emphasised this in *Magee v. MGN Ltd.*, (Unreported, High Court, 14th November 2003), para. [20] as follows: 'The essence of the wrong is injury to reputation, and so whilst this branch of the law gives protection against a false statement which adversely affects a person's reputation, it does not do so, even if the statement is false, unless that person has a reputation recognised by law which is so adversely affected.' In *Cooper-Flynn v. Radio Telefis Eireann* [2004] 2 I.R. 72, Denham J. held that a libel plaintiff cannot have multiple or contradictory reputations. In contrast, in the context of the criminal law, the concern is to ensure that prejudicial pre-trial publicity does not adversely affect an accused's right to a fair trial. In this respect, see the recent case of *DPP v. Redmond*, (Unreported, Circuit Court, 25th April 2007), Matthews J.

[28] See Chapter 6.

to a lesser extent, the European Court of Human Rights,[29] Irish defamation law does not distinguish between public and private figure plaintiffs,[30] so that public figure plaintiffs are not required to carry any higher evidentiary burden in a defamation action than private figure plaintiffs. Although reference has been made to 'personal',[31] 'political',[32] 'professional'[33] and 'public'[34] reputation, these terms have not been used in the context of a public/private figure divide. Despite public and private figure plaintiffs carrying the same burden in proving defamatory liability, as part of the second theme of this thesis, it remains important to consider whether any categorical distinction operates at the level of damages in such a way that the status of the plaintiff increases[35] or mitigates damages.[36] The reality is that two of the highest jury awards in this jurisdiction have gone to a politician[37] and well-known businessman.[38] Far from placing any emphasis on the public identity of the plaintiff or engaging in a determination of whether the libel had hindered further political and business success, Keane C.J. in the political libel case of *De Rossa* v. *Independent Newspapers*[39] held that:

> 'One of the most important factors in the assessment of damages is the effect of the libel on the plaintiff's feelings. The plaintiff has given evidence, during the course

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[29] See Chapter 4.

[30] The two most siginficant cases on the protection of public interest speech in the defamation context, namely *Hunter v. Duckworth and Co. Ltd & Anor* [2003] I.E.H.C. 81 and *Leech v. Independent Newspapers (Ireland) Ltd* [2007] I.E.H.C. 223, focused on subject matter and responsible journalism. However, it is to be noted that section 24(2)(a) of the Defamation Bill, 2006 provides that when a court determines whether a publication was fair and reasonable, it shall if it considers it relevant, take into account a number of matters, one of which is the extent to which the statement concerned refers to the performance by the person of his/her public functions. This provision is discussed further in Chapters 3 and 8. See also sections 29(6)(a), 29(4)(h) and 42 of the Defamation Bill 2006.

[31] *De Rossa v. Independent Newspapers* [1999] 4 I.R. 432.

[32] *Ibid.*, p. 464.

[33] Above, n. 31, p. 464.

[34] *Hillary v. The Minister for Education and Science, Ireland, the Attorney General and the Commission to Inquire into Child Abuse*, above, n. 9, p. 340.

[35] In Namibia, the fact that the claimant is a politician is a factor which justifies an increase in damages: see *Afrika v. Metzler* (1997) 4 SA 531 (NmH) 535.

[36] A politician plaintiff serves to mitigate damages in South Africa: see *Marais v. Groenewald* (2001) 1 SA 634 (T) 648. This case and that in the preceding footnote were sourced in D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), pp. 32, n.142 and 33, n. 154 respectively.
Section 29(6)(a) of the Defamation Bill 2006 provides in general terms, which do not appear to support the inclusion of a plaintiff's status as a factor in the mitigation of damages, that '[T]he defendant may in a defamation action for the purposes of mitigating damages – (a) give evidence of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement....'.

[37] Above, n.31.

[38] *O'Brien v. Mirror Group Newspapers* [2001] 1 I.R. 1 (£250,000). The same businessman was awarded €750,000 in libel damages by a High Court jury on 23rd November 2006 for an article published in the Irish Mirror eight years ago. See more recently the award to a private individual in *McDonagh v. Sunday World*, (Unreported, High Court, 28th February 2008) (€900,000).

[39] Above, n. 31.

of three trials, of the distress, hurt and humiliation caused to him by the said publication and of his determination to vindicate his personal and political reputation.'[40]

[2-11] This focus on the politician plaintiff's perception of the injury caused is arguably linked to the protection of dignity while the reference to the vindication of political reputation reveals to some extent Post's honour concept of reputation at play. The concepts of honour and dignity were used in this case to offer protection to reputation rather than engaging in any adequate constitutional analysis of the rights of freedom of expression and the importance of the protection of public interest speech.

Corporate Reputation

[2-12] The tort of defamation is not confined to natural persons but extends to include legal persons such as corporate bodies.[41] An action may also be brought on behalf of a company by its shareholders relying on their personal rights.[42] The Irish Law Reform Commission has explained that while a trading corporation can sue in respect of treatment of employees or sponsorship of public events, it may not sue in respect of allegations such as murder, incest or adultery.[43] There is presently no requirement for a corporate body to prove special damage.[44] Section 11 of the Defamation Bill 2006 makes provision for a body corporate to bring a defamation action whether or not it has incurred or is likely to

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[40] Above, n.31, p.464. In an observation made pre *De Rossa* but which remains applicable, McDonald argued: [W]hile personal hurt/idealised repute might well be matters which are worthy of protection in their own right, the construction and execution of such protection should hardly be carried out in the guise of protecting something else.' See M. McDonald, 'Defamation Reform: A Response to the LRC Report' (1992) 10 *I.L.T.* 270, 271. The Irish courts are not alone in compensating for hurt feelings even in the absence of reputational damage. For example, in the English case of *Cleese v. Clark* [2004] E.M.L.R. 37, para. [39], Eady J. held that '[O]n the facts of this case, it seems to me that the major element in assessing compensation has to be the impact upon Mr. Cleese's feelings. I doubt in the light of the evidence, despite his own apprehensions, that his well established reputation here and elsewhere will have been significantly damaged if at all.' The figure awarded was £13,500.

[41] *Irish People's Assurance v. City of Dublin Assurance* [1929] I.R. 25 and *Crofter Properties Ltd. v. Genport Ltd.* [2002] 4 I.R. 73. See further, A. O'Neill, *The Constitutional Rights of Companies* (Thomson Round Hall, 2007), pp. 207-210 and by the same author, 'Corporate Reputation in the House of Lords' (2007) 28(3) *Comp. Law.* 75. See also G. Gibbons, 'Corporate Defamation: Increased Clarity and Law Reform' (2006) 13(11) *C.L.P.* 284 for criticism of the exclusion of corporate bodies from the criminal offence in s.35(1) of the Defamation Bill 2006 of publishing gravely harmful statements.

[42] This was one of the reasons which lead Boyle and McGonagle to recommend the abolition of the defamation action for all entities other than individuals. K. Boyle and M.McGonagle, *Report on Press Freedom and Libel*, (National Newspapers of Ireland, 1988), para. [5.46].

[43] Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, (March, 1991), p. 143.

[44] Further, in *Crofter Properties Ltd v. Genport Ltd*, above, n. 41, it was held that the lack of evidence of actual damages suffered was not fatal to a claim for general damages. The Irish Law Reform Commission in its *Report on the Civil Law of Defamation*, *op. cit.*, n. 2, para. [12.20] recommended no change in this area.

incur financial loss as a result of the publication of the statement.[45] The Bill does not limit protection to the trading reputation of the corporate plaintiff. The lack of any requirement of proof of actual or likely financial loss on the part of the corporate body reveals the involvement of something other than Post's property concept of reputation.[46]

[2-13] In the absence of Irish authority, the decision of the *House of Lords in Jameel (Mohamed) v. Wall Street Journal Europe Sprl* [47] is useful for its explanation of the values which support the lack of a requirement on the part of a corporate plaintiff to prove special damage.[48] In rejecting any requirement to prove special damage, Lord Bingham explained that '...the good name of a company, as that of an individual, is a thing of value.'[49] This 'value' according to Lord Scott means that '[I]f reputation suffers, sponsorship invitations may be reduced, advertising opportunities may become difficult, customers may take their custom elsewhere. If trade suffers, profits suffer.'[50] He also focused on the difficulty for a corporate plaintiff in proving special damage[51] by explaining that '[P]roof of actual damage caused by the publication of the defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely [be] inconclusive.' [52]

[2-14] In dissent, Baroness Hale commenced from the premise that a balance struck between freedom of expression and reputation in the nineteenth century may not be appropriate in modern circumstances. One such modern circumstance is the importance

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[45] An option recommended by the Australian Law Reform Commission was to allow a corporation to seek a declaration, correction or injunction but that damages should be limited to the amount of pecuniary loss suffered, or likely to be suffered, by the corporation as a result of the publication of the defamatory matter. See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, (ALRC 11, 1979), para. [94].

[46] Post adopted the property concept of reputation to corporations suing in defamation, *loc. cit.*, n.21, p. 696.

[47] [2007] 1 A.C. 359.

[48] See also the approach of the ECtHR in *Steel and Morris v. United Kingdom* [2005] E.M.L.R. 15.
In England, the Faulks Committee had recommended that '[N]o action in defamation should lie at the suit of any trading corporation unless such corporation can establish either – (i) that it has suffered special damage, or (ii) that the words were likely to cause it pecuniary damage. (b) Actions in defamation by non-trading corporations (including governmental bodies and local authorities) and trade unions should be subject to similar limitations.' Faulks Committee on Defamation, (Cmnd. 5909, 1975), para. [342].

[49] Above, n.47, para. [26].

[50] Above, n. 47, para. [120]. In response, the following argument has been proffered: 'The fact that companies spend a great deal of money on corporate images is not, *ipso facto*, a sufficient reason for the law to allow them to obtain redress without proof of damages.' See K. Beattie, 'New Life for the *Reynolds* "Public Interest Defence"? *Jameel v Wall Street Journal Europe*' (2007) 1 *E.H.R.L.R.* 81, 88.

[51] Counsel for the defendant had argued that economic loss in a defamation action is no more difficult for a company to prove than in other civil proceedings in tort. It was further argued that a company can only be financially injured and can therefore only recover damages for reputational injury which manifests itself either as loss of income or damage in some less quantifiable form such as goodwill.

[52] Above, n.47, para. [121].

attached to freedom of expression, especially on matters of political interest. She favoured requiring proof of special damage on the basis that this

> '...would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.'[53]

[2-15] The argument made by Baroness Hale as to the increasing role of non-governmental agencies applies equally in Ireland. The outsourcing of government services and rise of independent regulatory bodies[54] renders it necessary to define governmental widely to encourage debate on government policy as prescribed by Article 40.6.1°(i) and promote democratic accountability. In order to constitutionally reconcile corporate reputation and freedom of expression, the property concept of reputation is most appropriate to the former. The application of honour and dignity concepts to entities which do not suffer distress[55] to support the absence of a requirement to prove special damage fails to achieve an appropriate balance between these two rights.

Government Libel

[2-16] While neither the Defamation Act 1961 or the Defamation Bill 2006 refers to governmental authorities, the reputation of a State body has been referred to in domestic jurisprudence.[56] In England, in *Derbyshire County Council v. Times Newspapers*,[57] counsel

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[53] Above, n.47, para. [158].

[54] See Tasc, 'Power to the People? Assessing Democracy in Ireland', Executive Summary, 2007, available at www.tascnet.ie

[55] The distinction between corporate and individual reputation was appreciated by Lord Hoffman in *Jameel*, in dissent, above, n. 47, para. [91]. Similarly, in *Collins Stewart Ltd. v. The Financial Times Ltd.* [2005] E.W.H.C. 262, para. [31], Gray J. held: 'If that be the correct analysis of the proper function of aggravated damages, it seems to me to follow that aggravated damages are in principle not available to a corporate claimant. The reason is that...a company has no feelings to injure and cannot suffer distress....'.

[56] *Shortt v. Commissioner of An Garda Síochána and Ors.* [2007] I.E.S.C. 9.

[57] [1993] A.C. 534. For detailed discussion of the case, see E. Barendt, 'Libel and Freedom of Speech in English Law' [1993] *P.L.* 449. For commentary which argues that the judgment tipped the scale too far in favour of freedom of expression, see Beloff M.J., *'Politicians and the Press'* in Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams, (eds.) J. Beatson and Y. Cripps, (2000, OUP), pp. 63-85. For argument that the decision did not go far enough to favour freedom of expression, see Forsyth, C., *'The Protection of Political Discourse: Pragmatism or Incoherence?'* in the same collection of essays, pp. 87-104 and J.Fleming, 'Defamation: Political Speech' (1993) 109 *L.Q.R.* 12.
For a similar decision in Australia, see *Ballina Shire Council v. Ringland* (1994) 33 N.S.W.L.R. 680.

for the defendants cautioned against the development of a tort of government libel.[58] The Court of Appeal and subsequently the House of Lords were asked to deny a government corporation the right to sue in defamation for the protection of its reputation, or failing this, to support a constitutional privilege for publications imputing maladministration to such a body.[59] Fearful of the chilling effect such litigation could produce, Lord Keith in the House of Lords held that to permit organs of government, central or local, to sue for libel, is contrary to the public interest.[60] In support of this approach, Lord Keith pointed to other reputational safeguards entitling individual members of the local authority to institute libel proceedings[61] and the local authority to bring a claim for malicious falsehood.[62] He also placed some emphasis on the ability of a local authority to defend itself in public statements and council chamber debates.[63]

[2-17] If governmental reputation is protected in Irish law as something distinct from the reputations of individual members of government, it must involve something other than property, honour and dignity in Post's definition of those terms. A more convincing

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[58] Protection of a government's reputation was long established in criminal law, see L.W. Maher, 'The Use and Abuse of Sedition' (1992) 14 *Syd. L. Rev.* 287 and P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stan. L. Rev.* 691. One American writer has argued that '[D]efamation of the government is an impossible notion for a democracy.' See H. Kalven, Jr., 'The *New York Times* Case: A Note on the "Central Meaning of the First Amendment"' (1964) *Sup Ct. Rev.* 191, 205.

[59] There had only been two English cases involving proceedings by a local authority as to whether local government had a governing reputation which could be protected and these conflicted: see *Manchester Corporation v. Williams* [1891] 1 Q.B. 94 and *Bognor Regis Urban District Council v. Campion* [1972] 2 Q.B. 169. For further discussion of the latter case, see T. Weir, 'Local Authority v. Critical Ratepayer – A Suit in Defamation' [1972] *C.L.J.* 238.

[60] The House of Lords was influenced by the American case of *City of Chicago v. Tribune Co.* 139 N.E. 86 (1923). It however misread that decision which barred a government body from taking any civil action to defend its reputation. The English solution allowed for an action to be taken in malicious falsehood while claiming to have adopted the result in the American decision.

[61] Although under s.111 of the Local Government Act, 1972, the governmental body may be able to grant an allegedly defamed officer an indemnity in respect of a libel action for statements made concerning his performance of governmental duties, the courts are alert to ensure this is not a disguised libel action taken by the local authority or government department: see, *R. (On the application of Comninos) v. Bedford Borough Council and others* [2003] E.W.H.C. 121 (Admin).
Lord Keith's approach differed with that of Brennan J. in *New York Times v. Sullivan* (1964) 376 U.S. 254, 292, who considered that the individuals who staffed a government body could not be entirely separated from the body itself and therefore, '[T]here is no legal alchemy by which a State may thus create the cause of action which would otherwise be denied for a publication....'

[62] The case has been criticised by Loveland for its over-indulgence of free speech interests in so far as the only legal remedy it left open to a governmental body is the action for malicious falsehood, which requires proof of quantifiable economic loss. See I. Loveland, 'Defamation of government: taking lessons from America? [1994] 14(2) *L.S.* 206 and 'Reforming Libel Law: The Public Law Dimension' (1997) 46 *I.C.L.Q.* 561, 582-583. However, the same observer is equally critical of the under-indulgence given to free speech values by permitting individual councillors to sue as if private individuals. See I. Loveland, 'The Constitutionalisation of Political Libels in English Common Law' [1998] *P.L.* 633.

[63] The *Derbyshire* principle was subsequently employed in respect of an arm of government in *British Coal v. National Union of Mineworkers* (Unreported, Queen's Bench Division, 28th June 1996) and a political party in *Goldsmith v. Bhoyrul* [1998] Q.B. 459; [1997] 4 All E.R. 268; [1998] 2 W.L.R. 435.

constitutional argument in terms of balancing free speech and reputation is that governmental reputation is a public good.[64] The importance of public interest speech in democratic discourse has been accepted in recent Irish jurisprudence as discussed in Chapter 1. Nonetheless, informed public debate on governmental matters may be undermined by the injection of false information when citizens act on this misinformation. That reputation may exist as part of a wider public interest was canvassed in argument before the Supreme Court in *Mahon v. Post Publications Ltd*[65] in the context of the work of the Tribunal of Inquiry into Certain Planning Matters and Payments. Counsel for the Tribunal submitted that the public interest consisted in vindicating the good name of individuals as part of the Tribunal process and asked the Court to make general orders restraining the defendant and in effect all media from communication of documents circulated by the Tribunal prior to public hearing of its modules. Fennelly J. did not accept that the right to good name could prevail over the expression rights of the Tribunal to injunct it from publication of material.[66] It remains to be seen how the courts react to the public good line of argument where a defamatory publication affects governmental reputation.

[2-18] Acceptance of the public good argument to protect governmental reputation and restrict political expression fails however to sufficiently recognise the importance of

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[64] Given this view of reputation as more than an individual interest, some commentators on Amercian defamation law are critical of the *New York Times* actual malice standard for its failure to protect the community interests of reputation. So for example, Passaportis, observed that '...once the calculus includes the normative effects of false negative speech, as opposed to merely the individual pyschic costs of false defamation, any regime of punishment more lenient than negligence necessarily causes social harm.' See M. Passaportis, 'A Law and Norms Critique of the Constitutional Law of Defamation' (2004) 90 *Va. L. Rev.* 1985, 2030.
That reputation is more than an individual right was accepted in *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127, 201; [1999] 4 All E.R. 609, 622; [1999] 3 W.L.R. 1010, 1023 as follows: 'For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.' To similar effect, see the Canadian Supreme Court in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130.

[65] Above, n. 18.

[66] In contrast, in *Mahon v. Keena* [2007] I.E.H.C. 348, the High Court held that material from the Planning Tribunal which had not been circulated by it in advance of a public hearing had the necessary quality of confidence to impose an obligation of confidentiality on persons with whom the Tribunal dealt with in that phase of its inquiry. In the context of balancing individual privacy rights against those of a tribunal of enquiry, Denham J. in *Desmond v. Moriarty* [2004] 1 I.R. 334, 372, held that '...the rights of the applicant are not such as to curb the public inquiry established by the representatives of the people from their use of the Glackin Report. To allow the applicant's right to his good name to prevail over freedom of speech in such a situation in the tribunal on this issue would be wholly disproportionate.'

democratic self-governance, prescribed by Article 5 of the Irish constitution. One free speech commentator [67] has argued that:

> 'When the particular reputation in question is closely intermingled with issues about which the public may make a governmental decision, a defamation suit amounts to an infringement upon the guaranteed fact-finding powers of the public. The common interest of a speaker-accuser and his listeners is that they are all members of a governmental body. If the free-speech clause protects a defamatory statement, it is because that statement was a part of the decision-making processes of that body.'[68]

[2-19] At the least, it can be fairly contended that the above argument stands a much stronger chance of acceptance before the Irish courts in the wake of the recent freedom of expression jurisprudence discussed in Chapter 1, which has recognised the importance of citizen engagement in discussion of matters of public interest as an element of effective participation in the democratic process.

Defamation of the Dead [69]

[2-20] The cases of *Hilliard v. Penfield Enterprises Ltd* [70] and *Murray v. Commission to Inquire into Child Abuse* [71] limit protection of good name to living persons.[72] The Defamation Bill 2006 does not provide for defamation of the dead. The Bill does however provide that on the death of a person, a cause of action for defamation vested in him immediately before death should survive for the benefit of the estate.[73] The extension of reputational protection to the deceased is recognised in some jurisdictions as part of their

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[67] D. R. Adair, 'Free Speech and Defamation of Public Persons: The Expanding Doctrine of *New York Times Co. v. Sullivan* (1966-1967) *Cornell L. Rev.* 419.

[68] *Ibid.*, p. 422.

[69] See generally, R.P. Manuel and R. Hobbs, 'The Right to a Reputation after Death' (1991) 13 *Comm. & L.* 25 and G. Bottner, 'Protection of the Honour of Deceased Persons: A Comparison between the German and Australian Legal Situations' (2001) 13(1) *Bond. L. Rev.* 109. In the Irish context, see M. McGonagle, 'Criminal Law – Criminal Libel – Libel of the Dead' (1990) 12 *D.U.L.J.* 138.

[70] [1990] 1 I.R. 138. This was a criminal libel case.

[71] [2004] 2 I.R. 222.

[72] See also *McDonnell v. Brady* [2001] 3 I.R. 588, 599. This case concerned the protection by a widow of her late husband's reputation before an Oireachtas sub-committee. Keane C.J. explained: 'The sub-committee allowed her to be legally represented, although she is clearly in a significantly different position from those persons still alive who have an admitted and indisputable constitutional right to the vindication of their good name.'

[73] Section 38(2) and (3). The Bill also provides that a cause of action in defamation subsisting against a person should survive his death and lie against his estate.

dignity.[74] Despite evidence of the dignity concept of reputation in Irish defamation law through the doctrine of presumed damages,[75] its use appears to have been ruled out as regards the deceased. The primary argument used against a right of action for the deceased is that it deters historians in publishing important works and in recognition of this competing interest, some reform bodies have recommended limitation periods for the cause of action.[76] It would have been encouraging for free speech values if the Irish courts had limited protection of good name to those alive due to recognition of the importance of encouraging historical publications,[77] but the jurisprudence is not so developed. In *Murray*,[78] Abbott J. simply read *Hilliard*[79] to support the position that because the deceased are neither alive nor citizens, they have no personal rights.

COMMUNATARIAN VINDICATION: THE ROLE OF THE JURY

[2-21] More than in any other proceedings, the contribution of a jury in a defamation action is widely accepted.[80] The community-judgment element of jury decision-making is pivotal in the determination of whether a particular statement is defamatory or not on account of the traditional judicial definition of the tort of defamation, namely, '...the wrongful publication of a false statement about a person, which tends to lower that person in the eyes of right-thinking members of society or tends to hold that person up to hatred, ridicule or contempt, or causes that person to be shunned or avoided by *right-thinking*

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[74] In Germany, human dignity forms part of the right of personality of individuals protected in Articles 1 and 2 of the German Constitution.

[75] Post has argued that the doctrine of presumed damages points to the dignity concept of reputation. *Loc. cit.* n.21, p. 697. The proposition is likewise made by another author in the following terms: 'The principal aim of the common law's presumed damages doctrine is to protect the reputational interests and dignity of natural persons. By relieving plaintiffs of the burden of proving actual reputational harm, the doctrine reflects a philosophical bias that reputational interests are so important as to justify an irrebuttable presumption of such harm, a presumption arising upon proof of falsehood that ordinarily would seem likely to harm reputation.' See A.W. Langvardt, 'A Principled Approach to Compensatory Damages in Corporate Defamation Cases' (1990) 27 *Am. Bus. L.J.* 491, 516 (footnotes omitted).

[76] Irish Law Reform Commission, *Report on the Civil Law of Defamation*, *op. cit.*, n. 2, and Faulks Committee, *op. cit.*, n. 48, para. [420].

[77] The importance of protecting free and open debate about historical events has been highlighted by Article 19, *'Defining Defamation, Principles on Freedom of Expression and Protection of Reputation'*, (Article 19, 2000), p. 6.

[78] Above, n.71.

[79] Above, n.70.

[80] Judicial affirmation to this effect is evident from the judgment of Walsh J. in *Quigley v. Creation Ltd* [1971] I.R. 269. One First Amendment scholar has noted that '[U]nlike the common law of contracts, property, or crimes, all of which are dominated by what are at least provisionally static bodies of doctrine, the law of torts is explicitly tied to floating community norms.' See R.A. Smolla, 'Let the Author Beware: The Rejuvenation of the American Law of Libel' (1983-1984) 132 *U. Pa. L. Rev.* 1, 24.

members of society.'[81] This community based perception of reputation illustrates the external character of reputation.

[2-22] Section 2 of the Defamation Bill 2006 proposes to replace the various common law formulations with 'reasonable members of society.' Who better to decide whether this test has been satisfied than the 'reasonable' members of society, or in other words the ordinary man or woman? Denying the legal parties in a defamation action the opportunity to put their case to the twelve jury members who, at least in theory,[82] are intended to represent a cross-section of the community would not accord with the core elements of the tort of defamation. Although vindication is not constitutionally defined, it can hardly be convincingly proposed that it does not involve this community element. A single judge or panel of judges will not represent as accurately as could a jury, the collective judgment of a community and will fail to reach a determination based on '...a multiplicity of perspectives.'[83] For this reason, the Irish courts have recognised and encouraged a clear distinction in the respective role of judge and jury in a defamation action.[84] These differing roles were clearly delineated by Walsh J. in *Quigley v. Creation Ltd*, which for present purposes is worth quoting in its entirety:

> 'Basically, the question of libel or no libel is a matter of opinion and opinions may vary reasonably within very wide limits. When a jury has found that there has been a libel, this Court would be more slow to set aside such a verdict than in other types of actions and it would only do so if it was of the opinion that the conclusion reached by the jury was one to which no reasonable men could not or ought not to have come. In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it

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[81] B. E. McMahon and W. Binchy, *Irish Law of Torts* 2nd ed.,(Butterworths, 1990), p. 609, see now B.E. McMahon and W.Binchy, *The Law of Torts*, 3rd ed., (Butterworths, 2000) para. [34.10] (emphasis added); see also *Quigley v. Creation Ltd.*, *ibid.*, and *Berry v. Irish Times Ltd* [1973] I.R. 368.

[82] There is current concern about jury selection process in this jurisdiction and whether it hinders a truly representative jury. This topic is outside the scope of this thesis but a useful article in this area is R. Casey, 'The Good, the Bad and the Ugly: The Effect of Composition of Juries on Verdict' (2000) 3 *Trinity C. L. Rev.* 3.

[83] J. Gobert, *Democracy and the Jury* (Ashgate, 1997), p.95.

[84] In *Barrett v. Independent Newspapers Ltd* [1986] I.R. 13, [1986] I.L.R.M. 601, the trial judge held that the words complained of were defamatory as a matter of law, and left only the question of damages to the jury. On appeal, the Supreme Court held, by a majority, that, in so doing, the judge had usurped the jury's function whose duty it was to decide whether the words were defamatory.

would be wholly unreasonable to attribute a libellous meaning to the words complained of.'[85]

[2-23] Although the judge first determines whether the publication is capable of a defamatory meaning, the Irish courts have not signalled any great desire to regulate community norms and interfere with the role of the jury in this respect.[86] If it were otherwise, such judicial screening, while potentially reducing the chilling effect of defamation litigation on defendants, would arguably conflict with the objective of the constitutional guarantee of good name and the tort of defamation, which serve to remedy damage to reputation in the eyes of the community.

RE-ASSESSMENT OF THE VALUES OF REPUTATION IN IRISH DEFAMATION LAW

[2-24] Domestic commentators have ventured explanations of the cultural contexts for reputational protection ranging from the history of dispossession and poverty[87] to the importance of respectability and standing.[88] These reasons for protecting reputation no longer carry the same force in a country which has recently witnessed over a decade of tribunals of enquiry investigating allegations of governmental and other corruption. It is argued in Chapter 3 that the traditional protection afforded to reputation has produced a chilling effect on freedom of expression. Recent domestic case law, addressed in Chapter 1, has started a move towards recognition of the importance of the constitutional guarantee of freedom of expression in a democratic society and in order to complete this constitutional exercise and effect the appropriate constitutional reconciliation of reputation and speech rights, it is also necessary for re-assessment of the interests which underlie reputation.

[2-25] Irish defamation law has not committed to any one value for the protection of reputation. The treatment of the different categories of libel plaintiff discussed earlier in the chapter revealed this mixed position. While dignity and honour concepts of reputation are applied to natural living persons and corporations, neither concept appears to play a

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[85] Above, n. 80, p. 272.

[86] See *Barrett v. Independent Newspapers*, above, n. 84. But see *Reynolds v. Malocco* [1999] 2 I.R. 203; [1999] 1 I.L.R.M. 289 where in the context of an injunction in a defamation action, Kelly J. held an allegation of homosexuality to be defamatory and granted an injunction to restrain the publication. For discussion, see N. Cox, 'Tort- Prior Restraint – Injunction – Defamation' (1998) 20 *D.U.L.J.* 246.

[87] M. McGonagle, *Media Law* (Round Hall, 2003), p.72.

[88] B.Conroy, 'Constitutionalising the Tort of Defamation: Bunreacht na hEireann as a Framework for the Reform of Ireland's Libel Laws' (2002) 5 *Trinity C. L. Rev.* 1, 14.

part in defamation of the dead. Moving from the categories of libel plaintiffs to the role of the jury, clearly what juries find defamatory[89] reflects the purpose of defamation law in as much as it reveals the thinking of members of society at a given time and place. If, say a jury awards damages to a libel plaintiff in the absence of proven harm to career, this shows that reputation is about more than the protection of financial interests or Post's concept of property. [90] Vindication in that circumstance reflects a desire to protect a plaintiff's social reputation and ties in to Post's honour and dignity characterisations.[91] That the highest jury awards in this jurisdiction have gone to a politician and leading businessman, with little apparent evidence of consequential career injury, signals that concepts of honour[92] and dignity play a significant role in how reputation is characterised. Valuing reputation in these terms requires engaging in a more uncertain exercise than measuring it in property terms. As *De Rossa v. Independent Newspapers*[93] demonstrated, it has encouraged the protection of hurt feelings and distress rather than the loss of reputation. The *De Rossa* approach is supported by the legal presumption of reputational damage which by equating falsity and injury means that redress may be given to a libel plaintiff in the absence of proven injury.[94]

[2-26] As regards the existence of defamation privileges as defences for freedom of expression rights, Slaughter has explained that they support a property concept of

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[89] In this respect, the Supreme Court in *Barrett v. Independent Newspapers*, above, n,84, observed that '[T]he opinions of juries – and of judges – are notoriously subjective and unpredictable in deciding what is defamatory.' Although past examples of what was considered defamatory are of limited assistance, see generally McMahon and Binchy, *op. cit.*, n. 2, pp. 894-961 and McDonald, *op. cit.*, n.2, pp. 31-40.

[90] In the English case of *Cleese v. Clark*, above, n.40, it was explained at para. [37] that the purpose of libel damages was threefold, namely to compensate for distress and hurt feelings, to compensate for any actual injury to reputation which has been proved or which may reasonably be inferred and to serve as an outward and visible sign of vindication.

[91] It also reflects the argument of the sociologist Bellah that reputation is a community interest: R. N. Bellah, 'The Meaning of Reputation in American Society' (1986) 74 *Cal. L. Rev.* 743.

[92] The lack of legal aid for defamation actions in s. 28(9)(a)(i) of the Civil Legal Aid Act, 1995 supports the honour concept of reputation. It is questionable whether this position can continue in light of the ECtHR's decision in *Steel and Morris v. UK* (2005) 41 E.H.H.R. 22.

[93] Above., n.31.

[94] Lidsky has argued that '[R]ather than presuming harm based on the nature of the defendant's statement, the courts should force the plaintiff to prove actual harm to reputation through his own testimony and through the testimony of witnesses.' See L.B. Lidsky, 'Defamation, Reputation and the Myth of Community' (1996) 71 *Wash. L. Rev* 44. The same author at p. 45, goes on to observe that removal of the presumption of reputational harm '...would help ensure that defamation primarily protects reputational rather than emotional interests.' (footnotes omitted). See further A. Lewis, '*New York Times v. Sullivan* Reconsidered: Time to Return to the "Central Meaning of the First Amendment"' (1983) 83 *Colum. L. Rev.* 603 and D. Anderson, 'Reputation, Compensation and Proof' (1984) 25 *Wm. & Mary L. Rev.* 747, 749. For a counter-argument that requiring proof of actual injury would make it unduly difficult for a plaintiff to locate relevant witnesses, see A. Kundu, 'Defamation, Reputation and the Community: An Analysis of the Doctrine of Presumed Harm in Defamation Law' (2005) 10 *Media & Arts L. Rev.* 53.

reputation given their characterisation by contractual social relations.[95] However, Post has made the point, which applies in the Irish context, that the concept of reputation as property fails to explain the rule that a communication must be deemed defamatory prior to an action for defamation.[96] It is clear that different elements of Irish defamation law are premised on a variety of underlying values. In the absence of any apparent judicial acknowledgment of this reality, freedom of expression has sometimes been weighed within an inappropriate value system.

[2-27] When discussing the value of dignity in Irish defamation law,[97] it is important to note that it is expressly recognised in the Preamble of the Irish constitution[98] and the interests protected in domestic jurisprudence in reliance on the concept[99] reveal dignity as something distinct from reputation. It is submitted that to protect dignity through the tort of defamation as if it were the same as reputation is constitutionally misconceived. While the exercise of free speech rights may encroach on the constitutional value of dignity in some situations, it is submitted that the protection of dignity within defamation law is inappropriate.[100] If dignity continues to play a role in the tort of defamation, it is imperative to accept that the right of reputation does not hold a monopoly on dignity but that equally dignity has a part to play in the right of freedom of expression. It has been argued in Chapter 1 that the late development of the self-fulfillment theory in the interpretation of Article 40.6.1°(i) is linked to the promotion of community values in preference to individual autonomy. This may account for the absence of dignity values within freedom of expression jurisprudence.

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[95] *Loc. cit.*, n. 22, p. 372.
[96] *Loc. cit.*, n. 21, p. 697.
[97] This chapter is confined to defamation and does not address the role of dignity to any real extent in other causes of action such as privacy and breach of confidence.
[98] The concept of dignity is recognised in foreign constitutions, see for example Article 1 of the German Grundgesetz and Articles 1(a), 7(1) and 10 of the South African Constitution and numerous international human rights instruments. For discussion of the latter, see O. Schachter, 'Human Dignity as a Normative Concept' (1993) 77 *Am. J. Int'l L.* 848. In fact, in Candian defamation jurisprudence, dignity is strongly linked to reputation so that in *Hill v. Church of Scietology of Toronto*, above, n. 64, p. 1179, it was explained that '[T]he good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights.'
For general discussion of dignity in Irish constitutional law, see O'Dowd, J *'Dignity and Personhood in Irish Constitutional Law'* in G. Quinn, A. Ingram and S. Livingstone, (eds), Justice and Legal Theory in Ireland (1995), pp. 163-181.
[99] Irish jurisprudence has recognised the role of dignity in a variety of rights including privacy (*Kennedy v. Ireland* [1987] I.R. 587), the natural rights of the child (*G v. An Bord Uchtala* [1980] I.R. 32, decision-making in medical treatment (*In the Matter of a Ward of Court*) [1996] 2 I.R. 79, equality (*Quinn's Supermarket Ltd. v. AG*) [1972] I.R. 1, the constitutional right to legal aid (*The State (Healy) v. Donoghue*) [1976] I.R. 325 and the right to procreate within marriage (*Murray v. Ireland*) [1991] I.L.R.M. 465.
[100] See D. Feldman, 'Human Dignity as a Legal Value – Part II' [1999] *P. L.* 61, 74-75, for a similar position that the law of defamation is an unsuitable tool for upholding dignity.

CONCLUSION

[2-28] Article 40.3.2° requires protection of good name as far as practicable and vindication of same in the case of injustice done. This qualified protection is necessary to balance the right to good name and the Article 40.6.1°(i) guarantee of freedom of expression. If the constitutional guarantee of good name is interpreted to mean vindication for anything other than proven injury to reputation,[101] it fails to correctly balance it with freedom of expression. It is submitted that attacks on honour and dignity are not the same as an attack on reputation and the use of these values in Irish defamation law is reflective of old-fashioned ideas of reputation which fail to conform to the democratic demands of Article 40.6.1°(i). If this value system continues, the right of good name will continue to operate on the premise of constitutionally misconceived values. Having completed the constitutional exercise in Chapters 1 and 2 on values, it is necessary in the next chapter to examine how the rights of speech and reputation have traditionally been balanced in Irish defamation law.

[101] This is not limited only to economic loss for a libel plaintiff may for example have suffered political reputational damage. Section 41 of the Defamation Bill 2006 places on a statutory footing the action in malicious falsehood and requires proof of special damage or that the publication was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or property or his or her office, profession, calling, trade or business. Section 29(7) of the Defamation Bill 2006 provides for special damages in respect of financial loss.

CHAPTER 3

IRISH DEFAMATION LAW: THE MEDIA AND PUBLIC INTEREST SPEECH

INTRODUCTION

[3-01] As discussed in Chapter 1, the lack of recognition for Article 40.6.1°(i) values over many years contributed to the absence of an enhanced protection for political speech in Irish constitutional free speech law. In the context of defamation law, this fact, coupled with the very strong protection given to the right to good name (as discussed in Chapter 2) meant that Irish law did not provide adequate protection for public interest speech. Thus, in the High Court case of *Hunter v. Duckworth and Co. Ltd & Anor*,[1] Ó'Caoimh J. accepted that '[I]t is, however, necessary, to assess whether the common law of defamation as traditionally interpreted in this jurisdiction meets the requirements of the Constitution.'

[3-02] This thesis argues that there are two principal areas within Irish defamation law which have failed to meaningfully protect public interest speech, namely (a) the lack of effective defences, most particularly the absence of a public interest defence for the media and (b) the manner by which damages awards are calculated and regulated.[2] In combination, it may be suggested that these two elements of Irish defamation law have

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[1] [2003] I.E.H.C. 81.

[2] See generally: N. Cox, *Defamation Law* (First Law, 2007), M. McGonagle, *Media Law*, (Thomson Round Hall, 2003); M. McDonald, *Irish Law of Defamation* (Round Hall, 1989), B. McMahon and W. Binchy, *Irish Law of Torts*, 3rd ed., (Butterworths, 2000), M. McGonagle, *Law and the Media: Views of Journalists and Lawyers* (Round Hall, Dublin 1997); E. O'Dell, 'Does Defamation Value Freedom of Expression? The possible influence of *New York Times v Sullivan* on Irish law', (1990) 12 D.U.L.J. (ns) 50, Law Reform Commission, *Consultation Paper on the Civil Law of Defamation* (March, 1991) and *Report on the Civil Law of Defamation* (LRC-38-1991), M. McDonald, 'Defamation Reform: A Response to the Law Reform Commission', (1990) 10 *I.L.T.* (ns) 270, E. O'Dell, 'Reflections on a Revolution in Libel' (1991) *I.L.T.* 181, (Part I), 214 (Part II), Binchy, W.,*'Some Unanswered Questions in Irish Defamation Law'* in J. Sarkin and W. Binchy (eds) Human Rights and the State: South African and Irish Approaches (Round Hall, Sweet and Maxwell, 2001), pp. 243-263, K. Boyle and M.McGonagle, *Press Freedom and Libel*, (National Newspapers of Ireland, 1986) and *Report of the Legal Advisory Group on Defamation* (March 2003). This last report is available at http://www.justice.ie
The present statute on defamation law is the Defamation Act 1961, which governs both civil and criminal defamation. For general discussion, see R.V.F. Hesuton, 'Recent Developments in the Law of Defamation'(1966) *Ir. Jur.* (n.s.) 247. The Defamation Bill 2006 repeals the 1961 Act.

produced a chilling effect[3] on the publication of public interest material by the media and have not served to reflect the values of the Article 40.6.1°(i) right of freedom of expression and the Article 5 guarantee of democratic governance.

[3-03] The fact that the defences of justification, fair comment and qualified privilege failed to give adequate weight to the necessity of the public receiving information on matters of public importance, reflected lack of acknowledgment of the democratic values which support Article 40.6.1°(i) and the role of the media in educating public opinion. Instead of balancing expression and reputation rights proportionately, the principle of strict liability re-enforced this position. The position is then exacerbated with the lack of regulation in the award of defamation damages, which again is related to the failure to understand the potential consequences to the right of freedom of expression. Of course, the protection offered to the publication of public interest material in the defamation context must be qualified by the competing constitutional right to good name on account of the damage which may be caused by false statements of fact. Given the potential for the clash of rights, reform of Irish defamation law must be effected within a constitutional framework which appropriately values both rights. This chapter discusses some recent shifting in the balance between expression and reputation and analyses this further in Chapters 8 and 9 in light of some similar developments in the jurisdictions which form the subject-matter of Part II.

STRICT LIABILITY [4]

[3-04] One of the many 'incidents' of defamation law to have caused concern is the strict liability principle.[5] This has been explained to mean that '[L]iability for libel does not

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[3] For information on its origins, see 'The Chilling Effect in Constitutional Law' (1969) 69 *Col. L. Rev.* 802. For a general analysis, see E. Barendt, L. Lustgarten, K. Norrie and H. Stephenson, *Libel and the Media, The Chilling Effect*, (Clarendon Press, 1997). The authors divide the manifestations of the chilling effect into the direct chilling effect and the structural chilling effect.
In Irish defamation law, the potential danger of the chilling effect was noted by Ó'Caoimh J. in *Hunter v. Duckworth*, above, n.1.

[4] For discussion of the different types of strict liability, see P. Cane, *The Anatomy of Tort Law*, (Hart Publishing, 1997), pp. 45-49. The same author explains the relatively minor role of mens rea in tort law as lying in the emphasis tort law gives to the interests of victims and to social values in constructing its concept of responsibility. See also P. Cane, 'Mens Rea in Tort Law' (2000) 20 *O.J.L.S* 533.

[5] For a good summary of the arguments for and against strict liabilty in Irish defamation law, see U. Ni Raifeartaigh, 'Defences in Irish Defamation Law' (1991) 13 *D.U.L.J.* 76 and by the same author, 'Fault Issues and Libel Law – A Comparison between Irish, English and United States law' (1991) 40 *I.C.L.Q.* 763, 777. For further discussion of the purposes of the strict liability rule, see J.D. Eaton, 'The American Law of

depend on the intention of the defamer; but on the fact of defamation.'[6] McDonald[7] rationalises the principle on the basis that '[T]he defendant's intention is irrelevant to a finding of defamation because defamation is pre-eminently concerned with the effect of the statement on the standard of opinion, and thus the damage to the plaintiff's reputation.'[8] The same author nonetheless goes on to provide the following argument against the strict liability principle '[T]hough the rule is clear, it operates at the expense of a degree of reality, because most obviously a defendant's intent is very much in issue on the finding of defamation. In fact, the whole action is taken because of it.'[9]

[3-05] Although a defendant's intent may have caused the publication, this forms part of a wider question of the standard of tort liability to assess the publication against and in turn an even wider question on balancing reputation and freedom of expression. It is strongly arguable that the strict liability principle in defamation law represents an overbroad and disproportionate principle of liability and fails to protect free expression rights. A strict liability standard should encourage the publication of true statements[10] on account of the level of care required which will benefit the public in receiving truthful information and comfort those in public life that they will not be subjected to trivial attacks on their reputations. However, the price that may be paid for this standard of care is an inhibited press, fearful to report in the public interest and engaged in self-censorship.[11] The absence of a fault standard, whereby the efforts made by the journalist are not taken into account, signals acceptance of the interference that strict liability may produce on the exercise of the right to freedom of expression in order to protect reputation. Whether this form of liability

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Defamation through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer' (1975) 61 *Va. L. Rev.* 1349, 1357-1358.

[6] *Cassidy v. Daily Mirror Newspaper* (1929) 2 K.B. 331, *per* Russell L.J. See also, *inter alia*, *White v. Tyrell* (1856) 5 I.C.L.R. 477, 487 and *Berry v. Irish Times* [1973] I.R. 368, 374.
Although not removing liability, s.21 of the Defamation Act, 1961 provides for a defence of unintentional defamation. Section 25 of the Defamation Bill, 2006 sets out a defence of innocent publication.

[7] M. McDonald, *Irish Law of Defamation*, *op. cit.* n. 2.

[8] *Ibid.*, p. 22

[9] *Op. cit.*, n. 2, p. 22. In fact, the state of mind of the defendant in a defamation action is relevant to the question of malice which can defeat the fair comment and qualified privilege defences. The intent of a defendant can also lead to an award of aggravated damages.

[10] Endorsing this justification for the strict liability principle, Justice Stewart in *Rosenblatt v. Baer* (1966) 383 U.S. 75, 94 explained that '[S]urely if the 1950s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.'

[11] This 'self-censorship' language is strongly evident in *New York Times v. Sullivan* (1964) 376 U.S. 254, 279, when the Court recognised that '[A] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to ... "self-censorship."...Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.' See also on the chilling effect of the strict liability rule, Rehnquist C.J. in *Hustler Magazine v. Falwell* (1988) 485 U.S. 46.

adequately protects freedom of expression has been seriously questioned, with one domestic commentator having described the strict liability principle as 'constitutionally impermissible'. [12]

[3-06] The failure of the strict liability principle to address the concept of fault was mitigated to some extent with the creation of defamation privileges. So, as Kalven [13] reasoned:

> 'The great role of the common-law privileges in defamation has been, therefore, to abate the harshness of the strict liability principle rather than to give exceptional protection to a particular category of communication. Arguably, if defamation had been assimilated in nineteenth-century tort theory and keyed to liability limited to negligence, no doctrines of privilege would have ever developed.'

[3-07] One of the arguments made in *Hunter v. Duckworth and Co. Ltd & Anor* [14] was that the right to freedom of expression should only be removed by fault on the part of the defendant where it is shown. This submission recognised that despite the existence of defamation privileges, the burden which their operation carried for defendants failed to reconcile speech and reputation rights effectively. In abatement of the strict liability principle, some recent developments in Irish defamation law have introduced the concept of fault and are returned to later in the chapter.

PRESUMPTION OF FALSITY IN DEFAMATION LAW[15]

[3-08] One aspect of the strict liability regime which has caused strong criticism is the presumption of falsity such that once a statement is shown to be defamatory, it is presumed

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[12] O'Dell explains that '[T]he strict lability rule, by insisting on the actual objective truth of the facts, thus cannot stand with a constitutional provision which protects speech which refers not just to facts but also to the subjective perception of the facts on the part of the speaker.' See E. O'Dell, *'Does Defamation Value Freedom of Expression? The Possible Influence of New York Times on Irish law'*, *loc. cit.*, n.2, pp. 58-59, 66. In the South African case of *National Media Ltd. v. Bogoshi* 1998 (4) SA 1196 (SCA), the Supreme Court of Appeal held that '[I]f we recognize, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended....'

[13] Kalven, 'The Reasonable Man and the First Amendment: *Hill*, *Butts*, and *Walker*' [1967] *Sup. Ct. Rev.* 267, 291.

[14] Above, n.1.

[15] The presumption of falsity in defamation law is itself a principle that could be written on extensively. This chapter sets out some of the arguments surrounding the presumption of falsity and returns to them in Chapter 8 in the context of fault in the operation of a public interest defence. The presumption of falsity is not addressed substantially in this thesis. For an-indepth comparative account and analysis, see D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), chapter V.

false.[16] The onus rests with the defendant to prove truth and this is returned to in the specific context of the defence of justification in the following section of this chapter. Whether the presumption of falsity should be retained or abolished has provoked much debate[17] and little agreement.[18] Proof of falsity of a defamatory publication is the strongest vindication of a plaintiff's reputation.[19] In addressing where the allocation of the burden of proof should lie, however, the Constitution requires the balancing of freedom of expression and reputation. The question is whether the allocation of the burden of proof to the defendant achieves the appropriate balance and is necessary to vindicate the good name of the plaintiff pursuant to Article 40.3.2°.[20]

[3-09] Placing the burden of proof on the defendant removes falsity as a particular of the plaintiff's case. There are some difficulties with this position. Firstly, the plaintiff is required to prove he has been defamed and has suffered consequent reputational injury as a result of an untrue publication in the absence of proving the core element of liability needed to support these secondary proofs. Secondly, the plaintiff is primarily concerned to protect his reputation and establish falsehood, yet becomes dependent on another party to do this.[21] Thirdly, the Irish Law Reform Commission recorded that '...in practice it is almost unheard of for plaintiffs not to give evidence that the allegation about them was false.'[22] This means that switching the burden of proof to the plaintiff does not relieve the defendant of having to stand over the truth of the publication or alternatively, relying on another defence. Aware of the burden which a defendant might face should a plaintiff

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[16] See generally, McGonagle, *Media Law*, *op. cit.* n.2, para. [4.3.2.1].

[17] For a flavour of the contrasting positions, see J. O'Callaghan, 'Citizens must keep their right to a good name', *Irish Times*, 1st November 2001, who argues that the law of defamation should not be changed to place the onus of proof on the person alleging libel and *Report of the Commission on the Newspaper Industry*, (Stationery Office, 1996, Pn 2841), para. [7.44].

[18] The Law Reform Commission proclaimed that '[W]e have been unable to reach agreement on this difficult topic.' See *Report on the Civil Law of Defamation*, *op. cit.*, n. 2, p.56.

[19] Although for example Ariel Sharon lost his libel lawsuit on the ground of actual malice, he received the verdict of the jury which allowed him remain in political life. See *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Sharon v. Time, Inc.*, 575 F. Supp. 1162 (S.D.N.Y. 1983).

[20] McDonald submited that '[I]t cannot either be said that because the law says a person is entitled to a good name that therefore the evidential burden of proof should be placed on the defendant.' See McDonald, *Irish Law of Defamation*, *op. cit.*, n.2, pp. 113-114.

[21] The defendant may for example rely on the defence of qualified privilege and not plead the defence of justification.

[22] *Report of the Civil Law of Defamation*, *op. cit.*, n.2, p. 56. The New South Wales Law Reform Commission, *Report 75*, (1995) para. [4.20] made the point that '...as a practical matter, it makes sense to put the burden of proof of falsity on the plaintiff, simply because the plaintiff "who knows the truth", is more likely to be in a position to prove falsity than the defendant to prove truth'. McDonald makes the further point that '[I]f the burden of proof was switched and a plaintiff was obliged to prove untruth, it would not weaken his position. He could not object to proving untruth since, even now, no genuine plaintiff would take a case without being happy that he could prove untruth if he had to.' See McDonald, *Irish Law of Defamation*, *op. cit.*, n.2, p. 114

choose not to give evidence, the Legal Advisory Group in its 2003 Report[23] recommended that in defamation proceedings, the plaintiff should file an affidavit verifying the particulars of the claim. This suggestion has been adopted in section 7 of the Defamation Bill 2006[24] and the introduction of this new procedure means that plaintiffs may be prosecuted for perjury if they provide false evidence, although as has been noted '...formally the onus of the proof of the truthfulness of the defamatory assertion would continue to rest on defendants....'.[25]

[3-10] Aside from the somewhat practical points raised in the preceding paragraph, there are broader issues raised by the presumption of falsity. One of the reasons given by the majority of the Irish Law Reform Commission[26] in recommending the removal of the presumption of falsity was to ensure that no presumptions existed, in other words, that there was no presumption of wrongdoing by the defendant or of the truth of the publication. If a plaintiff instituted libel proceedings, then in accordance with civil law procedure, he should be required to prove that the defendant committed the tort of defamation. The importance of the community-element of the tort of defamation has been discussed in Chapter 2 and it is arguable that a presumption of falsity in defamation law conflicts with and undermines the accepted role of the jury. On the other hand the point has been made by some commentators that the defendant has made the charge against the defendant and the plaintiff may argue he is entitled to be regarded as innocent until proven guilty.[27] Finally, some argue that reversion of the burden of proof needs to be considered in the context of other developments so that the balance does not become tipped too far in favour of defendants in defamation actions.[28]

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[23] *Op. cit.*, n.2, para. [22].

[24] This mirrors the approach of section 14 of the Civil Liability and Courts Act, 2004.

[25] R. Byrne and W. Binchy, *Annual Review of Irish Law* (Round Hall Press, 2003), p. 594.

[26] *Report on the Civil Law of Defamation*, *op. cit.*, n.2, p.56.

[27] E. McCullough, 'Report of the Legal Advisory Group on Defamation' (2003) 8 *B.Rev.* 141, 145. In the English context, in response to a proposal from Lord Lester to amend the Defamation Bill 1996 to place the burden of proving falsity on the plaintiff, the Lord Chancellor used the same argument based on the presumption of innocence. See Hansard HL Deb. Col 242, 2nd April 1996. For further discussion, see Eady J., *'Defamation: Some Recent Developments and Non-Developments'*, in M. Saville and R. Susskin, (eds.) Essays in Honour of Sir Brian Neill: The Quintessential Judge (LexisNexis, 2003), pp. 143-172.

[28] The Legal Advisory Group on Defamation in its Report decided to maintain the presumption of falsity and in the process drew attention to '...the proposed new defence of reasonable publication which should, in future, provide an alternative avenue of defence for those who might at this time be forced to rely on the defence of justification.' *Op. cit.*, n. 2, para. [21]. in In this respect, Cox has argued that developments in existing defences especially where the media are concerned '...have meant that the defence of justification is no longer the be all and end all where public interest material is at stake.' *Op. cit.*, n. 2, p. 148. By way of contrast, Milo has submitted that '[T]he relative uncertainty as to whether the responsible publication will apply or not, and the parsimonious comfort from the existing precedents, augments, or at least does not

[3-11] The discussion of the parameters of Article 40.6.1°(i) in Chapter 1 revealed that even by the time of *Attorney General v. Paperlink*[29] in the mid 1980s, it was unclear whether the constitutional guarantee was restricted to the expression of convictions and opinions or whether it also extended to the dissemination of factual information. It was not until the decision in *Murphy v. Independent Radio and Television Commission*[30] that the role of the democratic discourse model of freedom of expression vis-à-vis the constitutional guarantee was acknowledged. Such delayed acknowledgement impacted upon the protection of public interest speech, notably, in the context of defences in defamation law. This section argues that the defences of justification, fair comment and qualified privilege have failed to effectively protect the media in its constitutional duty under Article 40.6.1°(i) to educate public opinion. They have operated in a climate where the chilling effect of restrictions on the exercise of constitutional free speech rights have not been engaged with sufficiently by the Irish courts. [31] As far as the traditional defences are re-formulated in the Defamation Bill 2006, the media's protection may be weakened in some respects. The introduction of the media-tailored defence of fair and reasonable publication on a matter of public interest is a concession to the proven ineffectiveness of existing defamation defences. There are also two significant judgments, namely *Hunter v. Duckworth & Co. Ltd* [32] and *Leech v. Independent Newspapers (Ireland) Ltd*[33] which support the use of the English cases of *Reynolds v. Times Newspapers*[34] and *Jameel v. Wall*

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mitigate, the undesirable chilling effect that arises from the presumption of falsity. Above, n. 15, p. 176. It is interesting to note the South African approach in *Khumalo v. Holomisa* 2002 (5) SA 401 in which it was held that the presumption of falsity is not an unjustifiable infringement of freedom of expression in the context of the existence of a reasonable publication defence. This defence is returned to in the Irish context in Chapter 8.

Judicial examples of the type of holistic approach to defamation law reform advocated by Cox above, include *Steel v. McDonald's Corporation*, (Unreported, Court of Appeal (Civ), 31st March 1999) and Eady J. in *Chase v. News Group Newspapers* [2002] EWHC 1101.

[29] [1984] I.L.R.M. 373.

[30] [1999] 1 I.R. 12; [1998] 2 I.L.R.M. 360.

[31] Although the chill factor in the context of defamation law was referred to by Ó'Caoimh J. in *Hunter v. Duckworth*, above, n. 1, how the defence in *Reynolds v. Times Newspapers Ltd* [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010, and its application would reduce the chill factor was not addressed.

[32] Above, n. 1.

[33] [2007] I.E.H.C. 223.

[34] Above, n. 31.

Street Journal Sprl[35] in Irish law. Chapter 5 demonstrates that these English cases support a public interest defence based on a standard of responsible journalism.

Justification [36]

[3-12] As the earlier section on the strict liability principle made clear, a defamatory statement is presumed to be false. This presumption places the burden[37] of proving the truth of the alleged defamatory statement on the defendant.[38] If the presumption is displaced by the defendant, the defence cannot be defeated[39] by intent [40] or lack of public interest.[41] It is not necessary that every element of the statement is proved true provided the 'sting' of it is justified,[42] so that for example an inaccurate minor detail is insufficient to defeat the defence.[43] Section 22 of the 1961 Act provides that the defence *shall not fail* provided that any words not proved to be true do not *materially injure* the plaintiff's reputation,[44] and although s.14(2) of the 2006 Bill continues this test, s.14(1) obliges the

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[35] [2007] 1 A.C. 359.

[36] See generally, Cox, *op. cit.*, n. 2, chapter 5, McMahon and Binchy, *op. cit.*, n. 2 , pp. 917-920, McGonagle, *op. cit.* n.2, pp. 107-112, McDonald, *op. cit.*, n. 2, chapter 6. The Defamation Bill 2006 renames this defence as truth, implementing a recommendation of the Law Reform Commission in its 1991 Report, *op. cit.*, n.2, p. 44. The re-naming was also recommended by the New Zealand *Committee on Defamation Report* (1977) paras. [106-107] and *Report of the Committee on Defamation* (Cmnd. 5909, 1975), para. [129].

[37] The burden of proof in civil cases, that of the balance of probabilities, applies.

[38] That the burden of proof lies firmly on the defendant was made very clear by Bushe C.J. in *O'Shaughnessy v. Haydn* (1824) 2 Fox & Smi 329, 343 as follows: 'It appears to us, that if any man shall venture in this manner to slander another, he can only justify himself, by pleading and proving the truth of the charges by sworn witnesses, in a court of justice; but that, admitting them to be false, by the plea of the general issue, he cannot be permitted to defend himself by saying, that he was *bonâ fide* exercising the right of judging, and condemning others.' See also *Campbell v. Irish Press* (1956) 90 I.L.T.R. 105, 109. What is required to be proved is the truth of the statement itself. So, in *Lewis v. Daily Telegraph* [1964] A.C. 234, 283, Lord Devlin explained that '...you cannot escape liability for defamation by putting the libel behind a prefix such as 'I have been told that...' or 'it is rumoured that...', and then asserting that it was true that you had been told or that it was in fact being rumoured...For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it.'

[39] As Lavery J. explained in *Keaveny v. Geraghty* [1965] I.R. 551, 560: 'A true statement cannot be actionable in a civil claim for damages.'

[40] D. Price and K. Duodu, *Defamation: Law, Procedure and Practice*, 3rd ed.,(Sweet and Maxwell, 2004), para. [8.01] observed as follows on this point: '[T]he most malicious defendant who publishes allegations believing them to be wholly false, solely with the intention of injuring the claimant will successfully defend the claim if it emerges that he had accidentally stumbled upon the truth.'

[41] The Defamation Bill 2006 has not introduced a public interest element into the defence. However, true statements in respect of private life are addressed by the Privacy Bill 2006.

[42] *O'Connell v. Mansfield* (1846-47) 9 ILR 179, per Lefroy B. See also *Cooper-Flynn v. Radio Telefís Eireann* [2004] 2 I.R. 72.

[43] *Sutherland v. Stopes* [1925] A.C. 47, 79, per Lord Shaw. Where however a correct factual statement is published implying an innuendo, the truth of the statement may not be sufficient to sustain the defence, see *Irish People's Assurance v. City of Dublin Assurance* [1929] I.R. 25.
If the plaintiff sues on foot of some and not all of the allegations, and the defendant is unable to prove the truth of the statements sued upon, there is no defence even if the defendant may have proved the truth of those allegations not sued upon.

[44] This is the statutory basis for the defence of partial justification which is continued by s.14(2) of the Defamation Bill, 2006. The defence was explained in *Clarke v. Taylor*, 2 Bing NC 654, 664 by Tindal CJ as

defendant to *prove* that the statement is *true in all material respects.* [45] The phrase 'true in all material respects' may simply place in statutory form the rule requiring the defendant to meet the sting of the libel, but this remains uncertain pending judicial interpretation.

[3-13] One rationale for the defence[46] was that '[T]ruth is an answer to the action not because it negatives the charge of malice...but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.'[47] A second argument for the defence is that a true statement corrects a fraud perpetrated by the plaintiff on the public through deception. Finally, the defendant is entitled to the protection of the defence by virtue of the community benefit he carried out by revealing the truth. Although lack of public interest is not sufficient to defeat the defence of justification, the rationales for the defence reveal that primarily the defence is intended to protect reputation and serve the public interest by ensuring a free flow of truthful information to the community. However, as regards the final rationale offered, the operation of the defence of justification regulates the marketplace of ideas to such an extent that it may discourage rather than promote the dissemination of material that carries public interest value.[48]

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follows: 'There can be no doubt that a defendant may justify part only of a libel containing several distinct charges...but if he omits to justify a part which contains libelous matter, he is liable in damages for that which he has so omitted to justify.'
It is to be noted however, as explained by the Irish Law Reform Commission in its *Consultation Paper*, *op. cit.*, n.2, p. 49, that '[D]istinguishable from partial justification of an imputation, is attempted justification by proof of a less serious form of imputation. A defendant may not justify a statement by proving that a less serious form of the wrong alleged was committed by the plaintiff.' For an example of this in practice, see *White v. Tyrrell* (1856) 5 ICLR 477, 498.

[45] The English case of *Chase v. Newsgroup Newspapers Ltd* [2003] E.M.L.R. 218 is useful in explaining the two-stage process involved in this aspect of the justification defence. Brooke L.J explains that '[T]hey must first decide whether on the admissible evidence called by the parties the defendant has proved to their satisfaction, according to the appropriate standard of proof, all or at least some of the factual propositions asserted by the particulars of justification. They must then decide whether the whole of the facts which they have found to be proved are such as to establish the essential or substantial truth of the "sting of the libel." In so far as the sting of the libel is concerned, Brooke L.J. further explains that '[T]he sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act.'

[46] For futher discussion of the rationales underpinning the defence, see, R.R. Ray,'Truth: A Defense to Libel' (1931) 16 *Minn. L. Rev.* 43, (for a history of the defence, see pp. 43-54), B. Hartnett and J.V. Thornton, 'The Truth Hurts: A Critique of a Defense to Defamation' (1949) 35 *Va. L. Rev.* 425 (the writers recommend truth as a defence only where the statement has been published with good motives or has an element of public benefit or both) and M.A. Franklin, 'The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law' (1963-1964) 16 *Stan. L. Rev.* 789.

[47] *McPherson v. Daniels* (1829) 10 B & C 263, 272, *per* Littledale J.

[48] This reality has been accepted by courts in a number of jurisidictions considered in Part II. For an example of the difficulty in proving justification, see the account of the 1957 libel trial involving two politicians and a

[3-14] Empirical research from a leading study[49] of the impact of defamation law on various branches of the mass media in the United Kingdom revealed that editors, journalists, broadcasters and their legal representatives expressed particular concern about the presumption of falsity and the consequent burden of proof on the defendant, which has created an unwillingness to publish stories which they believe on good evidence to be accurate. The principal difficulty for media defendants in running the defence of justification is the confidentiality that may have been promised to sources.[50] The revelation of sources which may be necessary to run a successful justification defence create dangers that sources cease to come forward, newsgathering is hampered, a culture of investigative journalism is not nurtured[51] and vitally, information received in the public interest is not published. The potential of an award of aggravated damages should the defence run and fail[52] is a further deterrent in publishing or pleading.[53]

[3-15] Undoubtedly, untrue information has the potential to damage reputation, a constitutionally protected right, yet the suppression of true information does not serve democracy, and so a balance is required between the importance of protecting true speech and the individual reputational and community cost of protecting false speech. Writing in 2003, McGonagle recorded that the defence '...is pleaded on its own in only five per cent of cases.'[54] It is not unreasonable, particularly when one considers the findings of empirical research referred to in the preceding paragraph, to suppose that this is not on the basis that

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General Secretary of the Labour Party in P. Carter-Ruck, *Memoirs of a Libel Lawyer*, (Weidenfeld & Nicolson, 1990), p. 109.

[49] E. Barendt, L. Lustgarten, K. Norrie and H. Stephenson, *Libel and the Media: The Chilling Effect*, *op. cit.*, n. 3, pp. 32, 132-33.

[50] Addressing complaints from the media to the effect that they were prevented from reporting matters in the public interest and which they knew to be true but could not prove in court, the Irish Law Reform Commission did not recommend any change in the law in this area: see *Report on the Civil Law of Defamation*, *op. cit.*, n.2, p. 61. The level of protection for journalists' sources in this jurisidiction is far from certain with Quirke J. in *Gray and ors. v. Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 52, referring to a 'questionable privilege' in contrast to the High Court in *Mahon v. Keena* [2007] I.E.H.C. 348, considering it 'well-established in Irish jurisprudence.'

[51] The importance of investigative journalism has been acknowledged by the Irish courts: see McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 and more recently by Charleton J. in *Leech v. Independent Newspapers (Ireland) Ltd*, above, n. 33.

[52] For example, see *Crawford v. Todd* (1941) 75 I.L.T.R. 233, 235 (N.I. C.A.), *per* Murphy L.J. and *Bolton v. O'Brien* (1885) 16 L.R. Ir 97, 483 (p. 131) *per* Johnson J.

[53] In this respect, McGonagle refers to the defence as 'a dangerous one' while Cox, *op. cit.*, n.2, p.146, refers to the potential for aggravated damages as providing '...an incentive to the defendant not to exercise his constitutional right to defend an action that has been taken against him.' (footnote omitted).
It is interesting to note the stridency of the minority view of the Irish Law Reform Commission in its *Report*, *op. cit.*, n. 2, p. 57, as to the presumption of falsity: 'The minority have no interest in protecting defamatory assertions that cannot be proved. The fact that it is difficult for a media defendant to prove truth is no justification for requiring a person defamed to prove falsity.'

[54] M. McGonagle, *Media Law*, *op. cit.*, n.2, p. 108.

untruths lie at the heart of most publications, but rather that the under-reliance on this defence may often be associated with elements of the defence identified above.[55] Article 40.3.2° prescribes the State to protect good name *as best it may* from *unjust attack.* It appears that the effects of the defence of justification go further than this constitutional requirement and fail to appropriately reconcile the right of reputation and freedom of expression. The Defamation Bill 2006 retains the presumption of falsity and has thereby declined to accept the suggestions made by some that the presumption should be reversed for statements on matters of public interest or in relation to those made about public plaintiffs.[56] The retention of the presumption of falsity thereby increases the obligation on the new defence of fair and reasonable publication to fulfill the effectiveness test in respect of public interest speech.

Fair Comment

[3-16] The use of 'fair' in the title of the defence has been criticised as misleading.[57] It creates an incorrect perception that the comment must be fair in the sense of reasonable when the defence actually protects unfair comment provided it meets four requirements set out below. The recommendation of the Legal Advisory Group on Defamation to re-name the defence as 'honest opinion'[58] has been accepted in section 18 of the Defamation Bill 2006. Including 'honest' in the defence's title may however distort focus from whether the comment constitutes a matter of public interest. Should this prediction unfold, then the defence may not effectively protect media defendants commenting on matters of public interest.

[3-17] This defence comprises four elements; (i) that the statement constitutes comment rather than fact (ii) the facts supporting the statement are proved to be true[59] (iii) the

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[55] Concern has also been expressed by some on the costs of running this defence. See G. Robertson and A. Nicol, *Media Law*, 4th ed.,(Sweet and Maxwell, 2002), pp. 114-115 and Price and Duodo, *op. cit.*, n.40, p. 56. For the Irish position on pleading the defence, see the recent cases of *McDonagh v. Sunday Newspapers t/a Sunday World* [2005] 4 I.R. 528 and *Leech v. Associated Newspapers (Ireland) Ltd*, (Supreme Court, Hardiman J., 10th February 2006, ex tempore).

[56] See Article 19, *Memorandum on the Defamation Bill 2006 and the Privacy Bill 2006 of the Republic of Ireland*, (September 2006), p.14, available at www.article19.org/pdfs/analysis/ireland-def-priv.pdf and by the same body, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (July, 2000), available at www.article19.org/publications/global-issues/defamation.html, p. 10. See also E. Barendt, 'Libel and Freedom of Speech in English Law' [1993] *P.L.* 449, 456. Boyle and McGonagle, *op. cit.*, n.2 , consider that there is a strong argument for removing the presumption at least in actions brought by public plaintiffs. See also Milo, *op. cit.*, n. 15, chapter V.

[57] Irish Law Reform Commission *Consultation Paper on Civil Law of Defamation*, *op. cit.*, n.2, p. 259.

[58] See s. 24 of the Group's General Scheme of a Defamation Bill, 2003.

[59] McMahon and Binchy explain why the law requires comment to be grounded in specific facts: 'Otherwise the comment, although seemingly in the realm of values, and thus incapable of proof or refutation, can

comment is honestly made (iv) on a matter of public interest. The defendant bears the burden of proof in respect of the defence,[60] which may be defeated by malice. Although generally heralded as a 'bulwark'[61] in the protection of free speech, it does not appear to have resulted in effective protection for media interests and in this respect McGonagle has recorded the 'limited success'[62] of this defence. There are a number of reasons which may explain this. Firstly, separating fact and comment has proven an obstacle in the operation of the defence.[63] Secondly, the onus on the defendant to prove that the facts supporting the statement are true, has raised particular difficulties for media defendants, as discussed above, in the context of the defence of justification. Finally, the concept of public interest has never been defined[64] and although the case law reveals a mix of subject matter coming within it[65] such as voting activity,[66] the evidence of a witness in judicial proceedings,[67] sports[68] and professional misconduct,[69] the concept of the public interest has not been

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nonetheless be capable of carrying with it a substratum of factual accusation, based on the listener's understanding of the kind of facts that tend to generate a normative response of the kind represented by the speaker's utterance.' *Op. cit.*, n.2, para. [34.212].

As Palles CB explained in *Lefroy v. Burnside* (1879) 4 L.R. r. 556, 565: 'A man may [not] invent facts and comment on the facts so invented, in what would be a fair and *bona fide* manner on the supposition that the facts were true.'

This element of the defence has been given statutory form in Ireland by s.23 of the Defamation Act, 1961 which provides: 'In an action for libel or slander in respect of words consisting partly of allegations of facts and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.'

[60] For examples of successful reliance on the defence, see *Stannus v. Finlay* (1874) I.R. 8 C.L. 264 (management of an estate) and *Crawford and Frame v. Vance* [1908] 2 I.R. 521 (accusations of bribery and corruption in a tendering process).

[61] *Report of the Committee on Defamation*, *op. cit.*, n.36, para. [151].

[62] M. McGonagle, *Media Law*, *op. cit.*, n. 2, p. 112.

[63] *Cooney v. Browne* [1985] I.R. 185; *Foley v. Independent Newspapers (Ireland) Ltd* [1994] 2 I.L.R.M. 61; *Magee v. MGN Ltd*, (High Court, 14th November 2003) and *Telnikoff v. Matusevitch* [1992] 2 A.C. 343; [1991] 4 All E.R. 817; [1991] 3 W.L.R. 952. See T. Gibbons, 'Demonstrating a Factual Basis for Fair Comment: *Lowe v. Associated Newspapers*' (2006) 11(1) *Comms. Law* 29. Section 19 of the Defamation Bill 2006 sets out matters to which the court shall have regard for the purpose of distinguishing between a statement consisting of allegations of fact and a statement consisting of opinion.

[64] The Supreme Court in the mid 1970s said the following on public interest in *In the Matter of Hibernia National Review Limited* [1976] I.R. 388, 391: 'The Court wishes to emphasise that criticism of the retention of the death penalty, of the Offences Against the State Acts or of any of their provisions, and of the establishment of the Special Criminal Court are not a contempt of court. These are matters which may validly be debated in public even if the comments made are expressed in strong language or are uninformed or foolish.' The case concerned two letters written to and published by a newspaper which referred to a recent criminal trial, which described it as a "trial" without evidence, and the letters alleged that the members of the Special Criminal Court had conducted a travesty of a trial, that they had not given the benefit of the doubt to the accused and had been involved in an effort by the government and police to procure a false verdict of guilty.

[65] See generally, McMahon and Binchy, *op. cit.*, n. 2, pp. 943-944 and Cox, *op. cit.*, n.2, pp. 195-202.

[66] *Crawford and Frame v. Vance* [1908] 2 I.R. 521, *Black v. Northern Whig* (1942) 77 I.L.T.R. 5 and *Fisher v. National Newspaper and Rooney* [1901] 2 I.R. 465.

[67] *Kave v. Mulvaney* (1866) I.R. 2 C.L. 402.

[68] *Campbell v. Irish Press* (1955) 90 I.L.T.R. 105.

[69] *Clinton v. Henderson* (1863) 13 I.C.L.R. A xliii

interpreted expansively in recognition of the importance of an active press in a democratic society.[70] As McDonald [71] has observed:

> 'The defence of fair comment is predicated on a balance of interest that was originally struck in the nineteenth century by common law judges who, while refusing to recognise a qualified privilege for public comment – and so make truth of the supporting facts irrelevant except on the question of malice – offered public debate the lesser protection of this defence.' [72]

[3-18] As noted above, the fair comment defence has become the defence of honest opinion by the Defamation Bill 2006. Described as 'rather clumsily drafted',[73] there are some features of the new defence which may result in reduced protection for media defendants than was the position under the 1961 Act.[74] S. 18(2)(a) refers to a belief 'in the truth of the opinion' which differs significantly from the recommendation of the Legal Advisory Group which required that the matter complained of constituted the honest opinion of the defendant.[75] In its Consultation Paper, the Irish Law Reform Commission had suggested that 'opinion' referred to a subjective perception of fact and is not thereby capable of objective proof.[76] The European Court of Human Rights has similarly drawn a distinction between statements of facts and value-judgments[77] on the basis that the existence of the former can be demonstrated, whereas the truth of a value-judgment is not

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[70] This view is likewise supported by McGonagle, *op. cit.*, n.2, p. 116.
In the English context, it is worth noting that Denning MR offered a definition of public interest in *London Artists v. Littler* [1969] 2 Q.B. 375, 391 as follows: 'Whether a matter is such as it will affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.'

[71] McDonald, *Irish Law of Defamation*, *op. cit.*, n.2.

[72] *Ibid.*, p. 210 (footnote omitted).

[73] K. Harty, *'The Defamation Bill 2006: The Impact of the Bill from the Perspective of the Plaintiff'*, Defamation, Privacy, and Media Regulation, Conference on the Defamation and Privacy Bills 2006, Trinity College Law School, 30th September 2006.

[74] This is despite the Explanatory and Financial Memorandum accompanying the Bill stating that s. 18 is intended to replace the defence of fair comment.

[75] *Op. cit.*, n. 2 , para. [44].

[76] *Op. cit.*, n. 2.

[77] *Lingens v. Austria* (1986) 8 E.H.R.R. 407. Whether a statement is classified as a statement of fact or as a value judgment is a matter which firstly falls within the margin of appreciation of the national authorities, particularly the domestic courts. See *Prager and Oberschlick v. Austria* (1996) 21 E.H.R.R., para. [36] and *Pedersen v. Denmark*, App. No. 49017/99, 17th December 2004, para. [76]. However, the Court has qualified the level of protection afforded to value judgments by the requirement that '...even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.'
See generally A. L. Young, 'Fact, Opinion, and the Human Rights Act 1998: Does English Law Need to Modify its Definition of 'Statements of Opinion' to Ensure Compliance with Article 10 of the European Convention on Human Rights?' (2000) 20 *O.J.L.S* 89.

susceptible of proof.[78] Section 18 of the 2006 Bill therefore represents a restriction on the defence not previously required under Irish law. Furthermore, as noted by one domestic observer in respect of the operation of the burden of proof, '...rather than malice (or subjective dishonesty) being used to defeat a defence that, had, in all other respects been made out, absence of malice (or subjective honesty) now becomes an element of the defence which the defendant must establish.'[79] While section 23 of the 1961 Act did not draw any distinction between those facts included within the defamatory matter and those to be found outside of it,[80] s. 18 of the Defamation Bill 2006 clarifies that the facts upon which the comment is based can be specified in the statement containing the opinion or referred to in the statement, or be covered by the defence of absolute or qualified privilege. This element of the defence has been criticised for restricting the defence in a manner that the existing defence had not.[81] Given that the fair comment defence had not proved to be the anticipated bulwark for public interest speech prior to the Defamation Bill 2006, the further limitations attached to the defence in the Bill arguably weaken the defence further so that it remains sufficiently ineffective to protect media publications in support of Article 40.6.1°(i) values.

Qualified Privilege

[3-19] Described as '...a patchwork of duty-interest relationships and statutory interventions....',[82] the traditional defence of qualified privilege is intended to protect false defamatory statements[83] on particular occasions, and unlike the defences of justification

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[78] In *Pedersen v. Denmark*, *ibid.*, para. [76], the Court said that '[T]he requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10....' The Court confirmed in *Steel & Morris v. United Kingdom* (2005) 41 E.H.R.R. 22, that placing the burden of proof on a defendant in libel proceedings was not incompatible with Article 10. In the United States context, see Powell J. in *Gertz v. Welch* (1974) 418 U.S. 323, 399.

[79] Cox, *op. cit.*, n.2, p. 204.

[80] For further disucssion on this point, see the Irish Law Reform Commission *Consultation Paper*, *op. cit.*, n. 2, pp. 259-265.

[81] M. McGonagle, 'Reforming Media Law in Ireland: Part 1: Defamation and Privacy, (2006) *Comms. L.* 11(6), 195 and by the same author, 'Modernising Defamation Law (2006) 1(3) *Qtly Rev. Tort Law* 19, 21.

[82] Law Reform Commission, *Consultation Paper*, *op. cit.*, n.2, p. 252. See generally, V. Corbett, 'Qualified Privilege: *Reynolds* Comes Home to Roost', (2004) 1(2) *Independent L. Rev.* 36, 36-38.

[83] However, this does not prevent a court deciding that the defence does not apply in a situation where a defendant ought to have had the correct facts. A good example is *Doyle v. Economist Newspaper Limited* (1980-81) N.I.L.R. 171, 179 (HC) concerning an article on judicial appointments in Northern Ireland which asserted that the appointment of a Catholic judge had come in for criticism in the Belfast Bar library particularly among Catholic QCs who considered the appointment was a token and some of their Protestant collegaues would have been better fitted for the position. Murphy J. held that '[A] good deal was said in this case for the defendants about the freedom of the press, and I would not for a moment question the importance of this freedom in a free society; but the right of fair comment on a matter of public interest – a right which is enjoyed by the press as well as by everyone else – is the main safeguard for this freedom rather than the

and fair comment, does not impose a requirement to prove the truth of the factual basis of the publication. That the defence exists to protect the publication of this type of material demonstrates an acceptance of interference with the right to reputation to allow for the exercise of the right to freedom of expression.[84] Such interference is explained by the objective of the traditional qualified privilege defence which operates to protect such communications 'for the common convenience and welfare of society.'[85] The occasions which attract qualified privilege are those where the speaker has a duty or interest in communicating the information and the listener has a reciprocal duty [86] or interest in receiving it,[87] provided the defendant has not acted with malice,[88] or that there were no irrelevant allegations.[89] The privileged occasions which meet the duty/interest test have not been exhaustively defined[90] but have covered communications between a university

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defence of qualified privilege. Moreover, an important condition affecting the exercise of this right is that the commentator must get his facts right or pay the penalty for not doing so, and this condition provdes a most salutary protection for individuals who may be defamed by his words.'

[84] This was clearly recognised by McCarthy J. in *Hynes-O'Sullivan v. O'Driscoll* [1988] I.R. 436, 454: 'The defence of qualified privilege is itself an impairment in the interests of the common good of the right to vindication of one's good name.'

[85] *Toogood v. Spyring* (1834) 1 CM & R 181, 193. In *Hynes-O'Sullivan v. O'Driscoll*, *ibid.*, McCarthy J. commented that: '[T]he defence of qualified privilege is founded upon the needs of the common good whether at home, the factory, the shop, the houses of finance, or voluntary associations with professional or other purposes.'

[86] Lord Campbell's dictum in *Harrison v. Bush* (1855) 5 EL & BL 334, 348, 119 ER 509, 512 was later quoted by Geoghegan J. in *Reilly v. Gill* (1946) 85 I.L.T.R. 165, 186 in explaining the duty element of the defence: '[A]nd the word 'duty' cannot be confined to legal duties which may be enforced by indictment, action or mandamus but must include moral and social duties of imperfect obligation.'

[87] The duty/interest test is at the centre of the defence, see, *Toogood v. Sprying* (1834) 1 CM & R 181 and *Harrison v. Bush* (1855) 5 EL & BL 344, 119 ER 509. So, as Gibson J. made clear in *Sevenoaks v. Latimer* (1920) 54 I.L.T.R. 11, 14, '[Y]ou can, as I have said, go to a solicitor, to a policeman, or to a person in authority, but not a man in the street for the purpose of communicating your conviction of a man's guilt....No such instance of the extension of the law of qualified privilege is known to our law, that you can go to anyone, make a charge, and when mistaken say it was a privileged occasion.'
For further discussion of the interest in receiving the statement, see M. McDonald, 'Towards a Constitutional Analysis of Non-Media Qualified Privilege' (1989) 11 *D.U.L.J.* 94 and P. Mitchell, 'Duties, Interests and Motives: Privileged Occasions in Defamation' (1998) 18 *O.J.L.S.* 381.

[88] See *Clark v. Molyneux* (1877) 3 Q.B.D. 237 and *Jacob v. Lawrence* (1879) 4 L.R. Ir. 579. O'Byrne J. explained in *Kirkwood Hackett v. Tierney* [1952] I.R. 185, 203, that '...it must be shown that he acted from an indirect and improper motive. The state of mind of the defendant is the cardinal consideration....' Intemperate language in the absence of other proof of malice does not appear sufficient to defeat he defence. The danger of restricting the defence in this manner was highlighted in *Laughton v. The Bishop of Sodor and Man* L.R. 4 P.C. 508: 'To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.' In *Nevin v. Roddy and Carty* [1935] I.R. 397, 421, Fitzgibbon J. spoke of 'want of relevancy' or its being 'so manifestly outrageous' prior to concluding that the matter should not go to a jury on the defence of qualified privilege. See P. Mitchell, 'Malice in Qualified Privilege' [1999] *P.L.* 328.

[89] *McKeogh v. O'Brien Moran* [1927] I.R. 348.

[90] As O'Brien J. explained in *Hamerton v. Green* (1864-66) 16 I.C.L.R. 77, 106, '[N]ow I do not think in stating that rule the Court is to be understood as having intended to enumerate *all* the cases in which a communication could be held privileged except such as came within the terms stated.' McMahon and Binchy

president and the secretary and bursar of the university in the context of a financial inquiry,[91] communication in the employment context,[92] for the purpose of defending one's own reputation[93] and property[94] and in the discharge of public duty.[95]

[3-20] The operation of the traditional common law defence of qualified privilege, fulfilled by a duty/interest test was not extended to protect the media communicating to citizens on matters of public interest.[96] The lack of development of any form of 'media qualified privilege' was justified on the basis of the harm that may be produced by publication at large.[97] However, McGonagle has argued that '[I]n this respect, the common law is out of step with modern thinking on the right of the public to know and the duty...of the media to inform the public.'[98] This is not to suggest that the value of public interest speech has not been acknowledged by the Irish courts. Indeed, there are many Irish cases

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have explained that '...new occasions will undoubtedly arise in the future to which the law will be willing to attach privilege.' *Op. cit.*, n.2, para. [34.163].

[91] *Kirkwood Hackett v. Tierney*, above, n. 88.

[92] *Corcoran v. W. & R. Jacob & Company Limited* [1945] I.R. 446 (report by one employee about another to a welfare officer of the company in the presence of another employee).

[93] This must however be done honestly in self-defence and not actuated by malice towards the party who originally assailed his reputation; see *O'Donoghue v. Hussey* (1871) I.R. 5 C.L. 124. Subsequently in *Dwyer v. Esmonde* (1877) I.R. 11 C.L. 547 (High Court); (1878) 2 I.R. Ir 243, 254 (Court of Appeal) the limits of the defence were explained further: '[I]t is admitted that a privilege of the nature of that claimed by the Defendant extends only so far as to enable him to repel the charges brought against him - not to bring fresh accusations against his adversary. This privilege is in fact a shield of defence, not a weapon of attack.' See also *O'Brien v. The Freeman's Journal Ltd* (1907) 41 I.L.T.R. 35.

[94] *McCormack v. Olsthoorn* [2004] 1 I.E.H.C. 431. In this case, Hardiman J. rejected the dicta in the earlier case of *Coleman v. Kearns* Ltd [1964] *Ir. Jur. Rep.* 5 and made the point that '[T]here is no doubt that something said with a view to bringing a thief to justice is privileged but it is not the only heading of privilege that arises in such circumstances. Privilege exists where a legally recognised duty or interest in speaking exists: in my view the legitimate desire to recover one's property is just as much a legitimate interest as the desire to bring a thief to justice. Very often these desires will co-exist. Realistically where there is a sudden theft or suspected theft the owner or his agent will not pause to analyse his own motives in detail but will act imediately out of an instinctive and proper desire to stop a theft.' This line of reasoning lead Hardiman J. to reach the conlcusion that '...there must of necessity be an element of hardship where one honest man due to an unfortunate coincidence of circumstances *bona fide* accuses another honest man of theft. It is a nice question as to whether the reputation of the latter should not predominate over the privilege of the former, but I do not think that it does. The law must make reasonable allowances for the absolutely unheralded manner in which these circumstances arise, the lack of time to formulate a polite form of words to use and the need for haste generally.'

[95] See *McCarthy v. Morrissey* (1939) *Ir. Jur. Rep.* 82 (allegations by a member of Dail Eireann and of local authoirty that report on children's hygiene within a school prepared by the county medical officer was untrue); *Pierce v. Ellis* (1856) 6 I.C.L.R. 55 (public interest in what occurs at board of guardian meetings).

[96] This traditional approach is not peculiar to Ireland. See, for example, *Blackshaw v. Lord* [1984] Q.B. 1 (England); *Truth (New Zealand) Ltd v. Holloway* [1960] N.Z.L.R. 69 (New Zealand); *Morosi v. Minor Newspapers* [1977] 2 N.S.W.L.R. 744; *West Australia Newspapers v. Bridge* (1979) 141 C.L.R. 535 (Australia) and *Banks v. Globe and Mail* (1961) 28 D.L.R. (2d) 343 (Canada).

[97] *Kirkwood Hackett v. Tierney*, above, n. 88, p. 203.

[98] M. McGonagle, *'Defamation – The Path to Law Reform'* in K. Boyle and M. McGonagle, (eds), Law and the Media: Views of Journalists and Lawyers (Sweet and Maxwell, 1997), pp. 57-102, 85. See also C. Murphy, 'Defamation, the Media and the Public Interest: A Constitutional and Comparative Analysis of the Case for Reform' (2003) 3 *U.C.D.L.R.* 137.

which demonstrate the link between the protection of this expression and a functioning democracy.[99] Recently, in *Cogley v. RTE*,[100] Clarke J. said that '[T]he form of parliamentary democracy enshrined in the Constitution requires that there be a vigorous and informed public debate on issues of importance.'[101] These and other similar judicial pronouncements were not made however in the context of the reconciliation of the constitutional rights to freedom of expression and reputation. Finally, it is important to point out that section 16 of the Defamation Bill 2006 provides for a defence of qualified privilege with retention of the traditional duty/interest test.[102]

It is submitted that it was only in the relatively recent High Court decision of Ó'Caoimh J. in *Hunter v. Duckworth and Co. Ltd & Anor*, [103] that the question of whether the qualified privilege defence should be expanded to afford strengthened protection to public interest speech by the media has been seriously addressed for the first time in this jurisdiction by an Irish court.[104] Quite apart from the judgment itself, the arguments of counsel are important in respect of the options as to how defamation law should address the balance between public interest speech and reputation. The judgment is therefore addressed in some detail over the following pages. Endorsement for the public interest defence is also to be found in *Leech v. Independent Newspapers (Ireland) Ltd*[105] and section 24 of the Defamation Bill 2006. These developments are also considered below.

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[99] See *Attorney General v. for England and Wales v. Brandon Book Publishers Limited* [1986] I.R. 597, *National Irish Bank v. Radio Telefis Eireann* [1998] 2 I.R. 479, *Desmond v. Glackin (No.2)* [1993] 3 I.R. 106 and *McKenna v. An Taoiseach* [1995] 2 I.R. 10.

[100] [2005] 4 I.R. 74; [2005] 2 I.L.R.M. 549.

[101] [2005] 4 I.R. 74, 94; [2005] 2 I.L.R.M. 529, 543. See also, *inter alia*, *Murphy v. I.R.T.C* [1997] 2 I.L.R.M. 467, *Irish Times v. Ireland* [1998] 1 I.R. 359, *Kelly v. O'Neill v. Ireland* [2000] 1 I.R. 354 and *Desmond v. Moriarty*, Unreported, Supreme Court, 20th January 2004.

[102] Section 16(6) of the 2006 Bill defines duty as a legal, moral or social duty. It defines interest as a legal, moral or social interest. The common law elements of malice in order to defeat the defence are provided for in section 17. See N. Cox, *Defamation Law*, *op. cit.*, n.2, pp. 288-289 for concerns that the section might make it less difficult for a plaintiff to prove malice than previously.

[103] Above, n.1.

[104] Ó'Caoimh J. acknowledged that '...the Defendant has raised issues of particular importance on the trial of this issue, which have not been fully addressed previously.'

[105] Above, n.33.

RECENT JUDICIAL AND LEGISLATIVE DEVELOPMENTS:

THE PUBLIC INTEREST DEFENCE

Hunter v. Duckworth [106]

[3-21] The plaintiffs were two members of 'The Birmingham Six' who were found guilty of offences of conspiracy and attempting to cause explosions following the Birmingham pub bombing in 1974 in which more than 20 twenty people were killed and injured. Having spent sixteen years in prison the plaintiffs had their convictions quashed. The second named defendant wrote and the first named defendant published a booklet, *The Birmingham Six and Other Cases*, on 'miscarriages of justice' and their effect on the English criminal justice system. The booklet contained, *inter alia*, the following passage:

> 'The successful appeal against a guilty verdict by the jury, so the argument runs, restores the accused to the status of an innocent person which he is possessed at the beginning of the trial. That is not so. The law is, strictly speaking, unconcerned with guilt or innocence. Its concern is conviction or acquittal. Has the Crown proved its case? The jury's verdict of not guilty is unequivocally and incontestably to maintain the presumption of innocence. It is the end of the affair. The jury is unaccountable for any verdict of acquittal. But a jury's verdict of guilt which is overturned by a Court of Appeal in law is only a wrongful conviction. The presumption of innocence which subsists only so long as the accused is unconvicted is not revivified.'

[3-22] The plaintiffs pleaded that the above passage, either in its natural or ordinary meaning and/or by way of inference and innuendo, read so that the quashing of their convictions did not imply that they were entitled to be presumed innocent. The plaintiffs also pleaded that the emphasis in the booklet on the possibility of the circumstantial evidence alone sustaining the conviction of the six men was clearly defamatory in suggesting their guilt. Defamation was further pleaded on the ground that the publication invited readers to infer that a proper view of the circumstantial evidence in the case would have led to a reaffirmation of the convictions of the six.

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[106] Above, n. 1.

[3-23] In defence, the second-named defendant pleaded that the booklet contains an analysis of features of the English criminal justice system and that such analysis was made principally but not exclusively in relation to 'The Birmingham Six'. Further, it was pleaded that the Court of Appeal in its judgment quashing the plaintiffs' convictions stated that it was neither entitled nor obliged under its statutory powers to say whether the plaintiffs were innocent; it was concerned solely with whether the verdicts of the jury at their trial could stand. In support of the pleadings, the second named defendant relied on the right to freedom of expression under Articles 40.6.1°(i) and 40.3.1° of the Constitution, Article 10 of the European Convention on Human Rights and the freedom to provide services under Article 49 of the EC Treaty.

[3-24] Counsel for the second-named defendant submitted that Irish defamation law failed to strike an appropriate balance with freedom of expression so that '...the concomitant restrictions on the right to freedom of expression are invalid under the Constitution.' It was argued that the standard of Article 40.6.1°(i) is the standard against which the common law of libel has to be measured.[107] Counsel invited the Court to have regard to the underlying philosophy of freedom of expression in other countries,[108] with lengthy extracts from the United States Supreme Court judgment in *New York Times v. Sullivan.*[109] It was made clear however, that the Court was not being asked to reach the same conclusion as *New York Times*, whereby a public plaintiff is required to prove malice, but to recognise and apply in Irish defamation law, the free speech philosophy underlying that judgment. According to counsel, the second named defendant should not be required to demonstrate that the booklet attracted a defamation privilege or was a matter of fair comment on a matter of public interest, but rather should not be subject to the law of defamation in respect of the booklet. Having regard to comparative jurisprudence on freedom of expression, counsel submitted that the strict liability position should not continue and that the right to freedom of expression should only be taken away by fault on the part of a defendant, where it is shown. In conclusion, counsel argued that Irish defamation law put the second named

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[107] The principle of open justice, although not referred to in those terms, was also relied on, so that '...pure comment and opinion regarding legal proceedings are, when the proceedings are concluded, as important as reporting those proceedings while they are continuing.'

[108] Reference was made to the jurisprudence of the European Court of Human Rights: *De Haes and Gijsels v. Belgium* [1998] 25 E.H.R.R. 1, *Bladet Tromso and Stensaas v. Norway* [1999] 29 E.H.R.R. 125, *Handyside v. United Kingdom* [1976] E.H.R.R., Series A, No. 24 and *Nilsen and Johnson v. Norway* (2000) 30 E.H.R.R. 878.

[109] (1964) 376 U.S. 254.

defendant 'on the back foot' in a manner inconsistent with the constitutional right to freedom of expression.

[3-25] Unsurprisingly, counsel for the plaintiffs argued early in submissions that a cause of action existed which did not amount to saying that they will succeed in their actions. The fact that the plaintiffs were private citizens was stressed in the context of ECtHR jurisprudence in so far as it '...circles around the issue of political affairs.' Counsel concluded with the submission '..that the common law is clear and that subject only to the defence of privilege, a person is liable under current law for any untrue statement of fact which tends to lower another in the eyes of the average right-thinking person.'

[3-26] Finally, counsel for the Attorney General acknowledged that domestic defamation law may be inadequate to meet constitutional requirements. Referring to the jurisprudence of the ECtHR, counsel submitted that free speech on public interest affairs may require greater protection than had traditionally been afforded by the pre-Constitution common law qualified privilege defence. In support of these arguments, counsel referred to developments in the common law jurisdictions of the United States,[110] Australia,[111] New Zealand[112] and England.[113] Counsel rejected the United States approach as not adequately vindicating the individual's constitutional right to a good name. Rather, it was submitted that, if properly viewed, the existing qualified privilege defence allows for widely published statements on subjects of public interest, subject to restrictions based on a standard of reasonableness. Turning to the Constitution, counsel submitted that the limits imposed on the expression or communication of public interest material may legitimately differ from the limits to be placed on the expression or communication of other material.[114] A further distinction was drawn by counsel between the communication of statements of opinion and factual statements, with greater emphasis to be placed on the former than the latter right in a democratic society.

[3-27] Counsel for the defendant in response rejected the 'remodelling' approach suggested by counsel for the Attorney General. Rather than engaging in the refashioning of existing defamation defences, it was suggested that the proper approach is to consider the

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[110] *New York Times v. Sullivan*, *ibid* .
[111] *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 C.L.R. 104 and *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520.
[112] *Lange v. Atkinson* [1998] 3 N.Z.L.R. 424; [2000] N.Z.L.R. 385.
[113] *Reynolds v. Times Newspapers*, above, n. 31.
[114] Counsel referred to the constitutional right to freedom of expression, freedom of communication and the democratic nature of the state.

right to freedom of expression '..through the lenses of the Constitution....' so as to examine both the right itself and any limitations that may be placed on it. The public interest defence established in *Reynolds v. Times Newspapers*[115] which centred on the test of responsible journalistic behaviour was rejected as an appropriate starting point in determining the resolution of speech and reputation rights given that '...a written constitution is alien to English law and as a result the thought process in approaching the law in England is radically different to that in Ireland.' The Australian solution was likewise rejected on the basis of its re-modelling of the common law position rather than approaching the rights conflict through a constitutional mechanism.

[3-28] In his judgment, Ó'Caoimh J. stressed that the constitutional balance needed to protect in an appropriate manner both the right to freedom of expression and the right to reputation. Ó'Caoimh J. was satisfied that no essential difference existed between the Constitution and the provisions of the European Convention on Human Rights, rather what was relevant was how both instruments were to be interpreted and in interpreting Article 40.6.1°(i), regard was to be had to the interpretation of the Convention.[116]

[3-29] Although Ó'Caoimh J. did not consider it appropriate to 'enter into the realm of policy formulation by suggesting reform of the law of defamation....',[117] it was considered necessary to address the arguments put forward on behalf of the Defendant. Addressing the balancing of freedom of expression and reputation, he held that:

> 'I am satisfied that the right to freedom of expression may result in a situation where in the context of a democracy the position of the press and other organs of public opinion have to be respected and protected, having due regard to the right to one's reputation. Accordingly, it is clear that the circumstances in which the right to freedom of expression is invoked may differ from one case to another and the relationship between that right and the right to one's reputation may change depending on the circumstances.'

[3-30] The above passage appeared to signal recognition for the importance of the role of the press in modern society so that where there is a democratic value to speech, the

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[115] Above, n. 31.

[116] At the date of handing down of the judgment, the European Convention on Human Rights Act 2003 had not yet come into force. For further detail on this Act, see Chapter 4.

[117] This same desire to avoid entering into law reform in the context of the qualified privilege defence was evident many years previously in *Hynes O'Sullivan v. O'Driscoll*, above, n. 84, p. 450.

balancing of speech and reputation may be different to that required in other circumstances.[118] As to where this democratic value lied, Ó'Caoimh J. considered relevant jurisprudence of the ECtHR, as well as that of Australia, New Zealand and England.

[3-31] As regards the Australian approach which introduced a concept of reasonableness as an alteration to the traditional common law approach to reflect the Constitution, Ó'Caoimh J. was of the belief that the incorporation of a reasonableness test in this jurisdiction is a matter for legislative intervention.[119] In the absence of a clear legislative framework, he considered that *Reynolds v. Times Newspapers*[120] and the flexibility it offered represented the most appropriate direction for defamation law in this jurisdiction. He explained his endorsement of *Reynolds* as follows:

> 'In considering the various authorities open to this court, I am persuaded that the flexible approach represented by the decision of the House of Lords in *Reynolds v. Times Newspapers Ltd* is the most appropriate way of approaching the problems in the instant case, in the absence of a clear legislative framework. It is clear that in the context of Ireland being a democratic state, clear recognition has to be given to the right to freedom of expression. I believe that this right should not be undermined by the provisions of the Constitution relating to the protection of one's reputation. It is clear that the rights have to be construed on a harmonious basis. Nevertheless, it is clear that in certain cases, in the context of the democratic nature of the state, primacy may have to be given to freedom of expression. The approach adopted by the House of Lords has the merit of enabling the law to be developed on a case by case basis having regard to the requirements of the Constitution and the Convention which may inform the court in its approach to the interpretation of the Constitution. One must proceed on the assumption that the courts in addressing individual cases will have regard to the circumstances of each case and the nature of the rights pleaded by the parties and will be able to assess whether the right to

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[118] This approach was re-inforced later in the judgment, in a passage quoted in its entirety below, where Ó'Caoimh J. expresses the view that '[N]evertheless, it is clear that in certain cases, in the context of the democratic nature of the state, primacy may have to be given to freedom of expression.'

[119] This position has been questioned in R. Byrne and W. Binchy, *Annual Review of Tort Law* (2003), *op. cit.*, n.25, p. 587, as follows: '[R]easonableness is the core concept of negligence, which is quintessentially a common law creation of the courts. It is true that the cost/benefit analysis involved in assessments of what constitutes reasonable behaviour generally relates to matters of physical or scientific judgment rather than the resolution of a conflict of abstract values, yet this is not invariably so:, see for example, *Spring v Guardian Assurance plc* [1995] 2 A.C. 296; *O'Rourke v An Post and the Commissioner of an Garda Siochana*, Circuit Court, McMahon J., July 27, 2000.'

[120] Above, n. 31.

freedom of expression contended for in any case is such that the Defendant may rely upon a plea of privilege or fair comment having regard to the evidence in any given case. I am fully conscious of the 'chill factor' referred to in the speech of Lord Nicholls and in particular I agree with his observation where he said:

"The chill factor is perhaps more keenly felt by the regional press, book publishers and broadcasters than the national press."'

[3-32] Despite permitting the defendant to amend the defence in light of the Court's ruling, the formal status of *Reynolds v. Times Newspapers Ltd* [121] remained unresolved. Ó'Caoimh J. clearly signalled the importance of the democratic role of the press and that protection of media rights may affect the level of protection for reputation. However, he clearly appeared constrained not to engage in law reform[122] and supported *Reynolds* in the absence of a clear legislative framework. The detailed submissions of counsel therefore remain to be more substantively addressed in subsequent case law.

Leech v. Independent Newspapers (Ireland) Ltd[123]

[3-33] That the status of *Reynolds v. Times Newspapers Ltd*[124] in Irish defamation law had not been formally resolved in *Hunter v. Duckworth and Co. Ltd & Anor*,[125] was confirmed by Charleton J. in *Leech* where in the early part of the judgment, the judge asked '[I]s there such a thing as a public interest defence?' This question arose in the context of a newspaper article which had reported on an incident the previous day in a live call-in programme on the national radio station where a caller had unexpectedly broadcast an allegation of improper conduct between the plaintiff, a communications consultant and the then Minister for Transport. It was urged on the Court by counsel for the defendant that the public interest aspect of the case was to be found in the situation where the national news broadcaster ran a programme without any time gap and subsequently had to apologise and issue a press statement in those circumstances.

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[121] Above, n. 31.
[122] In fact, Ó'Caoimh J. did not refer to the *Report of the Legal Advisory Group on Defamation*, *op. cit.*, n.2, published four months prior to the judgment.
[123] Above, n. 33. For a general case note, see D. Byrne, 'The Public Interest Defence in Irish Defamation Law: *Leech v. Independent Newspapers*' (2007) 12(5) *B. Rev.* 166.
[124] Above, n. 31.
[125] Above, n. 1.

[3-34] Having explained the operation of classic qualified privilege, Charleton J. went on to address *Reynolds v. Times Newspapers*[126] as follows:

> 'In *Reynolds v. Sunday Times Newspapers*...that was developed so that an issue arose as to whether there was such a thing as a general interest in the public in favour of them receiving information, albeit incorrect. And it seems to me that, yes, there is. The public have an interest in many matters, as opposed merely to being interested in matters. Being interested in matters, it seems to me, would refer to matters which are merely titillating or salacious or gossipy. Matters which are of public interest, on the other hand, have to be matters which affect the public in terms of the governance of the country, their safety, their security, and their right to judge their public representatives fairly on the basis of real information. That is not an exhaustive list. I could not possibly formulate an exhaustive list, even if I had time to reserve judgment in this case.'

[3-35] Notably, although he did not formulate an exhaustive list of matters of public interest on the basis that this would be impossible to do, Charleton J. gave an indication of what this list should be directed to. While leaving the list open for addition, the examples given are more clearly types of political rather than public interest material and are similar to the definition of political matters in the Australian case of *Lange v. Australian Broadcasting Corporation,*[127] which had been relied on by counsel for the Attorney General in *Hunter v. Duckworth and Co. Ltd & Anor.*[128] Interestingly, while the Court of Appeal and the House of Lords in *Reynolds v. Times Newspaper* [129] rejected the Australian definition on the basis that it was too narrow and failed to reflect the reality that many matters affect the public beyond the strictly political, Charleton J. rejected the adoption of a definition of public interest on the basis that it was too difficult an exercise to complete.

[3-36] Charleton J. made it very clear that although the *Reynolds v. Times Newspapers*[130] privilege derived from ordinary qualified privilege, it is a separate defence which operates through a two stage determination, namely whether the subject matter of the article is in the public interest and on the evidence whether the steps taken to gather and publish the information were responsible and fair. In relation to the second stage, the judge drew

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[126] Above, n. 31.
[127] Above, n. 111.
[128] Above, n. 1.
[129] Above, n. 31.
[130] Above, n. 31.

particular attention to whether the article contained the gist of the plaintiff's side of the story and whether the plaintiff was contacted for comment. Significantly and in line with ECtHR jurisprudence,[131] Charleton J. acknowledged the practical realities of newsgathering given that news is a perishable commodity.

[3-37] In terms of the jury's role in the two stages of the public interest defence, Charleton J. said:

> 'Now, I don't accept that in this country it would be right for me to decide these issues, and to, in effect, overturn the statute, which requires a jury trial of this defamation matter, by making a ruling. I can, of course, make a ruling in relation to whether or not the Plaintiff has made out a case. She clearly has made out a case of libel sufficient to be considered by the jury. If this defence were to be put by the court, it would be put to the jury as a matter of fact, and appropriate questions related to the tests based on the two aspects of *Jameel*, would be put to them.'

[3-38] The case of *Reynolds v. Times Newspapers*[132] and subsequent case law is discussed in detail in Chapter 5 and reveals that one of the questions which arose for consideration post-*Reynolds* was the role of the jury in the operation of the defence. Charleton J. in *Leech* clearly eliminated any uncertainty in the Irish position in this regard. This position is supported by section 24(5) of the Defamation Bill 2006 which explains that the reference to 'court' in relation to a defamation action brought in the High Court means the jury, if the High Court is sitting without a jury.

[3-39] On the facts of the case, Charleton J. was satisfied that 'literally just about' there was public interest involved in the manner in which the national broadcaster in a small country deals with its broadcasts. Moving to the test of responsible and fair journalism, the High Court judge explained that:

> 'If there is actually an issue as to malice transmuted, which I hold that there is, into the second test for public interest privilege of responsible and professional journalism in establishing the *Reynolds* test, then in order to establish it, the reality is that whoever took these decisions, be it the journalist, the editor and the sub-editor, have to be here to establish it. And therefore, in the circumstances of there

[131] See Chapter 4.
[132] Above, n. 31.

being no evidence as to this, the defence of public interest will not be put before the jury.'

[3-40] The *Leech* judgment has 'adopted'[133] the *Reynolds v. Times Newspapers*[134] public interest defence into Irish defamation law and in the process pointed to an arguably political definition of public interest matters. Significantly, as regards the second limb of *Reynolds*, namely whether the steps taken to gather and publish the information were reasonable and fair, Charleton J. appeared to adopt a flexible position so that he focused on whether the article contained the gist of the plaintiff's side of the story and whether the plaintiff was contacted for comment rather than demanding that every *Reynolds* factor was adhered to.

Section 24 of the Defamation Bill 2006: Fair and Reasonable Publication on a Matter of Public Interest[135]

[3-41] The Bill adopts the recommendations of the Legal Advisory Group on Defamation[136] to give statutory expression to a new defence relating exclusively to publications made in the public interest rather than expanding the existing common law qualified privilege defence. The introduction of this defence recognises that the existing defences have not served to viably protect the constitutional rights of media defendants in dissemination of public interest material. That a defence tailored towards the media has been proposed in section 24 recognises the role of the media in the exercise of the rights as the organs of public opinion protected by Article 40.6.1°(i). Indeed, almost twenty years ago, McDonald had written that:

'If media and individual speech are intrinsically different activities, then it must follow that the specific reference in Article 40.6.1° to media liberty of expression

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[133] In fact, counsel actually conceded that *Reynolds* was part of Irish law.

[134] Above, n. 31.

[135] See generally, N. Cox, 'Public Interest Reporting and Defamation Law: Recent Irish Developments' (2007) 2(2) *Q'tly Rev. of Tort Law* 20.

[136] On balance, the Group favoured the development of a new defence relating exclusively to publications made in the public interest in place of the expansion of the common law qualified privilege defence. The Group recommended that statutory expression should be given to a new "defence of reasonable publication". To fall within the defence, the publication must relate directly to matters published in the public interest, the discussion of which was for the public benefit and is reasonable in all the circumstances. In determining whether or not the publication was reasonable, the Court could take into account a non-exhaustive range of factors including the extent to which the publication concerned the performance of public functions or activities of a person and whether a reasonable attempt was made to obtain and publish a response from that person.
For general discussion of the Report, see P. Cassidy, 'Publish and Be Damned' (2003) 97(7) *LSG* 18 and E. McCullough SC, 'Report of the Legal Advisory Group on Defamation' (2003) 8(4) *B.Rev.* 140.

must mean that appropriate and balanced legal protections which recognise the unique features of media speech activities are mandated by the Constitution and that any legislation which purports to offer less than that is unconstitutional.'[137]

[3-42] To fall within the new defence of fair and reasonable publication, a list of conditions which centre on 'reasonableness' have to met by the defendant where as the qualified privilege defence requires as an element of the defence that the defendant believed upon reasonable grounds that the statement was published to a person who had a duty or interest in receiving the information contained in the statement, but does not attach a similar list of conditions of reasonableness. One writer has commented that the Bill is intended to improve the balancing of free speech and reputation rights '...by recourse to standards of reasonableness more synonymous with the tort of negligence and the fault principle'. [138] To succeed under section 24, the defendant must prove that the statement was published (a) in good faith [139] and (b) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit. [140] In addition to satisfying the elements of (a) and (b) above, the defendant is also required to demonstrate that in all the circumstances of the case, it was fair and reasonable to publish the statement. Subsections (a) and (b) contain elements of state of mind and content rules, which are then brought within a more general requirement of fair and reasonable.

[3-43] Whether a publication was fair and reasonable in all the circumstances is to be determined by the court taking into account such matters as it considers relevant including any or all of the following: [141]

(a) the extent to which the statement concerned refers to the performance by the person of his or her public functions;

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[137] McDonald, *Irish Law of Defamation*, *op. cit.*, n.2.

[138] J. Healy, *Principles of Irish Torts Law* (Clarus Press, 2006), p. 348. See also the observations of the Law Reform Commission on reasonableness, *op. cit.* n. 2, pp. 316-320. Had the legislature chosen to use the traditional defence of qualified privilege to protect the publication of matters in the public interest, it seems inevitable to properly reconcile freedom of expression and reputation that a concept of reasonableness would have been introduced. This point was previously made by McDonald such that '[A]nd, in order to ensure the constitutional validity of the defence of qualified privilege, the defence must posit some factor of justification – such as reasonable care – which is closer to recognising the unavoidable imperatives of the right to a good name.' M. McDonald, 'Towards a Constitutional Analysis of Non-Media Qualified Privilege, (1989) 11 *D.U.L.J* 94,111.

[139] The test of good faith is commonly used by the ECtHR in defamation law and is discussed in Chapter 4.

[140] Cox has argued that '[E]qually it is difficult to conceive of a situation where discussion of a matter of public importance could not be for the public benefit.' Above, n.2, p. 334.

[141] Section 24(2)(a) of the Defamation Bill 2006.

(b) the seriousness of any allegations made in the statement;

(c) the context and content (including the language used) of the statement;

(d) the extent to which the statement drew a distinction between suspicions, allegations and facts;

(e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;

(f) in the case of a statement published in a periodical, the extent to which the publisher of the periodical-

(i) adhered to the code of standards of the Press Council or to standards equivalent to those specified in that code of standards, and

(ii) abided by determinations of the Press Ombudsman and determinations of the Press Council;

(g) the extent to which the plaintiff's version of events was represented in the publication concerned and, if not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person;

(h) any other means taken to verify the assertions and allegations concerning the plaintiff in the statement. [142]

[3-44] In a return to section 24(2)(g), section 24(3) provides that the failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not (a) constitute or imply consent to the publication of the statement, or (b) entitle the court to draw an inference if, in the particular circumstances of the case, the court considers that the plaintiff was reasonable in withholding any response or in believing that a denial or refutation by the plaintiff of a defamatory statement would itself be unfairly used or published. Even if a defendant meets the section 24(1) test, the onus still remains on this party to prove four other cumulative matters, failure of which

[142] This presumably includes sources and the following point has been made on the potential impact for journalists: '[A] number of journalistic practices could be impugned. The doubtful reliability of so-called 'chequebook journalism – where a source is paid for its information – means that it would obviously be called into question under a democratic model. The courts may similarly disapprove of an editoral decision to publish a story on the basis of a 'flyer' – the industry term for a suspect source.' See E. Carolan, 'Defamation and Privacy: A Democratic Model of Media Freedom?' (2006) 12(5) *B. Rev.* 147, 151.

results in an unsuccessful defence. These are (a) at the time of publication he or she believed the statement to be true (b) he or she did not act in bad faith or out of spite, ill will or other improper motive (c) the statement bore a relation to the purpose of the defence and (d) the manner and extent of publication of the statement did not exceed that which was reasonably sufficient in all of the circumstances.

[3-45] Any detailed analysis of section 24 of the Defamation Bill 2006 is postponed to Chapter 8 of the thesis having discussed similar developments in other jurisdictions. The operation of concepts of fair and responsible journalism in defamation law, particularly in the United Kingdom and Australia, are useful signposts, firstly, to indicate the range of options open to the Irish legislature at the time of the Bill's drafting and secondly, to assist in future predictions of how the Irish defence may unfold. What is important to argue however from the outset, is that the application of the section 24 factors must be carried out within the constitutional framework of rights of speech and reputation discussed in Chapters 1 and 2.

DAMAGES IN IRISH DEFAMATION LAW

[3-46] The increased trends towards awards in defamation cases which resemble national lottery jackpot winnings[143] have given rise to sustained criticism and have led to calls for a number of significant changes in the practice and procedure of the Irish courts in defamation actions. These concerns manifested themselves in two Supreme Court cases: *de Rossa v. Independent Newspapers* [144] (hereafter *de Rossa*) and *O'Brien v. Mirror Group*

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[143] Some evidence of this may be gleaned from the following cases: *Denny v. Sunday News*, Irish Times, 14th November 1992 (£275 000), *McNamee v. Mirror Group Newspapers*, Irish Times, 30th November 1989, (£135 000 plus costs), *McDonagh v Newsgroup Newspapers Ltd.* (Unreported, Supreme Court, 23rd November 1993) (£90 000) and most recently, *McDonagh v. Sunday World*, (Unreported, High Court, 28th Febraury 2008), (€900, 000).
While there has been an increased trend towards higher libel awards in this jurisdiction, such awards still pale in comparison to certain awards handed out in the United States. To give but one example, in a case within the last ten years, an intermediate court affirmed $9.5m of an $11m verdict in *Prozeralik v. Capital Cities Communications Inc* 635 NYS 2d 913 (4th Dept 1995); appeal dismissed 88 NY 2d 843, 667 NE 2d 334, 644 NYS 2d 683 (NY 1996).
The position in common law countries stands in contrast to that found in civil law jurisdictions where damages are sparingly awarded and where so awarded are kept to minimal amounts. For a general overview of the position in civil law countries, see: N. Braithwaite,*The International Libel Handbook, A Practical Guide for Journalists,* (Butterworth-Heinemann, 1995), Irish Law Reform Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* (LRC 12-1998) pp. 50-58, D.W. Vickand L. Macpherson, 'Anglicizing Defamation Law in the European Union' (1996) 36 *Va. J. Int'l L*, 933.

[144] [1999] 4 I.R. 432.
See P. Leonard,'Irish Libel Law and the European Convention on Human Rights', (2000) 5(8) *Bar Rev.* 410 and V. Browne, *'A Judgment that Chills Media's Zeal'*, *The Irish Times*, 4th August 1999.

Newspapers [145] (hereafter *O'Brien*). While it appears constitutionally permissible to dramatically reduce or perhaps even abolish the use of damages as a remedy in defamation litigation, this thesis submits that such a radical move may produce a move too far in favour of libel defendants.[146] Damages in certain cases represent a necessary and just remedy.[147] Therefore, what is required rather than abolition, is refinement both in terms of use and application. There are two elements of the system of defamation damages addressed in this thesis: the method of award and the role of exemplary damages. The section below commences with some focus on the present system of damages in Irish defamation law, in terms of the types of libel damages, their potential consequences and the role of the libel jury. The recent cases of *De Rossa v. Independent Newspapers*[148] (hereafter *De Rossa*) and *O'Brien v. Mirror Group Newspapers*[149] (hereafter *O'Brien*) are then considered, the former in terms of jury assessment of libel damages and appellate review standard of jury awards and the latter, in respect of Article 10 of the ECHR and exemplary damages. Any detailed analysis of the judgments and suggestions for reform are postponed to Chapter 9, following focus on developments in these areas in other jurisdictions in Chapters 4-7.

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[145] [2001] 1 I.R. 1.
See: Binchy, W.,'Some Unanswered Questions In Irish Defamation Law', in J. Sarkin and W. Binchy (eds) *Human Rights, the Citizen and the State, op. cit.*, n. 2, pp. 243-263.

[146] In the absence of legislative reform the Irish constitutional provisions dealing with freedom of expression and the right to the protection of a good name could provide assistance in the task of shifting the focus from damages to other remedies. Articles 40.6.1°(i) and 40.3.2° do not expressly require that a libel victim be compensated by way of damages. In fact the latter operates under the duty of protecting *'as best it may'* the good name of a citizen. It is highly questionable whether the damages regime that presently operates in this country achieves this purpose. To ignore the effectiveness that more speedy and less complex remedies such as declaratory judgments, correction orders, apologies and rights of reply could potentially play is arguably a negation on the State's part to uphold its constitutional obligations.
While legislative inertia has contributed to defective libel machinery, it has recently been judicially acknowledged that reforms must take place despite this legal stillness, as is evident from the partly dissenting judgment of Denham J. in *O'Brien*, *ibid.* p.34: 'The issue of damages, and rules related thereto, is a matter which may be addressed by the Oireachtas. In the absence of such legislation the court may use its common law jurisprudence to assist the jury and the trial.' Part 4 of the Defamation Bill 2006 introduces remedies other than damages.

[147] In fact, in some cases damages and alternative remedies are used simultaneously to vindicate a plaintiff's reputation as in *Kennedy and Arnold v. Ireland* [1987] I.R. 587 where damages were awarded in addition to a declaration that the plaintiff's constitutional right to privacy had been infringed.

[148] Above, n.144.

[149] [2001] 1 I.R. 1.

The present system of damages

[3-47] The existing position in Irish law is that damages are the central remedy for defamation with little emphasis placed on alternative remedies[150] such as apologies,[151] declaratory judgments,[152] correction orders [153] and rights of reply.[154] Recent judicial dicta have re-enforced the primacy of damages as the principal form of redress in a libel action, demonstrated by the comments of Hamilton C.J. in *De Rossa* wherein he noted and accepted that '[T]he only remedy open to a person whose right to his good name or reputation has been damaged or wrongfully interfered with is by way of an action for damages.' [155]

[3-48] In order to fully appreciate the consequences of the position advanced by the former Chief Justice, it is important to be familiar with the various types of damages currently available under Irish law and the resultant dangers of heavy and erratic damages awards, produced in this jurisdiction through over-reliance on damages as a means of restoring reputation to the virtual exclusion of alternatives, coupled with a regime which refuses to provide the jury with guidance when assessing libel damages.[156]

The types of libel damages

[3-49] There exist at present four heads of libel damages under Irish law: compensatory, punitive, nominal and contemptuous. Of these categories, those of compensatory and

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[150] This position was heavily criticised in a report published in the late eighties by K. Boyle and M. McGonagle, *A Report on Press Freedom and Libel*, (Dublin: National Newspapers of Ireland, 1988), pp. 26-30. It has been addressed in the Defamation Bill 2006 which introduces remedies other than damages.

[151] Part of the reason for the less than common reliance on the apology as a libel remedy is that an apology is considered an admission of liability. The legal basis for this position lies in s.17 of the Defamation Act, 1961 which provides that an apology is a factor to be considered in the mitigation of damages, thereby implying that an apology is a statement of liability. This limits the defences that a defendant may later plead at trial. Section 22 of the Defamation Bill 2006 provides, *inter alia*, that an apology is no longer an admission of liability by the defendant.

[152] Declaratory judgments are yet to be introduced into this jurisdiction but have been recommended by the Faulks Committee in England (*Report of the Committee on Defamation*, Cmnd 5909, HMSO, 1975) and have been the subject of much discussion in the United States: D.A. Barrett, (1986) 74 'Declaratory Judgments for Libel: A Better Alternative, Symposium: New Perspectives in the Law of Defamation', *Cal.L. Rev,* 847. Section 26 of the Defamation Bill 2006 introduces declaratory orders.

[153] The offer of amends in s. 21 of the Defamation Act, 1961 applies to a limited category of unintentional defamation. Section 20 of the Defamation Bill 2006 widens the scope of the offer of amends provision.

[154] No mandatory right of reply exists.

[155] Above, n. , p.457.

[156] Juries are used in defamation actions for ascertaining liability and quantum of damages. This stands in contrast to the present position that pertains in personal injury actions where a judge decides on both liability and damages following the abolition of juries in such actions on foot of the Courts Act, 1988. Section 29 of the Defamation Bill 2006 introduces some jury guidance in this respect.

punitive damages are of most significance for present discussion.[157] Compensatory damages are aimed at compensating a plaintiff for the injury to his reputation caused as a result of the publication of defamatory matter and are divided into general and special damages. General damages are awarded for the loss of reputation, presumed in law to flow from the publication of a libel and special damages consist of ascertainable loss occasioned by the plaintiff as a result of the libel.[158] Compensatory damages also serve to vindicate a plaintiff's reputation. The rationale underlying this category of damages was summarised by Lord Hailsham L.C. in *Broome v. Cassell & Co Ltd*[159] as follows: 'In case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.'[160]

[3-50] Within this heading of damages lies another theoretical form of compensatory damages known as aggravated damages. In the English decision of *Gleaner Company Ltd & Anor v. Abrahams (Jamaica)*[161] Lord Hoffmann explained that:

> '[I]n the case of any tort, liability to pay damages as compensation for loss or harm is capable of having some deterrent or exemplary effect and this is particularly true of defamation, first because it is an intentional tort and secondly because the conduct of the defendant is capable of aggravating the damages....The monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence.'[162]

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[157] Where a plaintiff wishes only to clear his name and does not bring the action to seek financial reparation or where a jury concludes that no significant injury to reputation has resulted from a publication, he may seek nominal damages: *McDonagh v. Tarpey* [1933] I.R. 666, p. 673, *per* Hanna J.
Although a plaintiff may be able to establish some damage to his reputation, a jury may decide to award him a derisory sum of money to indicate disapproval that the action has been brought. An example of an award of contemptuous damages is evident from *Keenan v. Wallace* (1916) 51 I.L.T.R. 19, where the plaintiff was awarded one farthing.

[158] The term damages 'at large', sometimes used in the discussion of libel damages, simply indicates that defamation damages are not limited to pecuniary loss and cannot be ascertained by any objective calculation. For a recent discussion of the distinction between human and corporate claimants in respect of damages for defamation, see the English judgment of Eady J. in *Jameel v. Wall Street Journal Europe SPRL* [2004] 2 All E.R. 92 and the House of Lords judgment, above, n.35. Section 29(7) of the Defamation Bill 2006 continues the provison of special damages in respect of financial loss suffered as a result of injury to reputation caused by a publication.

[159] [1972] A.C. 1027, [1972] 2 W.L.R. 645, [1972] 1 All E.R. 801.

[160] [1972] A.C. 1027, 1071, [1972] 2 W.L.R 645, 669, [1972] 1 All E.R. 801, 824. See also Cory J. in *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130.

[161] [2004] 1 A.C. 628.

[162] *Ibid.*, para. [42].

[3-51] These are awarded where injury to the plaintiff's reputation has been exacerbated by the oppressive conduct of the defendant, both at the time of and subsequent to publication. Examples of such behaviour might include persistence in a plea of justification which a defendant is later unable to establish, the offer of an insincere apology, or where a publication was borne out of malice on the part of the defendant. Although aggravated damages are classed as compensatory damages, their measurement is carried out by reference to the insolent or high-handed behaviour of the particular defendant, thereby acting more as a means of punishing the defendant for additional injury occasioned by the plaintiff than of compensating the plaintiff, who obviously receives increased compensation as a result.

[3-52] The final category of damages is the one that has caused the most criticism[163] primarily on the basis that it '...introduces an entirely penal element into what is otherwise a compensatory jurisdiction.'[164] Exemplary or punitive damages[165] are awarded in addition to compensatory damages to mark the jury's disapproval of the defendant's conduct and to deter others from engaging in similar conduct in the future. While exemplary damages are intended as a punishment of the defendant, they inevitably result in a sum of compensation for the plaintiff unlinked to a plaintiff's presumed or actual loss. However, they are generally only awarded in rare cases where a jury considers that the award of compensatory damages fails to mark disapproval of a defendant's behaviour. Having thus delineated the particular categories of damages potentially available to libel plaintiffs under Irish law, it is necessary to familiarise ourselves with the possible adverse consequences that damages are capable of producing to both sides in libel proceedings.

The potential consequences of libel damages

[3-53] The primary concern with substantial awards is the apprehension that such figures produce among the media, resulting in an overly cautious approach to publication and thereby the suppression of information concerning, *inter alia*, matters of public importance. This consequent inhibition represents a substantial threat to a vibrant

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[163] Their abolition has been recommended in England by the Faulks Committee (*Report of the Committee on Defamation*, Cmnd 5909, HMSO, 1975), para. [360]. In Australia, they should suffer a similar fate according to the Australian Law Reform Commission, (*Report on Unfair Publication: Defamation and Privacy*, 11/1979), para. [263], while the New Zealand Report of the Committee on Defamation (*Recommendations on the Law of Defamation*, 1977), paras. [387-391] favoured their retention provided the power to award them is exercisable by judge alone.

[164] P. Carter- Ruck, *On Libel and Slander*, (Butterworths, 1997), p.195.

[165] The words are often used interchangeably.

democracy in which amongst others, a government may not be held sufficiently accountable for its actions.[166] Undesirable fetters on diversity of views may also emerge as a risk consequent upon large and unpredictable damages awards. Media outlets, particularly smaller publishers and newspapers, may be forced to close down, a fact that that has not gone unnoticed by the Irish courts. The Supreme Court in *Dawson v. Irish Brokers Association*,[167] warned that '...defendants in defamation cases should never be regarded as the custodians of bottomless wells which are incapable of ever running dry.' Apart from the costs implications to the particular company, the Court observed that large sums awarded against defendants deal '... a blow to the freedom of expression entitlement that is enshrined in the Constitution.' The combination of high damages and costs may result in increased concentration of media ownership in an effort by media bodies to pay such collateral expenses of publication.[168] This produces a *chilling effect* upon the practical enjoyment of the right of freedom of expression by media bodies and results in press restrictions contrary to the public interest.

[3-54] Another concern centres on the potential stranglehold that some libel plaintiffs may be in the position to exercise such that media outlets may consider themselves financially compelled to settle early to avoid larger trial expenses. This may be exacerbated in this jurisdiction by the deficiencies attached to certain substantive defences on offer to libel defendants. Of course, another likely result of high damages awards is the encouragement they offer to plaintiffs not to settle early in the hope of receiving a larger amount at trial and thereby resulting in unnecessary trials.

[3-55] The risks of high damages awards are not confined to libel defendants, as substantial and erratic awards can likewise create real dangers for plaintiffs. High awards, particularly punitive damages, are very likely to receive media coverage with the result that the defamatory allegation is repeated in the press, carrying the possibility that the statement will be repeated to a larger audience than the one that originally heard or read the statement. While publication of a high award is intended to illustrate the baselessness of

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[166] One method adopted by courts in the United States, aimed at preventing this type of self-censorship, is the use of a summary judgment procedure. Following *Anderson v. Liberty Lobby Inc* (1986) 477 U.S. 242, there has been increased use of summary judgment with the requirement that the trial court apply the same standard of proof on summary judgments that apply at trial, which in defamation actions is one of *'clear and convincing evidence.'*

[167] Supreme Court, 27th February 1997.

[168] It is reported that Mirror Group Newspapers faced costs in the region of £500,000 following the trial in *Percy v. Mirror Group Newspapers Ltd.* (Unreported, High Court, February, 1996). See, 'Fourth biggest UK verdict' (1996) 38, *Gazette of Law and Journalism* 14.

the publication, if a newspaper has not apologised or continues to justify the publication, the fact that a high award was given may not sufficiently vindicate a person's reputation. Unpredictable awards of damages also carry implications for a plaintiff in deciding which court to bring the case before.[169] It is however to be remembered that the current rules concerning payment into court which ensures that a defendant will not have to pay a plaintiff's costs if the damages awarded are less than the sum lodged with the court, do not apply to defamation defendants under Order 22, r.1(3) of the Rules of the Superior Courts.[170] Due to the inherent nature of defamation actions, it will always remain difficult to predict with any degree of certainty how a particular jury will react to a publication, but there are methods, to be discussed in detail below, absent from the present domestic landscape, which could minimise the likelihood of immoderate jury awards.

The libel jury

[3-56] A common link amongst the above aspects of the libel regime is the jury. The support or lack thereof that one has for this institution fundamentally informs the manner of reform to be proceeded with. Therefore, prior to proceeding to a review of recent Irish and foreign developments in the area of libel damages generally, it becomes necessary to specifically address the role of the libel jury. The steady reluctance of the Irish courts to introduce changes in the practice and procedure of the operation of the libel jury is widely criticised for its production of large awards of damages in defamation actions. Ironically, much of the judicial justification for the refusal to countenance practical and procedural changes such that many of the mooted reforms would represent an unjustifiable interference in the domain of the jury, may actually do more long-term damage to the institution of the jury, due to decreasing public confidence in the capacity of the jury to reach sound and rational decisions and ultimately may lead to the demise of the jury in defamation actions. It also increases the number of occasions in which appeal courts are called upon to intervene, resulting in greater costs and uncertainty for the parties involved.

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[169] P. Cassidy, 'Defamation: which court to choose?' (2002) 96(3) *Law Society Gazette*, 22.

[170] This states: 'In actions for libel or slander, or where the defence raises questions of title to land or incorporeal hereditaments, money may not be paid into Court under this rule unless liability is admitted in the defence.'
Recently, Kelly J. in the High Court in *Norbrook Laboratories Ltd and Norbrook Laboratories (Ireland) Ltd. v. Smithkline Beecham (Ireland) t/a Smithkline Beecham Animal Health* [1999] 2 I.L.R.M. 391, admitted of failing to see any convincing reasoning to justify a differentiation between defamation and other tort actions on the issue of payment into court, but held that effect had to be given to the Rules of the Superior Courts, 1986. Section 27(4) of the Defamation Bill 2006 provides that the defendant shall not be required to admit liability for damages for defamation when making a payment to which the section applies.

[3-57] It has previously been explained in Chapter 2, that more than in any other proceedings, the contribution of a jury in defamation actions is widely accepted.[171] Although the role of the jury on the issue of liability does not give rise to concern among commentators,[172] there are those who call for the jury's input in a libel action to substantially end at this point, thus leading to the transfer of the function of assessing damages from the jury to the judge.[173] Whether the current law is satisfactory or not in placing almost exclusive emphasis on damages as the central remedy for defamation, the fact remains that reputation is presently measured in terms of monetary compensation. To afford the jury the freedom to determine whether a publication is defamatory but then to deny them the opportunity to express the extent to which they believed the publication has affected the victim is to empty the rationale of the community based test of any real significance.[174] It could further produce anomalies given that the trial judge may himself or herself have reached a different conclusion to the jury on the facts and is then obliged to elucidate on a finding of twelve persons who may have reached very different conclusions to himself/herself.[175] If this situation presents itself, how can the libel victim be assured that the figure is a reflection of those persons who decided that his/her reputation had been damaged? [176] The only substantive reason that is offered for this proposed role transfer is

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[171] Judicial affirmation to this effect is evident from the judgment of Walsh J. in *Quigley v. Creation Ltd* [1971] IR 269, 272. For an opposing viewpoint, see W.P. Keeton, 'Defamation and the Freedom of the Press', (1975-1976) 54 *Tex. L. Rev,*1221,1226.

[172] Abolishing the jury in defamation actions has never been seriously considered. Following numerous submissions by interested parties, the Irish Law Reform Commission concluded that the case had not been established for abolishing the role of juries in defamation actions: Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, *op. cit.*, n.2, pp. 389-390, and *Report on the Civil Law of Defamation, op. cit.*, n.2, pp. 75-78.

[173] The Irish Law Commission in its Report, *op. cit.* n.2, p.77, favoured the transfer of the function of assessing damages from the libel jury to the trial judge subject to the jury being able to give its opinions on the awarding of nominal damages. This reflects a re-consideration of its provisional recommendation in this area that juries should continue to determine the category of damages i.e. whether they are to be nominal, compensatory or exemplary. Upon reflection, it considered that their initial solution could lead to more problems given that the distinction between the categories of damages is not easy to draw. Therefore the assessment of damages should be a matter for the judge alone subject to the qualification that a jury should determine whether, in their view, there should be an award of nominal damages only. The Commission made this qualification on the basis that under the present law, in a case where the jury concluded that the plaintiff had been defamed but that he had no reputation worthy of vindication, that finding can be reflected by an award of nominal damages. The Commission wished to preserve this right of the jury.

[174] Supporting judicial dicta for this view can be found in the words of Sir Wilfred Greene M.R. in *Rook v. Fairrie* [1941] 1 K.B. 507,515, wherein the judge noted that '...the only way in which a jury can indicate its view of the grossness of the libel, the conduct of the defendant and the character of the plaintiff, is in the figure which the jury think right to award.'

[175] P.F. Carter-Ruck, *op. cit.*, n.164, p. 198 make the point that '[W]here general damages are concerned, overwhelming practical difficulties would arise were the tribunal of fact on questions of meaning, justification, aggravation and mitigation of damages different from the tribunal quantifying the award.'

[176] This point is cogently argued in the context of criminal trials by B. Holder Q.C.,'The Importance of Preserving the Jury System and the Right of Election for Trial' (1997) *Crim L.R.* 875. The author makes the

that a judge by his/her training or experience is in a better position to arrive at a sum, which is proportionate to the seriousness of the libel. To condemn a jury for its failure to award proportionate sums on the basis that it has no training is an argument for ensuring that such training be given, particularly in light of the general acceptance of the crucial role a jury plays in questions of fact. Awarding damages is simply the elucidation of these determinations of fact and to demarcate the responsibilities between two parties is not only overly complicated but also runs counter to the very spirit of the tort of defamation. Before such a radical proposal is considered, it is submitted that jury members should be afforded an interim period during which they are given the necessary 'tools' to reach an informed decision on the issue of damages. Should such tools still fail to meet the concern of critics of the jury's role in assessing damages, only then should consideration be given to minimising the role of citizens in libel trials. The wrong institution is presently being assailed for defects within the system beyond their control which prompted one commentator to make the following pertinent comment: 'If the jury system is to thrive rather than to become a museum piece, revered more for its history than its functionality, jurors must be given the tools to do their job properly, and should be told what that job involves.'[177]

[3-58] It is submitted in this thesis that if given certain tools, which are then used correctly, the effectiveness of the jury in modern defamation litigation will be increased, resulting in sounder determinations for all the parties involved and simultaneously increasing confidence in the institution of the libel jury. This is based on the recognition that a jury finding in a defamation action carries with it a commanding vindication of reputation that is difficult and dangerous to attempt to replace. [178]

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point that any judgment by a cross-section of society is far more satisfactory than a system of justice that depends on the State for the selection of its fact-finders as well as its investigator, prosecutor and sentencer.

[177] Gobert, *Democracy and the Jury*, (Ashgate, 1997), p.57

[178] Murphy J. in *Hill v. Cork Examiner Publications Ltd* [2001] 4 I.R. 219, 227 explained that '[A] special status attaches to an award for damages for defamation as determined by a jury.' In the English case of *Downtex plc v. Flatley* [2004] E.W.H.C. 333, para. [27], Tugendhat J. made the point that '[V]indication includes the ability at some future date, if the libel resurfaces, to show by reference to a substantial award that it has been decisively rejected by the Court.'

De Rossa v. Independent Newspapers [179]

[3-59] The case concerned an article by a well-known Irish journalist Eamon Dunphy about the plaintiff who was the then leader of an Irish political party, the Democratic Left Party and who had formerly been a prominent member of the Workers' Party. The writer criticised the Workers' Party of being involved in 'special activities', which included armed robberies and forgery. The Respondent contended that as a result of the said publication, he had been injured in his character and reputation and had been exposed to odium, ridicule and contempt.[180] Having found the publication to be defamatory of him, the jury awarded compensatory damages of £300 000. [181]

[3-60] On appeal to the Supreme Court against the awarding of such a sum of money, it was argued that not only were the damages excessive and disproportionate and consequently in breach of Articles 40.3.2° and 40.6.1°(i) of the Irish Constitution and Article 10 of the ECHR, but further, that the general practice of restraining counsel and the judge in defamation trials from offering specific guidance as to the appropriate level of damages also violated Irish constitutional provisions. In substitution of the current practice counsel submitted that more specific guidelines from the judge or counsel would facilitate the jury's assessment of a reasonable and fair award without jeopardising its unique role in libel actions. To this end, the guidelines to be given to a jury in its assessment of damages in libel actions should include the following: a reference to the purchasing power of any award which the jury might be minded to make and to the income which the award would produce, reference to what the trial judge and counsel considered to be the appropriate level of damages and reference by way of comparison by counsel and the trial judge to awards made in respect of personal injuries and to awards made in previous libel cases.

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[179] Above, n. 144.

[180] The Article stopped short of directly accusing De Rossa of involvement in these activities. It was made clear that at the time of publication, it remained unproven as to whether De Rossa knew about the source of his party's funds. In its defence, the newspaper pleaded, *inter alia*, that there had been public comment on a letter purportedly signed by the plaintiff which appeared to refer to such activities, and that, in that sense, the words complained of were true and accurate. The defendant subsequently amended its defence to include the following paragraph – "2. The defendant admits that the words complained of mean that the plaintiff was leader of a party which had previously received funds as a result of criminal activities and that there had been public comment on a letter signed, but not knowingly signed, by him which appeared to refer to such activities. In that sense, the words complained of were true and accurate.'

[181] This was the finding of a third jury after no verdict could be reached in two previous libel trials.

[3-61] It was further argued that the common law and the Constitution requires a court on appeal to subject large awards of damages to a more searching scrutiny than had been the case in the past. To this end, the Supreme Court was invited to replace the traditional test laid down in *Barrett v. Independent Newspapers* [182] (hereafter *Barrett*) with the new formulation, which had been put forward by Neill L.J. and accepted in the English Court of Appeal in *Rantzen v. Mirror Group Newspapers Ltd.*[183] This replacement would result in an appeal court asking whether a reasonable jury could have thought that the award was necessary to compensate the plaintiff and re-establish his reputation, rather than conducting the appeal on the basis of whether the sum awarded in the case went far beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded.[184]

[3-62] On the facts of the case, the Supreme Court by a four-to-one majority reached the conclusion that the award itself did not go beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded and was not disproportionate to the injury suffered by the plaintiff.[185] In relation to jury guidance on the quantum of damages to be awarded in a defamation action, Hamilton C.J., delivering the judgment, did not favour the alteration of Irish law to mirror the new English approach. To adopt the English solution would lead to a situation where '...the jury would be buried in figures...', creating jury confusion and '...an unjustifiable invasion of the province or domain of the jury.'[186] Denham J., in the sole dissenting judgment answered these concerns by making the point that the administration of justice would be enhanced by giving juries

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[182] [1986] I.R. 13; [1986] I.L.R.M. 601.
[183] [1993] W.L.R. 593; [1993] 4 All E.R. 975.
[184] The following are the main principles which derive from *Barrett v. Independent Newspapers*, above, n.182 : (i) it is the duty of the judge to direct that the damages must be confined to such sum of money as will fairly and reasonably compensate the plaintiff for his injured feelings and for any diminution in his standing (ii) the jury must be told to make the assessment on facts as found by them taking into acconut the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant at all stages of the case and any other matter which bears on the extent of the damages (iii) a helpful guide would have been to ask them to reduce to actuality the allegation complained of and to fit that allegation into its appropriate place in the scale of defamatory remarks to which the plaintiff might have been subjected and (iv) an award of compensatory damages must be reasonable and fair and bear a due correspondence with the injury suffered.
[185] Denham J. in a dissenting judgment emphasised the earlier Supreme Court decision in *McDonagh v. News Group Newspapers Limited*, above, n. 143, wherein words were interpreted as meaning that the plaintiff was a sympathizer with terrorist causes. The jury awarded the sum of £90 000, which was considered on appeal to be at the top end of the permissible range of damages. Denham J. considered the *McDonagh* and *De Rossa* cases to be similar in nature, yet despite certain aggravating factors present in the latter and absent from the former, nonetheless, there was no justification behind an award of £300 000.
[186] Above, n. 144, p.459.

guidelines resulting in more informed and consistent decision-making, in turn enhancing public confidence in the judicial system.[187]

[3-63] The *Rantzen v. Mirror Group Newspapers Ltd*[188] standard of appellate review was likewise rejected, with the Court preferring to ask whether in all the circumstances the award was so disproportionate to the injury suffered and the wrong done that no reasonable jury would have made such an award. [189] Nonetheless the Court wished to point out that it does not follow

> '...that the discretion of the jury is limitless: the damages awarded must be fair and reasonable having regard to all the relevant circumstances and must not be disproportionate to the injury suffered by the injured party and the necessity to vindicate such party in the eyes of the public. Awards made by a jury are subject to a right of appeal and on the hearing of such appeal, the award made by a jury is scrutinised to ensure that the award complies with these principles.' [190]

In applying this test to the facts before them, a jury is encouraged to have regard to such factors as the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant and various other matters that will vary from case to case.[191] The Court noticeably failed to focus on the political value of the speech involved. In applying the proportionality test, the majority was satisfied that the jury had been entitled to award the figure of £300,000, given the gravity of the libel and the defendant's conduct.

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[187] Denham J. arrived at her conclusions in *De Rossa* after extensive consideration of foreign authorities, which included decisions of the English, Scottish and Australian courts: *John v. Mirror Group Newspapers Ltd.*, [1997] Q.B. 586; [1996] 2 All E.R. 35, *Rantzen v. Mirror Group Newspapers Ltd.*, above, n. 183, *McCartan Turkington and Breen v.Times Newspapers Ltd.* [1998] N.I. 358, *Girvan v. Inverness Farmers Diary* [1996] S.C.L.R. 294, *Carson v. John Fairfax & Sons Ltd.*, (1993) 178 C.L.R. 44, *Crampton v. Nugawela* (1996) 41 N.S.W.L.R. 176, *Television New Zeakand Ltd. v. Quinn* [1996] 3 N.Z.L.R. 24.

[188] *Ibid.*

[189] In fact, it was this element of proportionality in Irish defamation law that led Hamilton C.J. to conclude that '[T]he obligations arising from the provisions of the constitution and the convention are met by the law of this State which provides that the award must always be fair and must bear a due correspondence with the injury suffered, and by the requirement that if the award is disproportionately high it will be set aside.' Above, n.144, p. 458.

[190] Above, n. 144, p.462

[191] The Court relied in particular for these factors on a passage taken from the judgment of the Court of Appeal in *John v. Mirror Group Newspapers Ltd.* above, n.187.

O'Brien v. Mirror Group Newspapers [192]

[3-64] A further opportunity to change the traditional practice in this area was afforded to the Supreme Court in *O'Brien* whereby the Court was expressly invited to overrule its earlier decision in *De Rossa.*[193] Two major grounds formed the basis of the appeal: that the Court had failed to properly consider the European judgment handed down in *Tolstoy Miloslavsky v. United Kingdom*[194] and had incorrectly assumed that the test laid down in *Barrett v. Independent Newspapers*[195] for determining whether an award of damages in a defamation action by a jury should be set aside on appeal was the appropriate test to conform to the requirements of Article 40.6.1°(i) of the Irish Constitution and Article 10 of the ECHR.

[3-65] As to the first of these grounds, Keane C.J. was not prepared to accept that the former Chief Justice had misunderstood in any manner the nature of the European decision. At European level the only issue before the Court was that of damages. The English High Court had awarded Lord Aldington £1,500,000 in damages in response to a pamphlet which had contained serious defamatory allegations against him relating to his activities during the Second World War. The ECtHR ruled that this figure of damages violated the applicant's right to freedom of expression guaranteed under Article 10 of the ECHR having regard to the size of the award coupled with the lack of adequate and effective safeguards against a disproportionately large award. Keane C.J. was satisfied that the earlier Supreme Court decision in *De Rossa* had properly taken these factors into consideration in reaching its decision.

[3-66] Keane C.J. was similarly not persuaded that an incorrect test had been used in determining the satisfactory level of an award against the requirements of the Constitution and the ECHR. He upheld Hamilton C.J.'s interpretation of the appropriate test wherein he had stated: 'The obligations arising from the provisions of the Constitution and the Convention are met by the law of this State, which provides that the award must always be

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[192] Above, n.145. The same businessman Denis O'Brien was awarded damages of € 750,000 by the High Court in November 2006 for an article published in the Irish Mirror eight years previously. The Mirror Group admitted that the article was unture and defamatory but never issued an apology to the plainitff. See O. Kelly and F. Gartland, *'Mirror Group likely to appeal O'Brien damages'*, Irish Times, 25th November 2006.
[193] Above, n.
[194] (1995) 20 E.H.R.R. 442.
[195] Above, n. .

reasonable and fair and bear a due correspondence with the injury suffered and by the requirement that, if the award is disproportionately high, it will be set aside.'[196]

[3-67] There was nothing in the way of 'compelling reasons' to suggest that this test should be overruled. [197] However, on the particular facts, the former Chief Justice believed an award of £250 000 to be excessive and remitted the matter for hearing, noting that the libel in *De Rossa* had been significantly more damaging than the admittedly serious statement concerning Mr. O'Brien, which had suggested that he had paid a sum of money as a bribe to the then Minister of Communications, Arts, Heritage and Gaeltacht, Mr. Ray Burke, in order to obtain a radio licence.[198] Similar to the position in *De Rossa*, there was an absence of discussion of the public interest element of the material and more generally, the deterrent effect that large damages could produce on the future dissemination of material of public interest to citizens. Finally, there was a limited focus on the application of exemplary damages in libel claims. While exemplary damages were not awarded in the present case, the Court countenanced the use of such damages in a future case, which involved a calculated breach of the constitutional right of the plaintiff to his good name. The Court did not explain the circumstances of such awards by reference to constitutional values.

CONCLUSION

[3-68] The Irish Law Reform Commission[199] argued over fifteen years ago that Irish defamation law failed to serve the interests of the plaintiff, the defendant and the public interest. It has been argued in Part I that the analytical absence in domestic case law of the values which underlie the competing rights has largely contributed to this position. Chapters 1 and 2 were thereby directed to the exercise of establishing which values properly support the constitutional rights of freedom of expression and reputation in the context of rights which must be reconciled with one another. The conclusions in these chapters that Article 40.6.1°(i) values have been under-developed and Article 40.3.2° has operated on misconceived values, created the necessary constitutional background for

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[196] Above, n. , p.16.
[197] In contrast, Denham J. was satisfied that there were compelling reasons to reconsider *De Rossa* and these are returned to in Chapter 9.
[198] Mr. Justice Geoghegan gave the sole judgment upholding the amount of the award.
[199] Consultation Paper, *op. cit.*, n. 2, p. 194.

discussion of Irish defamation law in Chapter 3. This chapter was necessarily somewhat functional in its explanation of Irish defamation law.

[3-69] This chapter has however demonstrated the consequences in two principal areas of defamation law of the constitutional imbalance in the rights of expression and good name, through the absence of an appropriate value driven framework. It will be argued in Part III that the re-balancing of the competing rights must be grounded upon constitutional values. The manner of reform which should result from the constitutionalisation of the rights is likewise detailed in Part III.

[3-70] In continuation of the constitutionalisation process for Irish defamation law, Part II will address developments in the European Court of Human Rights, the United Kingdom, the United States of America and Australia. Each of the jurisdictions has engaged to different extents in a process of constitutionalisation in the two areas of defamation law addressed throughout this thesis. Part III will return to these jurisdictions to complete the exercise of suggested reform.

PART I

CONCLUSION

The exploration of the constitutional values underlying freedom of expression and good name in Chapters 1 and 2 revealed a number of points. Firstly, there appeared to be a traditional absence of rights balancing based on constitutional values. Secondly, in the absence of an appropriate constitutional framework centred on values, the importance of protection for political and public interest speech was under-recognised. The imbalance which has resulted from the lack of application of constitutional values was considered in the context of domestic defamation law in Chapter 3.

More recently, there have been some important developments in respect of the level of protection for free speech which have pointed to a stronger commitment to the democratic rationale of this right. To date, the same constitutional scrutiny has not been applied by the courts to the constitutional guarantee of good name. The importance of applying appropriate constitutional values to each right is imperative to ensure that they are balanced in a proportionate manner vis-à-vis one another.

Part I of the thesis has suggested a set of constitutional values for use in the reform of Irish defamation law in the two principal areas considered; the public interest defence and the system for damages awards. It has been suggested that the democratic discourse model of free speech and the property concept of reputation should be applied in the exercise of future rights conflicts. The constitutional framework established in Part I is returned to in Part III of the thesis to complete the exercise of re-formulation of the relationship between the rights of speech and reputation in defamation law. In endeavouring how to determine the balancing of the rights in a defamation context which is done in Part III, it is helpful to consider the approach taken in different jurisdictions and it is to this that Part II now turns.

PART II

INTRODUCTION

Part II (Chapters 4-7) explores the use of the constitutionalisation process in respect of the balancing of speech and reputation rights in a number of other jurisdictions; the European Court of Human Rights, the United Kingdom, the United States and Australia. This Part serves to reveal how the balance between speech and reputation in defamation actions for false statements of facts in the context of public interest speech has been resolved in these jurisdictions in the two principal areas of the thesis. There are historical, cultural[1] and of course constitutional differences between the various jurisdictions, so that uncritical incorporation of comparative defamation law is not suggested.[2] However, such differences should not be relied on to prevent examination of the different constitutional methodologies used in the process of balancing rights. One commentator has suggested the use of foreign precedent is especially relevant in the context of political expression for the following reason: '[A]fter all, the institutions of representative government in liberal democracies by definition draw their authority from the consent of the people. This would seem to require a sufficient number of critically engaged citizens enjoying access to a range of information and opinions on public affairs.'[3] The level of constitutional influence over the common law in each of the four systems of democratic representative government addressed in Chapters 4-7 have varied, and each carries important lessons for Irish defamation law.

The comparative exercise commences in Chapter 4 with the European Convention on Human Rights and Fundamental Freedoms. The ECtHR has firmly committed itself to the democratic theory of free speech and this carries responsibilities for Ireland as a signatory. Despite the latitude which emerges from the margin of appreciation afforded to the Contracting States, domestic restrictions on political expression will be closely scrutinised

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[1] Lord Steyn explained in *Reynolds v. Times Newspapers Ltd* [2001] 2 A.C. 127, 209; [1999] 4 All E.R. 609, 630; [1999] 3 W.L.R. 1010, 1031 that '[T]here are powerful competing arguments of policy. They pull in different directions...And in considering the decisions in other jurisdictions it is right to take into account that cultural differences have played an important role.'

[2] For discussion of this point, see A. Stone, *'The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act'* in Sceptical Essays on Human Rights (eds.) T. Campbell, K.D. Ewing and A. Tomkins, (Oxford University Press, 2001), pp. 391-409.

[3] I. Cram, Contested Words, (Ashgate, 2006), p. 14.

for compatibility with Article 10. The implications for Ireland in respect of balancing freedom of expression and good name are explored in the chapter. Chapter 5 moves on to the United Kingdom, where, as noted above, there have been significant developments in this jurisdiction over the last decade with the liberalisation of the traditional common law position on dissemination of public interest material. This has occurred through the creation of a public interest defence and increased regulation of damages awards. Part of the reason for the re-balancing of the rights of speech and reputation has been the impact of the Convention in English domestic jurisprudence with the enactment of the Human Rights Act 1998. As discussed in Chapter 3, some of these recent English developments have influenced the development of Irish defamation law. The United States is next addressed in Chapter 6. The constitutional guarantee of free speech in the First Amendment has been applied to effect a radical shift from the common law position in respect of the balancing of this right against reputation. Of course, the fundamental constitutional difference between Ireland and this jurisdiction is the lack of express constitutional protection for reputation in the latter. This position, combined with heightened protection for free speech generally, has resulted in jurisprudence which has established different standards of liability determined according to plaintiff status, more commonly referred to as the public figure doctrine. Chapter 6 traces the development of the public figure doctrine. In this process, the under-valuation of reputation becomes evident. However, despite the democratic free speech rationale which grounded the creation of the public figure doctrine, the costs of this to freedom of expression are also explored. The final jurisdiction to be considered is Australia in which significant developments have also occurred, as regards re-shaping the common law in light of constitutional imperatives. The Australian example is particularly relevant to the discussion of Irish constitutional rights balancing, given its re-shaping of the balance between rights of speech and reputation at a relatively late stage in the constitutional life of the nation. The location of an implied constitutional freedom of political discourse has been used to develop the law of defamation and has raised questions on the appropriate methodology to be used in this constitutionalisation process. More specifically, the developments in Australian defamation law offer useful case law on the scope of the concept of political expression and the standard of reasonableness of conduct on the part of journalist.

CHAPTER 4

ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PUBLIC INTEREST SPEECH

INTRODUCTION

[4-01] The level of protection which the Irish law of defamation affords to the publication of public interest matters was considered by the Legal Advisory Group on Defamation in its 2003 Report.[1] The Group was of the view that the Irish position was arguably out of step with the values enshrined in the European Convention of Human Rights and Fundamental Freedoms (hereafter the Convention).[2] The values which underpin the Article 10 Convention right of freedom of expression have been developed by the European Court of Human Rights (hereafter the ECtHR) over many years and have lead to an established source of jurisprudence on the balancing of rights of speech and reputation. Aside simply from the comparative worth of this source of case law, Ireland is a signatory to the Convention and in 2003 incorporated this instrument into domestic law.[3] It is important to emphasise that although the ECHR is addressed in the comparative law element of the thesis within Part II, unlike the other jurisdictions covered, it is a formal source of law within the Irish legal system. However, the status of the Convention and increased importance of reflecting its values in Irish defamation law will be covered in the first section of this chapter.

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[1] Report of the Legal Advisory Group on Defamation, (Ireland, 2003). This Report is available at http://www.justice.ie

[2] *Ibid.*, para. [11].

The Convention has been ratified by forty-seven countries. For discussion of the signature, ratification and processes of negotiation, see A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001). For further information, see http://www.echr.coe.int/Eng/Edocs/DatesOfRatifications.html

The *Report of the Constitution Review Group*, (Government of Ireland, 1996), p. 302, recommended that any replacement of Article 40.6.1°(i) should be closely remodelled on Article 10 of the Convention. More recently, in *Hunter v. Duckworth and Co. Ltd & Anor* [2003] I.E.H.C. 81, Ó'Caoimh J. explained: '[I] am satisifed that no essential difference exists between the provisions of the Convention and the provisions of art 40.6.1 of the Constitution.'

[3] See generally L. Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56(2) *I.C.L.Q.* 217.

[4-02] The ECtHR adjudicates rights of speech and reputation within a framework where the latter right is set up as a restriction on the former.[4] This may account for the traditionally very robust approach of the Court in its assessment of any restrictions on the speech right. More recently, however, the Court has begun to consider reputation as an aspect of privacy, the latter of which benefits from express protection as an independent Convention right and this has created some rights re-balancing. Should this development continue, it will likely provide a more principled set of underlying values for reputation which has been largely absent in contrast to the Court's clear endorsement of the argument from democracy theory of free speech in many of its seminal judgments.

[4-03] The centrality of the argument from democracy in the Court's judgments has positioned political expression at the apex of a hierarchical set of speech rights. The Court has unsurprisingly offered a wide understanding of political expression as speech which contributes to democratic functioning on many matters outside the political sphere *per se*. The value of public interest speech is thus determined on the basis of content, but in contrast to the United States approach (see Chapter 6), which also supports the argument from democracy, the ECtHR has not employed this free speech theory to create a public figure doctrine. However, some of its leading judgments emphasise the importance of protecting the right to freely criticise politicians. From an Irish perspective, the question to be addressed is which approach, the American or that of the ECtHR, most closely aligns with the constitutional framework and this is returned to in Chapter 8.

[4-04] In line with the argument from democracy, the Court supports the role of the media in its dissemination of public interest material but obliges the media to behave responsibly in its public watchdog role. The jurisprudence on journalistic ethics is especially relevant as regards the operation of a public interest defence in Irish defamation law. It will be seen that the Court has approved of the *Reynolds v. Times Newspapers Ltd* [5] public interest defence and this is very significant for Ireland which has recently adopted the defence (see Chapter 3). Its operation is likely to feature in future ECtHR jurisprudence. Finally, although the Strasbourg bench has accepted the chilling impact that restrictive national defamation defences can produce, it has arguably not fully appreciated the equally compelling risk that unregulated and disproportionate damages can pose to speech rights.

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[4] The Convention does not provide for protection of reputation. However, Article 10(2) lists certain rights which may restrict the level of protection for freedom of expression and this list includes reputation.
[5] [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1993] 3 W.L.R. 1010.

Ireland's commitment since the incorporation of the Convention means that this source of law acts a floor for the protection of rights and there is nothing to prevent increased protection of one right provided it does not excessively compromise other Convention rights. The ECtHR's approach to the regulation of defamation damages is explained in this chapter and returned to in Chapter 9, for assessment of whether it sufficiently protects rights of speech and reputation, or whether there needs to be increased regulation of damages awards to reflect a more equal balance between these rights.

THE CONVENTION AND IRISH LAW

[4-05] This section will briefly describe the maturing relationship of the Irish courts with the Convention and its case law. The initial reluctance to use this source of law to mould Irish legal principles has given way to reliance on its principles to shape the development of Irish law. The introduction of the European Convention on Human Rights Act in 2003 (hereafter the ECHRA) was intended to further establish the Convention's role in developing domestic legislation and case law. Although the method of incorporation was not as strong as could have been adopted, academic commentators have welcomed potential for cross-fertilisation in Irish law. [6]

[4-06] The legal and political resolve amongst the democratic nations of Europe to give meaningful effect to the protection of fundamental rights and freedoms is copper fastened by their signatures as Contracting Parties to the Convention.[7] Despite ratification in Ireland over fifty years ago,[8] for some years Ireland carried the undesirable label of being the only

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[6] G. Hogan, 'The Value of Declarations of Incompatability and the Rule of Avoidance' (2006) 28 *D.U.L.J.* (n.s.) 408 and D. O'Connell, S. Cummiskey and E. Meeneghan with P. O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society of Ireland, 2006), chapter 1.

[7] *See generally* C. Overy and R. White, *Jacobs and White, The European Convention on Human Rights* (4th ed., Oxford University Press, 2006), M.W. Janis, R.S.Kay and A.W. Bradley, *European Human Rights Law, Text and Materials*, (Oxford University Press, 2000), P.van Dijk and G.J.H.Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law International, 1998), A.W. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon Press, 1997); K. Starmer *European Human Rights Law: the Human Rights Act 1998 and the European Convention on Human Rights*, (Legal Action Group,1999) and the Irish Law Reform Commission, *Report on the Civil Law of Defamation*, (LRC 38-1991), Appendix B, pp. 125-138. For analysis of the protection of human rights by the ECtHR, see *inter alia*, C. Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52(1) *C.L.J.* 89 and A. Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy' [1999] *P.L.* 703.

[8] Ireland signed the Convention on the 4th November 1950 and ratified it on the 25th February 1953. See Connolly A., 'Ireland and the European Convention', in B. Dickson (ed.) *Human Rights and the European Convention, The Effects of the Convention on the UK and Ireland* (Sweet and Maxwell, 1997), pp. 185-209.

state in the Council of Europe not to have incorporated the Convention into domestic law.[9] The effect of non-incorporation is that if a person wishes to vindicate a Convention right, all domestic remedies must first be pursued and exhausted prior to bringing an action alleging a breach of the Convention before the ECtHR. As O'Connell[10] pointed out, '...while the Convention applies *to* Ireland it does not apply *within* Ireland.'[11] Reliance on the Convention's provisions before the Irish courts afforded many opportunities to give meaningful effect to it within Irish jurisprudence.[12] Nonetheless, the Supreme Court in *In re O'Laighleis*[13] made clear that until such time as the Oireachtas determined that the Convention is to be part of the domestic law of the State, it was not permitted to give effect to the Convention when in conflict with domestic law or in terms of the imposition of obligations additional to those under domestic law.[14]

[4-07] Although many cases indicated an apparent unwillingness on the part of the Irish judiciary to rely on the Convention and Strasbourg jurisprudence, even by the mid 1980s, traces of receptiveness to the Convention by members of the bench were evident. [15] The concept of a presumption of compatibility of Irish law with the Convention has been accepted in some case law.[16] When Ireland signed the Good Friday Agreement in 1998,[17]

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[9] It is interesting to note that Ireland and Sweden were the first two Member States to accept the right of individual petition to the European Court of Human Rights in Strasbourg at the time of ratification of the Convention in 1953.

[10] D. O'Connell, 'The Irish Constitution and the ECHR: Belt and Braces or Blinkers?' (2000) *Irish Human Rights Review*, (Round Hall, Sweet and Maxwell) 90. See also J. O'Dowd, *'Article 10 of the European Convention of Human Rights and Freedom of Expression in Ireland'*, Briefing Paper, December 1995, Irish Council for Civil Liberties, available at http://www.iccl.ie/constitution/fos/98-censor21.htm

[11] *Ibid.*, p. 93.

[12] In fact, it is interesting to note that the Convention had been cited to an Irish court prior to its ratification by the State in *The State (Duggan) v. Tapley* [1952] I.R. 62, 83.

[13] [1960] 1 I.R. 93. For further discussion, see G. Whyte, 'The Application of the European Convention on Human Rights Before the Irish Courts' (1982) 31 *I.C.L.Q.* 856.

[14] Maguire C.J. explained that '[T]he insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of Ireland – if they be at variance with that law – is however the terms of the Constitution of Ireland. By Article 15,2,1° of the Constitution it is provided that " the sole and exclusive power of making laws for the State is hereby vested in the oireachtas: no other legislative authority has power to make laws for the State".' *Ibid.*, pp. 124-125. For similar reasoning, see *inter alia*, *Croke v. Smith and Others*, Unreported, High Court, 31st July 1995, and *Doyle v. Commissioner of an Garda Siochana* [1999] 1 I.R. 249; [1998] 1 I.L.R.M. 299 (HC); [1998] 2 I.L.R.M. 523 (SC).

[15] *O'Domhnaill v. Merrick* [1984] I.R. 151; [1985] I.L.R.M. 40.

[16] Henchy J. in *The State (DPP) v. Walsh* [1981] I.R. 412, 440 stated that there is a presumption that the common law on criminal contempt of court is in conformity with Articles 5 and 10(2) of the Convention. This view was subsequently endorsed in *Desmond v. Glackin (No.1)* [1993] 3 I.R. 1, 28-9; [1992] I.L.R.M. 490, 513, by O'Hanlon J. where Article 10 of the Convention and case law on foot thereof were expressly quoted. See Dillon-Malone, P., *'Individual Remedies and the Strasbourg System in an Irish Context'* in L. Heffernan and J. Kingston, (eds) Human Rights – A European Perspective, (Round Hall Press, 1994), pp. 48-64.

[17] The Good Friday Agreement was reached on 10th April 1998 at the conclusion of Multi-Party negotiations and requires the Irish government to have at least equivalent human rights protection as that provided for in

it made commitments to develop its human rights protection and move towards a culture based on respect for human rights.[18] Accordingly,[19] the ECHRA was introduced '..to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention....'.[20] Section 2 of this Act creates the framework through which further effect is to be given to the provisions of the Convention and provides that any statutory provision and any rule of law shall be interpreted, in so far as possible, in a manner compatible with the State's obligations under the Convention. Section 5(1) provides that where the High or Supreme Court on appeal decide in a given case that it is not possible to interpret a statutory provision or rule of law in a way which is compatible with the Convention, and where there is no other adequate legal remedy available, the court may, either on application by the injured party or of its own motion, make a declaration that the provision or rule of law is incompatible with the provisions of the Convention.[21] However, in line with section 5(2), where a court issues a declaration of incompatibility, it will be a matter for the Government to consider what steps should be taken to remedy the incompatibility. In other words, a declaration will not affect the validity, enforcement or continuing operation of the legislative provision(s) in question.

[4-08] Despite a variety of mechanisms by which to bring international law within the domestic legal order, the Irish Government adopted an indirect mode of incorporation, namely the interpretative model designed to operate at a sub-constitutional level.[22]

Northern Ireland. The introduction of the United Kingdom's Human Rights Act 1998 increased pressure on the Irish government in this respect. See G. Hogan, 'The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland' (1999) 4(4) *B.Rev.* 205.

[18] See generally, I. Bacik, and S. Livingstone, *Towards a Culture of Human Rights in Ireland* (Cork University Press, 2001).

[19] The Irish legal system adopts the dualist approach to international law under which international law will not be treated as part of domestic law unless it has been recognised by or incorporated into Irish law: see generally G.Biehler, *International Law in Practice: An Irish Perspective* (Thomson Round Hall, 2005) and C. Lysaght, 'The Status of International Agreements in Irish Domestic Law' (1994) 12 *I.L.T.* 171. This stands in contrast to the monist model of statehood, embraced in the United States and the Netherlands, to name but two examples, which allows for international agreements to which a state is a party to automatically become part of the domestic law. Dualism in the Irish context has its basis in Articles 15.2.1 and 29.6 of the Irish constitution.

[20] This purpose is taken from the long title of the Act. See generally, D. O'Connell, S. Cummiskey and E. Meeneghan with P. O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact, op. cit.*, n.6, chapter 1.

[21] Section 5(2)(b) preserves the right of individual petition to the ECtHR.

[22] For detailed discussion of the options available to the Government, see G. Hogan, *'The Incorporation of the European Convention of Human Rights into Irish Domestic Law'*, Law Society Conference, Dublin, 10th February 2001 and R. Murphy and S. Wills, "The European Convention on Human Rights and Irish Incorporation – adopting a minimalist approach" (2001) 7(1) *B.Rev.* 41.

Although the method of incorporation has been heavily criticised,[23] it is designed to increase judicial notice and penetration of the Convention in Irish law.[24]

[4-09] Many of the cases against Ireland before the ECtHR, against Ireland have involved Article 6[25] and Article 8[26] rights, and many progressive legislative reforms have been implemented to accommodate judgments prior to the introduction of the 2003 Act.[27] Clearly, therefore, the Court's jurisprudence produced legislative impact for many years even if the Irish courts were slow to use the Convention and its case law. However, what this section has demonstrated is that the position pre the ECHRA did not see Convention values impacting to any real extent in domestic free speech jurisprudence. In contrast, in a clear indication of the increased role of Convention jurisprudence in the Irish legal system, recent domestic free speech case law has revealed much greater reliance on Strasbourg jurisprudence, so that for example, the careful scrutiny test[28] came to the fore in the judgment of Clarke J. in *Cogley v. RTE*[29] and the test of proportionality played a strong part in Fennelly J.'s judgment in the Supreme Court case of *Mahon v. Post Publications*.[30] The potential for application of Convention values in the balancing of speech and good name in Irish defamation law in the two areas of this thesis is returned to in Part III.

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[23] For a flavour of such criticisms, see 'Shatter criticizes 'flawed' human rights legislation' *The Irish Times*. 15th June 2001, 'Rights commission president frustrated by delay' *The Irish Times*, 12th April 2001 and "Human rights bill is flawed – Senator", *The Irish Times*, 14th June 2001.

[24] It is also worth noting that the Convention may have a further impact in Ireland through European Community law. In developing its human rights jurisprudence, the European Court of Justice has had regard to the jurisprudence of the ECtHR. See further Costello, C. and Browne, E., *'ECHR and the European Union'* in U. Kilkelly (ed) ECHR and Irish Law, (Jordans, 2004) pp. 35-80 and G. Anthony, 'Clustered Convergence? European Fundamental Rights Standards in Irish and UK Public Law' (2004) *P.L.* 283.

[25] See, for example, *Airey v. Ireland* (1979) Series A., No. 32, *Heaney and McGuinness v. Ireland*, App. No. 34720/97, 21st December 2000, (this also addressed Articles 8 and 10), *Quinn v. Ireland*, App. No. 36887/97, 21st December 2000, (this also addressed Article 10), *O'Reilly and others v. Ireland*, App. No. 54725/00, 29th October 2004, *McMullen v, Ireland*, Application No. 42297/98, 29th October 2004 and *Barry v. Ireland*, App. No. 18273/04, 15th March 2006.

[26] See for example, *Johnston v. Ireland* [1987] 9 E.H.R.R. 203, *Norris v. Ireland* [1988] Series A, No. 142 and *Keegan v. Ireland* (1994) 18 E.H.R.R. 342.

[27] See D O'Connell, 'Review of the Cases from the Republic of Ireland in Strasbourg Over the Last Decade' (1995) *Irish Human Rights Yearbook* pp. 1-14; Connolly, A., *loc. cit.*, n. 8, pp. 203-206; L. Flynn, 'The Significance of the European Convention on Human Rights in the Irish Legal Order' (1994) 3(1) *I.J.E.L.* 4, pp. 19-29; Flynn, L., 'Chapter 5 – Ireland' in C. Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights* (Kluwer Law International, 1997), pp. 177-215, especially pp. 197-211 and J. Gleeson, 'The ECHR: Its Practical Relevance' (1993) 2(2) *I.J.E.L.* 248.

[28] In *Observer and Guardian v. United Kingdom* (1991) 14 E.H.R.R. 153, the Court explained that Article 10 does not mean that all prior restraints are incompatible with the Convention but should be subject to careful scrutiny.

[29] [2005] 4 I.R. 79; [2005] I.L.R.M. 529.

[30] [2007] 2 I.L.R.M. 1.

THE ARTICLE 10 FRAMEWORK

[4-10] Article 10 reads as follows:

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.

[4-11] The seminal case of *Handyside v. United Kingdom*,[31] offered an early indication of the robust approach the Court intended to adopt in the protection of the right:

> 'The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10.2 it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.' [32]

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[31] (1979-80) 1 E.H.R.R. 737.

[32] *Ibid.*, para. [49].

This judgment highlights two of the primary theoretical justifications for the protection of freedom of expression; namely, to promote the self-governing process and enable an individual's self-fulfilment. In the same year, the Commission had focused on the former justification in *X & Church of Scientology v. Sweden*, (1979) 16 DR 68. For further discussion of the philosophies underlying the Convention by analysis of the Convention's travaux préparatoires, see D. Nicol, 'Original Intent and the European Convention on Human Rights' (2005) *P.L.* 152.

[4-12] Despite the broad protection offered to freedom of expression,[33] which includes opinions, information and ideas, Article 10 does not guarantee unlimited protection. Article 10(2) addresses restrictions on the right of freedom of expression.[34] In addressing a conflict between the Article 10 right of freedom of expression and the Article 6 right to a fair trial in *Sunday Times v. United Kingdom*[35] in the context of contempt of court, the Court did not consider that it was faced '...with a choice between two conflicting principles, but with a principle of freedom of expression, that is subject to a number of exceptions which must be narrowly interpreted....'[36] The starting point for the Court was freedom of speech, which represents a different approach to the balancing of this right against others in established Irish jurisprudence. Furthermore, the ECtHR made clear that any exceptions to freedom of expression are to be measured by Convention standards.[37] The Court continued by explaining the relevant Convention standards and it is these seminal principles which have formed the foundation for the subsequent development of the right in its jurisprudence. These principles now have increased significance in Irish law in light of the incorporation of the Convention. The justification for a restriction on Article 10(1) requires that four conditions are satisfied:[38] (i) that the restriction is prescribed by law (ii) that the restriction pursues a legitimate aim (iii) that the restriction is necessary in a democratic society and (iv) that the restriction falls within the state's margin of appreciation. Each of these principles merit individual scrutiny[39] to fully understand the Court's approach to political

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[33] Other Convention articles are also relevant in this respect. Article 14 guarantees the right to freedom of expression without discrimination on any ground, Article 8 protects, *inter alia*, respect for correspondence and personal privacy, Article 11 offers a right to freedom of peaceful assembly and association while the right to manifest one's religion or belief is covered by Article 9.

[34] Article 10(2) is not the only Convention provision to limit the right to freedom of expression. For example, Article 16 provides that nothing in Article 10 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. Article 17 provides that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater degree than is provided for in the Convention. Article 15 permits derogations to be made to Article 10 in time of war or other public emergency threatening the life of the nation. Other rights which may impinge on Article 10 in some circumstances are the right to a fair trial as guaranteed in Article 6 and the right to respect for private life covered by Article 8. For a more in-depth discussion of the potential of many of these restrictions on Article 10, *see* Lester, A., *'Freedom of Expression'*, in R.St.J MacDonald, F. Matscher and H.Petzold, The European System for the Protection of Human Rights (Dordrecht and Nijhoff, 1993), pp. 465-466.
Notably, the Convention was the first human rights instrument to make express provision for limitations on freedom of expression – see R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), p. 1058.

[35] (1979) 2 E.H.R.R. 245.

[36] *Ibid.*, para. [65].

[37] Above, n. 35, para. [60].

[38] For a useful overview, see A. Nicol, G. Millar and A. Sharland, *Media Law and Human Rights*, (Blackstone Press Limited, 2001), Chapter 2.

[39] For a succinct yet lucid exposition of these principles, see Lester, A., *op.cit.* n.34, pp. 485-491.

speech and to appreciate the minimum standards expected in the protection of political and public interest speech in Irish defamation law.

Prescribed by law

[4-13] While legislation need not be framed with absolute certainty,[40] three general principles have been developed to test whether a restriction satisfies the 'prescribed by law' standard of review. The interference with the right to freedom of expression must have some basis in domestic law,[41] the law must be adequately accessible,[42] and finally, it must enable a citizen, with appropriate advice if necessary, to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail.[43] This principle of legal certainty is generally met by Contracting Parties' legal systems and most violations of Article 10 result from the lack of necessity of a particular restriction in a democratic society. Nonetheless, the principle that a measure must be prescribed by law remains in operation and has on rare occasions led to a finding of a violation of the Convention.[44]

Legitimate aim

[4-14] If the respondent State satisfies the Court that the restriction is prescribed by law, it then faces the burden of proving that it pursued a legitimate aim. The legitimate aims are those restrictions on freedom of expression set out in Article 10(2),[45] which includes

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[40] For example, in *Steel and others v. UK* (1998) 2 EHRR 603, despite conflicting domestic judicial pronouncements, the Court held that obscure conditions under which a police constable's power of arrest for breach of the peace arises, was sufficient to meet the 'prescribed by law' formulation. Therefore, common law provisions will suffice to meet the 'prescribed by law' standard.

[41] In *Sunday Times v. United Kingdom*, above, n.35, the Court explained that "[I]t would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10(2) (art.10-2) and strike at the very roots of that State's legal system." See also *Open Door Counselling v. Ireland* (1992) 14 E.H.R.R. 331 and *Times Newspapers v. United Kingdom*, App. No. 23676/03, 11th October 2005.

[42] In *Sunday Times v. United Kingdom,* above, n.35, para. [49], this was further explained to mean that the citizen must have an indication which is adequate in the circumstances of the legal rules applicable in a given case.

[43] See also *Sunday Times v. United Kingdom*, above, n.35 and *Huvig v. France* (1990) E.C.H.R. Series A, No. 176B, paras. [29-35].

[44] In *Hashman v. Harrup* v. UK (2000) 8 BHRC 104, the issue was whether behaviour *'contra bonos mores'* was adequately defined for the purposes of Article 10(2). Behaviour *'contra bonos mores'* had been described by Glidewell LJ., in *Hughes v. Holley* (1988) 86 Crim. App. R. 130, as '...conduct which has the property of being wrong rather than right in the judgment of the majority of contemporary fellow citizens.' This was not considered sufficiently precise to enable a citizen to regulate his conduct.
Other examples of a breach of the 'prescribed by law' principle are *Herczegfalvy v. Austria* (1992) 15 EHRR 437 (the correspondence of mental patients could be interfered with at any time) and *Gaweda v. Poland* (2002) 12 B.H.R.C. 486 (the rules governing the registration of periodical titles in Poland were not formulated with sufficient precision to enable the applicant to regulate his conduct).

[45] For a discussion of the application of the principle, *see* Lester A., *op. cit.*, n.34, pp. 487-488.

protection of reputation, [46] and in other Convention articles including the Article 6 right to a fair hearing and the Article 8 right to private life, the latter of which has been held in recent case law to include reputation. The balance struck between rights of expression and reputation is returned to later in the chapter.

Necessary in a democratic society [47]

[4-15] Any restriction must not be merely 'indispensable', 'reasonable' or 'desirable' but must correspond to a pressing social need and be proportionate[48] to meet that need.[49] Mahoney[50] convincingly ties the necessity test to the democratic objectives of the Convention by writing:

> 'In the concept of "necessary in a democratic society"...there is written into the very test of the European Convention a mechanism requiring the national law to respond to developing needs of society....Democratic society does not stand still, and neither does the way in which democratic society upholds its cherished fundamental values. The drafters must be deemed to have realised this when they made democratic society one of the governing elements of the Convention.' [51]

[4-16] In respect of the proportionality of restrictions on freedom of expression, Feldman[52] writes '[W]hat is said, the way in which it is said, the public importance of what is said, the context in which it is said, and the impact of the restriction or penalty on the speaker, all are relevant to making decisions about proportionality under Article 10.'[53] Of all these factors, the overriding one employed by the ECtHR is the public importance of what is

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[46] Some recent developments in the protection of reputation are discussed at paras. [4-33] to [4-34].
[47] This is a requirement set by Articles 8-11 and Article 2 of Protocol IV of the Convention.
[48] See generally McBride, J. 'Proportionality and the European Convention on Human Rights', in E. Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, 1999), pp. 23-35. The author acknowledges the need for balancing entailed when giving effect to those rights in the Convention that are subject to broadly framed limitation clauses, such as the right to freedom of expression. He explains that without resort to the concept of proportionality, the formulation of Convention provisions would be open to restrictions so long as they were prescribed by law and pursued a legitimate purpose.
[49] *Handyside v. United Kingdom*, above, n.31, para. [48].
Some examples of disproportionate interferences found by the Court include imposing conditions on the licenses of private broadcasters offered as a less restrictive alternative than banning them (*Informationsverein v. Austria* (1993) 17 E.H.R.R. 93); the amount of damages awarded in a defamation case (*Tolstoy v. Miloslavsky* (1995) 20 E.H.R.R. 442) and the removal of three peace activist protestors from a public space (*Steel v. United Kingdom* [1999] E.H.R.L.R. 109).
[50] P. Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Hum. Rts. L.J.* 57.
[51] *Ibid.*, p. 64.
[52] D. Feldman, *Civil Liberties and Human Rights in England and Wales*, (Clarendon, 1993).
[53] *Ibid.*, p. 761.

said. In *Bergens Tidende v. Norway*,[54] the Court explained that: 'Where measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the court is called for.'[55] The necessity of any restriction must be convincingly established [56] and the reasons given by the respondent State to justify the restriction must be relevant and sufficient.[57] The interference must be necessary having regard to the facts and circumstances prevailing in the individual case. [58]

Margin of appreciation

[4-17] Under Article 1 of the Convention,[59] the primary responsibility for ensuring that its rights are enforced rests with the national authorities. However, a defendant state may be found to have breached the Convention if it '...stepped outside the range of permissible options, that is outside their "margin of appreciation".'[60] Its purpose is succinctly explained by one commentator as follows:

> 'The effect of the European Convention cannot be to outlaw all bar the least restrictive national policy falling within this democratically legitimate range of differing opinions. The conclusion to which we are driven is thus that the Convention norm sets a universal minimum standard which nonetheless incorporates recourse to a principle of subsidiarity, in that it allows some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies.'[61]

[4-18] The application of the doctrine to Article 10 is traceable to the Court's *Handyside v. United Kingdom* judgment.[62] The Court acknowledged that it is not an appeal court

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[54] (2001) 31 E.H.R.R. 16.
[55] *Ibid.*, para. [52].
[56] *Autronic AG v. Switzerland* (1990) 12 E.H.R.R. 485, para. [61]; *Barthold v. Germany* (1985) 7 E.H.R.R. 383, *The Observer and Guardian v. United Kingdom*, above, n.28, para. [59].
[57] *Handyside v. United Kingdom*, above, n. 31, paras. [48-50], *Sunday Times v. United Kingdom*, above, n. 35, para. [62].
[58] *Observer and Guardian v. United Kingdom*, above n.28, para. [65].
[59] This provides that '[T]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'
[60] See T.Jones, 'The Devaluation of Human Rights under the European Convention', (1995) *P.L.* 430. The author traces the doctrine to the French public law concept of une marge d'appréciation on the part of the legislative and executive.
[61] P. Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments', [1997] *E.H.R.L.R.* 364, 369.
[62] Above, n.31. For discussion of its earlier application, see P.Van Dijk and G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, *op. cit.*, n.7, who trace it to *Greece v. United*

vested with authority to replace the decision of a national court, but rather that its mandate is to carry out a review to establish whether the national court acted within the proper exercise of its margin of appreciation.[63] This is because '...the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.' [64] More specifically, the Court considered that there was no uniform European definition of morality and that each Contracting State is best placed to ascertain the likely impact of a publication on the moral fabric of its society. [65]

[4-19] Subsequent case law delineates wide or narrow applications of the doctrine depending on the nature of the right and whether there is general European agreement on the issue.[66] In respect of morals,[67] national security,[68] and social and economic policy[69] the Court has been less interventionist than in relation to the right to freedom of expression, where restrictions have merited heightened European judicial scrutiny.[70] This has lead to criticism that '...the idea of a margin of appreciation, while clear and sensible in concept, has proven highly malleable in application.'[71] In combination, the centrality of the Convention's democratic objectives and restrictive application of the margin of appreciation in respect of freedom of political expression point to the need for a similar framework in the operation of Irish defamation law.

Kingdom, App. No. 176/56, Yearbook 2 [1958-59], p. 174 and *Lawless v. Ireland*, Series B, Vol 1 [1960-61], p. 408. In respect of *Handyside*, see C. Feingold, 'The Little Red Schoolbook and the European Convention on Human Rights' (1978) 3 *Human Rights Rev.* 263.

[63] The ECtHR has subsequently repeated this principle. In *Klass v. Germany* (1979-80) 2 E.H.R.R. 214, para. [49], it held that '[I]t is certainly not for Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.'

[64] Above, n.31 para. [48].

[65] Helfer has criticised the 'Consensus Inquiry' by arguing that '[F]or example, the Court and the Commission have not specified what percentage of the Contracting States must alter their laws before a right-enhancing norm will achieve consensus status. Nor have they defined the degree of which international treaties and regional legislation are relevant to their analysis.' See L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell Int'l L. J.* 133, 140.
Amongst forty-seven Contracting States, the concept of political expression varies, yet the Court does not generally rely on the margin of appreciation in respect of political expression. This shows that when invoking the margin of appreciation, the Court focuses less on consensus and more on the content of the right.
For further discussion of free speech case law and the 'best placed' line of argument, see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), pp. 92-95.

[66] This latter factor is referred to by Jones as 'the consensus principle', *loc.cit.*, n. 60.

[67] *Muller v. Switzerland* (1991) 13 E.H.R.R. 212, *Wingrove v. UK* (1997) 24 E.H.R.R. 1 and *Otto Preminger Institute v. Austria* (1994) 19 E.H.R.R. 34.

[68] *Leander v. Sweden* (1987) 9 E.H.R.R. 433.

[69] *James v. UK* (1986) 8 E.H.R.R. 123.

[70] For a general discussion of the doctrine and its application to different forms of speech, see Macdonald, R.St. J., 'The Margin of Appreciation', in MacDonald, The European System for the Protection of Human Rights, *op. cit.*, n. 34.

[71] Janis, Kay and Bradley, *op. cit.*, n.7, p. 163. It has also been criticised for leading to unprincipled and confused case law, see, *inter alia*, M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *I.C.L.Q.* 638 and S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23(3) *O.J.L.S.* 405.

THE TYPES OF SPEECH PROTECTED UNDER ARTICLE 10

[4-20] The Article 10 Strasbourg jurisprudence indicates a categorisation of expression into three categories, namely political, commercial and artistic.[72] As the focus of the remainder of this chapter is on the category of political speech, the treatment of commercial and artistic speech by the Court will receive brief attention.

Commercial Expression

[4-21] Despite affording protection to commercial speech under Article 10,[73] the Court's willingness to afford Member States a wide margin of appreciation in respect of this type of speech[74] has rendered general statements of principle more illusory than real.[75] One commentator[76] deduced that the Court's approach to commercial expression '...is consistent with an assumption that, whereas public affairs are essentially 'political', economic relations are essentially 'non-political' and do not engage democracy to the same extent.' [77]

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[72] Nicol, Millar and Sharland caution against rigidly adopting this threefold classification, arguing that particular expression may fall into more than one category. In support of this, the authors refer to *Hertel v. Switzerland* (1998) 28 EHRR 534, in which the ECtHR considered that newspaper articles concerning alleged dangers associated with microwave ovens was not merely commercial in nature but also formed part of a general debate on public health. *Op. cit.*, n. 38, pp. 22-23.
Lord Lester has pointed out that he is unable to '...discern a satisfactory logical, philosophical or jurisprudential basis for protecting political expression and media freedom more strongly than artistic and cultural expression.' See A. Lester 'Universality v. Subsidiarity: A Reply' (1998) 1 *E.H.L.R.R.* 73.

[73] In *Markt Intern Verlag and Klaus Beerman v. Germany* (1989) 12 E.H.R.R. 161, para. [26], the following statement of principle emerged: '[I]t is clear that the contested article was addressed to a limited circle of tradespeople and did not directly concern the public as a whole; however, it conveyed information of a commercial nature. Such information cannot be excluded from the scope of Article 10 § 1 (art. 10-1) which does not apply solely to certain types of information or ideas or forms of expression'. For similar statements of principle, see *Jacubowski v. Germany* (1994) 19 E.H.R.R. 64, para. [25] and *Casado Coca v. Spain* (1994) 18 E.H.R.R. 1, paras. [35] and [36].

[74] In *Hertel v. Switzerland* above, n.72 para. [47], the Court reasoned, '...a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition.' It then continued by drawing a distinction between the application of the margin of appreciation doctrine to commercial speech as compared with other forms of speech by pointing out the necessity '...to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health....'

[75] For example, in *Casado Coca v. Spain*, above, n.73, the legality of an advertising ban was upheld on the basis that the matter is not settled uniformly in the Member States, national authorities are better equipped to regulate advertising standards in individual countries to ensure a proper balance between competing rights and because the reaction of the Spanish national authorities was not considered to be disproportionate.

[76] S. Marks, 'The European Convention on Human Rights and Its 'Democratic Society'' (1995) LXVI *British Yearbook of International Law* 209.

[77] *Ibid.*, p. 233. See also M.H. Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?' (2006) 6 *Hum. Rts. L. Rev.* 53.

Artistic Expression

[4-22] The ECtHR held in *Müller v. Switzerland*[78] that Article 10 protects freedom of artistic expression. The Court was bolstered in reaching this conclusion by reference to Article 19(2) of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas 'in the form of art.' It also indicated in *Müller* that Member States are to enjoy a wide margin of appreciation where artistic expression is concerned[79] and applied this approach by upholding the decision of the Swiss authorities to confiscate exhibition paintings depicting sexual acts and fine the artists.[80] The restrictions on artistic speech by national authorities are generally justified on the basis of their blasphemous or obscene nature.[81] The approach of the Court to the protection of artistic freedom is aptly summarised by a former President of the ECtHR, with the following extra-judicial observation:

> 'What the right to offend is intended to guarantee is the participation in the democratic process through public debate of questions of general concern. The

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[78] (1988) 13 E.H.R.R. 212.

[79] This is not surprising, according to Nicol, Millar and Sharland, who make the point that the scope of the Court's jurisdiction is wide, extending '...from liberal Northern European states such as the Netherlands to the socially conservative Turkey.' *Op.cit.*, n. 38, pp.30-31. See, C. Warbrick, *'"Federalism" and Free Speech – Accommodating Community Standards: the American Constitution and the European Convention on Human Rights'* in I. Loveland (ed) Importing the First Amendment: Freedom of Expression in American, English and European Law, (Hart: Oxford, 1998), pp. 173-195, 189 who refers to the Court's 'indiscriminate analysis' in cases concerning religious or moral expression.
See also, C. Evans, *Freedom of Religion under the European Convention on Human Rights*, (Oxford University Press, 2001), pp. 142-145.

[80] In a highly critical appraisal of the Court's decision, Lord Lester opined that: 'If an interference as extreme as the confiscation of an artist's works is regarded as within the margin of appreciation, it is difficult to imagine a case in which European supervision is likely to be real and effective where a work is regarded by the national authorities as obscene or otherwise injurious to public morals.' *Loc. cit.*, n. 34.

[81] The European Commission of Human Rights in *Gay News and Lemon v. United Kingdom* (1983) 5 E.H.R.R. 123, failed to condone a fine of £1,000 and a nine month's sentence of imprisonment, suspended for eighteen months, as a violation of Article 10 for a poem accompanied by a drawing by *GayNews* which depicted Christ as a homosexual in some detail. In *Otto-Preminger- Institut v. Austria* (1994) 19 E.H.R.R. 34, the ECtHR upheld a regional court's decision to order the forfeiture of a film that caricatured leading figures of the Christian religion. In *Wingrove v. United Kingdom* (1996) 24 E.H.R.R. 1 the Court also upheld a refusal by the British Film Board of Classification to issue a certificate for distribution of a film which portrayed a nun, described as St. Teresa of Avila, a 16th century nun, as engaging in erotic behaviour with the crucified figure of Christ. Lord Lester of Herne Hill, Q.C., responded to the *Wingrove* decision by arguing as follows: 'The concept of the 'margin of appreciation' has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake....At times this has led the Court to refer to the need for strict scrutiny of restrictions on free speech. But in practice the Court's case law on Article 10 has been weak and unpredictable.' See A. Lester, 'The European Convention on Human Rights in the New Architecture of Europe', General Report in Proceedings of the 8th International Colloquy on the European Convention on Human Rights, (Council of Europe, 1996), pp. 227-240, pp. 236-237.

strength of the protection offered will depend on the extent to which the expression can be linked to the direct functioning of the democratic society.' [82]

Political Expression

[4-23] Although the term political expression is used by some commentators and on occasion the ECtHR, the jurisprudence reveals that what is actually protected is speech which carries a public interest value so that political expression is not used in the narrow sense of that term to mean discussion of governmental or institutional activities. This section discusses the ECtHR's understanding of the meaning of public interest speech which is carried through to include discussion of the existence or otherwise of a public figure doctrine. Distinct from the relevant question for this thesis of whether speech should be protected based on the status of the plaintiff, the ECtHR case law on the public figure question reveals further guidance for the Irish courts and legislature as to the meaning of public interest speech.

(i)The Meaning of Political or Public Interest Speech

[4-24] The heightened protection for political speech which contributes to the functioning of the democratic process is a strong feature of the Court's jurisprudence and supports the liberal democratic strands running throughout the Convention.[83] The Court has consistently proclaimed that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.'[84] Political expression is not

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[82] L. Wildhaber, 'The Right to Offend, Shock or Disturb? – Aspects of Freedom of Expression under the European Convention on Human Rights', (2001) XXXVI *Ir. Jur.* 17.

[83] The Preamble refers to 'effective political democracy' and the holding of free elections is addressed under Article 3, Protocol I. In *Mathieu-Mohin and Clerfayt v. Belgium* (1987) 10 E.H.R.R. 1, para. [47], the Court referred to the latter article as 'of prime importance in the Convention system.' In addition to the Article 10 freedom of expression guarantee, Article 9 protects freedom of thought, conscience and religion and Article 11 protects freedom of assembly and association. The Court made it clear in *United Communist Party of Turkey v. Turkey* (1998) 26 E.H.R.R. 121, para. [45], that '[D]emocracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.'
Marks makes the point that this level of protection for political speech points to '...the strong connection made between this freedom and democracy, and the basis of the connection, resting as it apparently does on the impulse for self-fulfilment, the liberal values of tolerance and broadmindedness, and the democratic concern with securing the accountability of those who exercise public power.' *Loc. cit.*, n.76, p. 213. See also C. Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal', (2000) 51(3) *N.I.L.Q.* 381, who argues that the strict supervision exercised by the ECtHR over national authorities' restrictions on political speech was not controversial.

[84] *Lingens v. Austria* (1986) 8 E.H.R.R. 407, para. [42]. See also *Oberschlick v. Austria(No.2)* (1997) 25 E.H.R.R. 357, para. [58], *Bowman v. United Kingdom* (1998) 26 E.H.R.R. 1, para. [42] and *Rekvinyi v. Hungary*, App. No. 25390/94, 20th May 1999, para. [26].

confined to the 'high politics'[85] of criticising politicians and has been extended to include discussion of suspected irregularities in the award of public contracts to commercial entities,[86] motor related issues such as traffic policies, road safety and the environment,[87] killing methods in the seal-hunting industry,[88] cosmetic surgery [89] and alleged police brutality.[90] These cases support the pronouncement by the ECtHR in *Thorgeirson v. Iceland* [91] that there should be no difference in treatment between matters of political discussion and other matters of legitimate public concern. As regards a test based on the public interest nature of the material, the cases are decided in the absence of any organising principle,[92] short of general statements of principle emphasising the importance of freedom of the press in a democratic society. Given its jurisprudence which is highly protective of press freedom, the term public interest will continue to be defined broadly, yet on a case by case basis. Despite the heightened protection afforded to political expression, as Lord Cooke pointed out in *Reynolds v. Times Newspapers Ltd*, [93]'[A]s the European case law stands at present, no trace is to be found of the endorsement of a generic privilege in the political context.' [94] While Ireland is not likely to be obliged to adopt a generic approach to political expression,[95] this form of expression is to be regarded as high status speech and to receive protection as such.

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[85] This phrase is used by Warbrick, *loc. cit.*, n. 79, p. 184.
[86] *Cumpana and another v. Romania* (2005) 41 E.H.R.R. 14.
[87] *Demuth v. Switzerland* (2004) 38 E.H.R.R. 20.
[88] *Bladet Tromso and Stensaas v. Norway* (1999) 29 E.H.R.R. 125.
[89] *Bergens Tidende v. Norway* (2001) 31 E.H.R.R. 16.
[90] *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843.
[91] *Ibid.*
[92] McGonagle writes: '[T]he European Court of Human Rights...in deciding defamation cases, considers them in the light of all the circumstances (i.e. context) and looks at the purpose of the publication concerned. It does not adopt a "one rule fits all" approach but considers the totality of the circumstances surrounding the particular publication.' See M. McGonagle, 'Modernising Defamation Law' (2006) 1(3) *Qtly. Rev. Tort Law* 19, 21-22.
[93] [2001] 2 A.C. 127;[1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010.
[94] [2001] 2 A.C. 127, 223; [1999] 4 All E.R. 609, 643, [1999] 3 W.L.R. 1010, 1045.
[95] For a similar conclusion, see P. Dillon Malone, *'Privacy and Media Law'*, in U. Kilkelly (ed.) ECHR and Irish Law, *loc. cit.*, n.16, pp. 243-279, p. 255 who submits that '[A]lthough the adoption of a new generic privilege...would not in itself violate the ECHR, and in application would probably accord in most cases with the weighing of interests under the Convention, Ireland is bound to have regard to the case-by-case balancing approach of the ECHR.'

(ii) The Public Figure Doctrine [96]

[4-25] The text of the Convention does not delineate a hierarchy of rights nor does it prescribe a method for reconciling competing rights so that a 'continuous process of compromise'[97] between the rights of freedom of expression and reputation is carried out by the ECtHR.[98] The starting point for discussion of the existence or otherwise of a public figure doctrine is *Lingens v. Austria.*[99] A former Austrian Chancellor, Bruno Kreisky, instituted private proceedings for defamation against the applicant, a journalist and editor of the Vienna- based Magazine, *Profil*, in respect of two articles in which he had been accused of 'basest opportunism' and of engaging in 'immoral' and 'undignified behaviour.' Such comments were levelled against Kreisky following a general election in which he had discussed with Mr. Peter, the leader of a far-right party, the possibility of forming a coalition government. Kreisky had defended Peter against accusations of having a Nazi past. The applicant was convicted for defamation and fined. According to the Court, the conviction and fine constituted a violation of the applicant's rights under Article 10. In a seminal passage the Court explained that:

> 'Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of a democratic society which prevails throughout the Convention.
>
> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para.2 (art.10-2) enables the reputation of

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[96] See generally S. Coliver, 'Defamation Jurisprudence of the European Court of Human Rights' (1992) 13(4) *Media Law and Practice*, pp. 250-253, Lord Lester of Herne Hill QC and N. Schiffrin, 'The European Convention on Human Rights and Media Law' (1999) IV *Yearbook of Copyright and Media Law*, pp. 355-358 and I. Loveland, 'A sign of things to come? The ECHR and a 'public/private' divide in the civil law of defamation' (1996) 1(5) *Communications Law*, 193.

[97] D. Elder, 'Freedom of Expression and the Law of Defamation: The American Approach to Problems Raised by the Lingens Case (1986) 35 *I.C.L.Q.* 891, 892.

[98] See D. Voorhoof, 'Defamation and libel laws in Europe – the framework of Article 10 of the European Convention on Human Rights (ECHR)' (1992) 13(4) *Media Law and Practice* pp. 254-261 and Lord Lester of Herne Hill QC, M. Meier Wang and K. Pinto Jayawardena, 'The European Convention on Human Rights and Media Law' (2001-2002) IV *Yearbook of Copyright and Media Law* pp. 345-350.

[99] Above, n. 86. For two short case summaries, see J.A. Andrews, 'Freedom of Speech and Politicians', (1986) 11 *E.L.Rev.* 491 and Case Comment, (1986) LVII *B.Y.I.L.* 463. It is worth noting that the Court accepted written observations from the International Press Institute through Interights. This acceptance of submissions is a trend that has continued in subsequent cases such as *Prager and another v. Austria* (1995) 21 E.H.R.R. 1, *Wingrove v. United Kingdom*, above, n. 69 and *Nikula v. Finland* (2004) 38 E.H.R.R. 45.

others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to weighed in relation to the interests of open discussion of political issues.' [100]

[4-26] The Strasbourg bench took the opportunity in *Oberschlick v. Austria* (No.2) [101] to repeat and extend the principles of freedom of expression in respect of politicians, established in the *Lingens* case. Oberschlick, a journalist and editor of the periodical, *Forum*, had reported on a speech by Jörg Haider, leader of the far-right Austrian Freedom Party, which had been reproduced in full in the article. In the speech, Haider had glorified the role of the 'generation of soldiers' who had taken part in the Second World War, irrespective of which side they had fought on. The comments by Oberschlick on this speech were set out under the headline, 'P.S.: Idiot instead of Nazi'. Following a private prosecution by Haider for defamation and insult, the journalist was convicted for the latter under Austrian law and ordered to pay a fine. According to the Austrian government, insults '...make no positive contribution to the political development of society.[102] The applicant argued in response that he had used the term 'idiot' to denote that Haider's statements were such as to deprive the speaker himself and most citizens of the right to freedom of opinion and had been directed not against the speaker but against what he had said. The ECtHR considered that in light of Haider's speech, which in its view was intended to be provocative and hence arouse strong reactions, the journalist's response did not constitute a disproportionate or gratuitous personal attack.[103]

[4-27] The broad statements of the Court in the above two cases to the effect that politicians are expected to tolerate strong criticism for choosing to enter public life is a running theme throughout its jurisprudence. So, in *Krone Verlag GmbH & Co Kg v.*

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[100] *Ibid.*, para. [42].
[101] Above, n 84 .
[102] *Ibid.*, para. [28].
[103] According to Lester and Schiffrin, adding insulting political speech to the types of expression afforded protection under Article 10 is no small achievement, in light of the Court's clear distaste for gratuitously offensive speech. They give *Otto-Preminger Institut v. Austria*, above, n. 67, as an example. See A. Lester and N. Schiffrin, 'The European Convention on Human Rights and Media Law', (1999) Vol. IV, *The Yearbook of Copyright and Media Law*, 353.
The judgment is also authority for the proposition that the title of an article is not to be taken in isolation but is to be judged in conjunction with the article in its entirety. For a similar approach in Ireland, see *McGarth v. Independent Newspapers*, (High Court, 21st April 2004). For discussion of the case, see B. Kirwan, 'Defamation Isolation and the Ordinary Reader' (2004) 9(4) *B.R* 130.

Austria,[104] although the allegation against a politician that he had not earned all of his income lawfully was a very serious one, he had nonetheless '...entered into the public arena and had to bear the consequences thereof.' [105] Similarly in *Colombani v. France*,[106] a law under which *Le Monde* was found to have insulted a foreign head of State was considered incompatible with Article 10 on the basis that it '...amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions.' [107] Discussion of the behaviour of a politician prior to entering the public arena may also receive Article 10 protection if relevant to fitness to exercise political functions,[108] as may behaviour '...of a possible failure of a public figure to observe laws and regulations aimed at protecting serious public interests, even in the private sphere....'.[109] The Court in *Tammer v. Estonia*,[110] did make clear however that a public figure is entitled to a private life and that a public figure may not remain one for all times.[111]

[4-28] While it may appear from the passages in the above paragraph that political reputation is of a type wholly distinct from private reputation,[112] academic opinion is somewhat divided as to whether the Court has created a public figure doctrine. There are those who argue that such a doctrine arises from the *Lingens* case itself,[113] some who argue that the level of protection is determined on the basis of the public interest nature of the material rather than the status of the person allegedly defamed [114] and those who argue that

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[104] (2003) 36 E.H.R.R. 57.
[105] *Ibid.*, para. [37].
[106] App. No. 51279/99, 25th June 2002.
[107] *Ibid.*, para. [68].
[108] *Schwabe v. Austria* (1992) E.C.H.R. Series A, No. 242B. See also *Fressoz & Roire v. France* (1999) 31 E.H.R.R. 28.
[109] *Tønsbergs Blad As And Hawkom v. Norway*, App. No. 510/04, 1st March 2007, para. [87]. See also *Karhuvaara v. Finland* (2005) 41 E.H.R.R. 51.
[110] (2003) 37 E.H.R.R. 43.
[111] Ms. Laanaru had previously held political positions including a stint as editor for the Prime Minister's party newspaper. She was nonetheless not considered a political or even public figure by the Court at the time of the publication. It may also be noted that *Worm v. Austria* (1997) 25 E.H.R.R. 454 is authority for the proposition that a politician is no less entitled to a fair trial than a private individual.
[112] The Court has also made clear that protection of reputation extends to commercial reputation, when in *Steel and Morris v. United Kingdom* (2005) 41 E.H.R.R. 22 it rejected the argument that a large multinational company should not be able to defend itself against defamatory allegations.
[113] M.McGonagle, *Media Law*, (2nd ed., Thomson Roundhall, 2003), p. 102.
[114] E.Barendt, 'The Impact of the Human Rights Act 1998 on the Law of Libel', (2001/02), Vol. VI, *Yearbook of Copyright and Media Law*, pp. 143-150 and by the same author, *Freedom of Speech*, 2nd ed.,(Oxford University Press, 2005), p. 223. See also P. Milmo and Rogers (eds.), *Gatley on Libel and Slander*, 10th ed.,(Sweet and Maxwell, 2003), p. 725 and J. Wright, *Tort Law and Human Rights* (Hart Publishing, 2001), p. 150.

the Court has adopted a halfway house between the two approaches.[115] The Court appears to have created some form of reputational hierarchy, with a sliding scale that begins with offering the highest protection to political criticism of governments,[116] with politicians next on the scale. Thus, in *Castells v. Spain*,[117] the Court held that '...the limits of political criticism are wider with regard to Government than in relation to a private citizen, or even a politician.'[118] It developed the *Castells* principle in *Ceylan v. Turkey*,[119] by providing the justification for affording wide latitude to criticism of government to the effect that '...the dominant position which a government occupies makes it necessary for it to display restraint in resorting to the criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms of its adversaries.'[120]

[4-29] Just as the Court expects government to tolerate greater criticism than a politician, it does not accept that a civil servant is expected to endure the same level of criticism as a politician, but is liable to wider criticism in some instances than a private individual.[121] The Court primarily distinguishes civil servants from politicians as the former, unlike the latter, do not knowingly lay themselves open to close scrutiny of their every word and deed. Nonetheless, the Court held in *Nikula v. Finland*[122] that a civil servant is expected to accept wider criticism than a private citizen particularly when exercising public functions.

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[115] Tierney refers to the Courts 'dualistic approach'; firstly, the 'categorisation approach' whereby public figures are entitled to less reputational protection than private individuals and secondly, the 'substantive approach' whereby the decisive factor is the public interest element of the material at issue. See S. Tierney, 'Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights' (1998) 4 *E.H.R.L.R.* 419, pp. 423-425.
Clayton and Tomlinson criticise the failure of the Court to reconcile the two approaches, *op.cit* n. 34, p.1066.

[116] In *Lombardo and others v. Malta*, App. No. 7333/06, 24th April 2007, it was held that government includes a local council. The Court reasoned at para. [54] that '...a local council, being an elected political body made up of persons mandated by their constituents,...should be expected to display a high degree of tolerance to criticism.'

[117] (1992) 14 E.H.R.R. 445.

[118] *Ibid.*, para. [46].

[119] (1999) 30 E.H.R.R. 73.

[120] *Ibid.*, para. [34].

[121] See *Thoma v. Luxembourg* (2003) 36 E.H.R.R. 21 and *Janowski v. Poland* (1999) 29 E.H.R.R. 705. In *Janowski*, the Court upheld a conviction of the offence of having insulted municipal guards when the applicant had called them 'oafs' and 'dumbs' following a request that street vendors leave a square where selling was allegedly not authorised. In dissent, Judge Sir Nicolas Bratza contended that while the discussion may not have been of major significance, it concerned what was perceived by the applicant as an abuse or excess of authority on the part of public officials and to this extent was clearly a matter of public concern that merited the protection of Article 10. Feldman observes that this generosity afforded to civil servants has a down-side in that the desirability of maintaining the political neutrality of civil servants makes it possible to justify restricting their own participation in political activities, at least in former Soviet Bloc countries where history warns of the dangers of totalitarianism through a political party's domination of the public service, D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed., (Oxford University Press, 2002) p. 757.

[122] (2004) 38 E.H.R.R. 45.

However, in subsequent case law,[123] the Court explicitly included some civil servants within 'the judicial machinery in the broader sense of this term'. [124] Inclusion within the judicial arm of the State allows the Court to rely on the need for public confidence in judicial officers[125] in addition to the protection of reputation in some cases, to justify restrictions on political expression; essentially, the traditionally lower tolerance for criticism of judges[126] has been extended to certain civil servants. The Court has failed however to clearly explain its understanding of who is a public servant. While in *Busuioc v. Moldova*,[127] it held that it would be going too far to include all persons employed by the State or State-owned companies within this judicial-type category, it failed to articulate where the appropriate line is to be drawn,[128] leaving it unclear as to '...whether the common thread of public office is vital to the generation of the public interest.'[129]

[4-30] Returning to the reputational scale, in *Fayed v. United Kingdom*,[130] businessmen were categorised as some form of public figure, when the Court explained that '...the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals.'[131] Finally, as regards private reputation, which in many cases includes professional reputation,[132] the Court has repeatedly stated in broad terms that a private individual is entitled to greater protection than the other categories of persons discussed above. Significantly however, the broad statements to this effect are weakened significantly in light of the Court's broad approach to public interest speech, for if the expression addresses 'matters of general

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[123] *Lesnik* v. *Slovakia*, App. No. 35640/97, 11th March 2003.
[124] *Ibid.*, para. [54].
[125] One of the Article 10(2) objectives is the authority and impartiality of the judiciary.
[126] For discussion of the Court's approach in this regard, see M.K. Addo, 'Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?' (1998) 47 *I.C.L.Q.* 425.
The Court has been criticised for its failure to explain why it refined the categories of persons who must tolerate greater press criticism or where judges fit on the hierarchical scale. See S. Tierney, *loc. cit.*, n. 115, pp. 423-425.
[127] (2006) 42 E.H.R.R. 252.
[128] In *Stoll v. Switzerland*, App. No. 69698/01, 25th April 2006, a member of the diplomatic corps with the rank of ambassador in charge of a particularly important mission in the United States was considered a civil servant. See para. [47].
[129] Tierney, *loc. cit.*, n. 115, p. 427.
[130] (1994) 18 E.H.R.R. 393.
[131] *Ibid.*, para. [75]. The Court accepted in *Steel and Morris v. United Kingdom*, above, n.112, that a corporation may be defamed. It recognised the public interest in open debate about business practices but also accepted a competing interest in protecting the commercial success and viability of companies for the benefit of shareholders, employees and the wider economic good. See para. [94].
[132] See *Bergens Tidende v. Norway*, above, n. 89 and *Selisto v. Finland* [2005] E.M.L.R. 8.

public interest',[133] then this value often outweighs private reputation. In *Bladet Tromso and Stensaas v. Norway*,[134] the Court made this very clear:

> 'Whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.' [135]

[4-31] Kozlowski [136] succinctly sums up the Court's approach to private reputation with the following observations:

> 'Private persons, the Court has declared, deserve greater protection of their reputations and privacy. In practice, however, the court has emphasized the context of the speech, and the protection is far from absolute. When private persons involve themselves in issues of public interest or concern, the court has found that their privileged status in the court's hierarchy is reduced. The court has consistently protected expression that harms individual reputation if the expression pertains to a debate of public interest, so long as the accusation was made in "good faith".' [137]

[4-32] Just as the ECtHR has not adopted a generic privilege for political expression, neither has it created a public figure doctrine in the sense of *New York Times v. Sullivan*[138] although arguably *Lingens v. Austria*[139] came close to this. The Legal Advisory Group on Defamation provided a useful summary of the Court's approach to political expression when it explained that '[L]ooked at in the round, therefore, the jurisprudence would

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[133] *Bergens Tidende v. Norway,* above, n. 89, para. [51].
[134] Above, n. 88.
[135] *Ibid*, para. [62]. Allegations against a cosmetic surgeon in *Bergens Tidende v. Norway*, above, n.89, for his failure to provide proper or adequate post-surgical treatment to remedy the results of unsuccessful operations, which it was accepted would cause substantial damage to his professional reputation, were not sufficient to outweigh the important public interest in the freedom of the press to impart information of matters of legitimate public concern.
[136] D. Kozlowski, 'For the Protection of the Reputation or Rights of Others': The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2) (2006), *Comm. L. & Pol'y* 133.
[137] Perhaps unsurprisingly, the Court has afforded a lesser degree of reputational protection to those private individuals who voluntarily enter the public arena. So, in *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft M.B.H. (No. 3) v. Austria*, App. Nos. 66298/01 and 15653/02, 13th December 2005, the Court explained at para. [47] that '...Mrs. G., by accompanying...a member of Parliament whose criminal proceedings were a subject of great public interest, in his escape, had entered the public arena and she, therefore, had to know the consequences of her decision.'
[138] (1964) 376 U.S. 254.
[139] Above, n.84.

suggest that there is a strong case in favour of the idea of affording something like a broad qualified privilege on matters of public interest which has due regard to good faith principles.' [140] The issue of good faith principles in the context of journalistic ethics is returned to later in the chapter.

RECENT DEVELOPMENTS IN THE BALANCING OF FREEDOM OF EXPRESSION AND REPUTATION[141]

[4-33] The case law on public interest speech discussed in the previous section reveals internal Article 10 balancing such that the ECtHR has traditionally viewed reputation as an Article 10(2) restriction on the Article 10(1) right of freedom of expression [142] and by this method of balancing[143] has tended to prioritise freedom of expression over reputation. However, there has been an increasing trend in more recent jurisprudence to view reputation as an Article 8 right.[144] Characterising reputation as part of the Article 8 right to respect for private life means that it is weighed independently as a right competing with the Article 10 right of freedom of expression rather than operating as an internal Article 10 restriction. This development is likely to result in increased scrutiny of the reputational harm caused by a publication and whether the publication can be justified in the public interest for its contribution to democratic discourse. Indeed this approach has been firmly established in *Von Hannover v. Germany*[145] in which the ECtHR delivered a seminal judgment on the balance to be struck between privacy and freedom of expression.

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[140] *Op. cit.*, n.1, para. [7]. See also E. Barendt, 'Human Rights Act 1998 and Libel Law: Brave New World?' (2001) 6 *Media and Arts Law Rev.* 1.

[141] See H. Fenwick and G. Philipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), pp. 1068-1070, H. Delany and E. Carolan, *The Right to Privacy* (Thomson Round Hall, 2008) and E. Carolan, 'The Changing Face of Media Freedom under the ECHR' (2008) 13(2) *B. Rev.* 37. .

[142] For an example of this approach, see *Winer v. UK*, (App. No. 10871/84, (1986) D.R. 154).

[143] For greater discussion of the ECtHR's adjudicative method generally, see S. Greer, *The ECHR – Achievements, Problems and Prospects* (Cambridge University Press, 2006), chapter 4.

[144] See *Rotaru v. Romania*, App. No. 28341/95, [2000] E.C.H.R. 192, para. [44], *Radio France v. France* (2005) 40 E.H.R.R. 29, para. [31], *Chauvy v. France* (2005) 41 E.H.R.R. 29, para. [70], *Cumpănă and Măzare v. Romania* (2005) 41 E.H.R.R. 14, para. [91], *White v. Sweden* [2007] E.M.L.R. 1, para. [26] and *Pfeifer v. Austria*, App. No. 12556/03, 15th November 2007, paras. [35] and [38] and *Stoll v. Switzerland*, App. No. 69698/01, 10th December 2007.

[145] (2005) 40 E.H.R.R. 1. There is quite a growing literature on this case. See, *inter alia*, Phillipson, G *'The 'right' of privacy in England and Strasbourg Compared'* in A.T. Kenyon, and M. Richardson (eds), New Dimensions in Privacy Law: International and Comparative Perspectives (Cambridge University Press, 2006), pp. 184-228, in particular, pp. 202-212, M.A. Sanderson, 'Is *Von Hannover v. Germany* a Step Backwards for the Substantive Analysis of Speech and Privacy Interests?' (2004) 6 *E.H.R.L.R.* 631 and B. Rudolf, 'Council of Europe: *Von Hannover v. Germany*' (2006) 4(3) *Int'l J. of Cons. Law* 533. For some general discussion of German privacy law, see Markesinis, B.S. and Nolte, N *'Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places'* in P. Birks, (ed) Privacy and Loyalty in the Law of Obligations, (Clarendon Press, 1997), pp. 113-131.

Although a privacy rather than defamation case and one which concerned the publication of photographs rather than a piece of writing, the judgment reveals principles which are also of relevance to the protection of public interest speech:

> 'The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart [ing] information and ideas on matters of public interest...it does not do so in the latter case.
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> Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, even in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned...this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.'

[4-34] Although the judgment continues to endorse the 'informed consent' rationale[146] of earlier judgments such as *Lingens v. Austria*,[147] *Oberschlick v. Austria (No.2)*[148] and *Castells v. Spain*,[149] the ECtHR has began to interpret the scope of Article 8 more fully when balanced against Article 10. It is interesting to note the rationale offered by Judge Loucaides in *Lindon v. France*[150] for including reputation as an aspect of Article 8. According to the judge, '[T]he right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life.' Having linked reputation to the protection of dignity and as an autonomous human right, Judge Loucaides stated:

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[146] This rationale and its application belongs to Loveland. See I. Loveland, 'Reforming Libel Law: The Public Law Dimension' (1997) 46 *I.C.L.Q.* 561, 578.
[147] Above, n. 84.
[148] Above, n. 84.
[149] Above, n.117.
[150] App. Nos. 21279/02 and 36448/02, 20th October 2007.

'One should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidently or even occasionally, even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity of individuals. Such restraint should include the duty to investigate defamatory allegations before rushing into print and the obligation to give an opportunity to the persons affected by their defamatory stories to react and give their own version. Furthermore they should remain legally accountable to the persons concerned for any false defamatory allegations. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself.'

[4-35] One method which the Court displayed in *Pfeifer v. Austria*,[151] notably in the context of political discussion, of increasing the protection for reputation as an Article 8 right was to classify the publication as factual rather than as a value judgment and so require proof of the truth of the publication.[152] It remains to be seen how further interpretation of reputation as an Article 8 right and its underlying values affects the future protection of the Article 10 freedom of expression guarantee.

THE ROLE OF THE MEDIA AND POLITICAL/PUBLIC INTEREST SPEECH

The Public Watchdog Role

[4-36] Although the press is not expressly mentioned in Article 10,[153] the ECtHR has repeatedly emphasised the important role played by the media in a democratic society in

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[151] Above, n 144.

[152] There have however been previous cases in which the Court explained the difficulty that lies in making a distinction between facts and value judgments – see *Cumpana and another v. Romania*, above, n. 86, para. [99]. In *Scharsach and News Verlagesellschaft mbH v. Austria*, App. No. 39394/98, 13th November 2003, the Court explained at para. [40] that '...their difference finally lies in the degree of factual proof which has to be established.'

[153] This can be contrasted with Article 11(2) of the Charter of Fundamental Rights of the European Union 2000, which reads as follows: 'The freedom and pluralism of the media shall be respected.'

the dissemination of material of public interest value.[154] In *Lingens v. Austria,*[155] the Court pronounced clearly that '[I]t is incumbent on the press to impart information and ideas on political issues just as in those of other areas of public interest. Not only does the press have the task of imparting such ideas; the public also has a right to receive them....'[156] In light of the expansive protection afforded to political speech, it follows that the press will receive Article 10 shelter when fulfilling its public watchdog role.[157] National restrictions which encroach on the ability of the press to work effectively are examined closely against the background of a strong commitment to freedom of expression. Thus, in *Observer and Guardian v. United Kingdom,*[158] the Court made clear that '[W]here...measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.' [159]

[4-37] Similar to the interpretation of the Irish constitutional free speech guarantee,[160] Article 10 has not been read by the ECtHR so as to institutionally protect the press *per se*, but to protect it in so far as it serves an 'instrumental value'.[161] Even where a journalist has republished other parties' defamatory comments, he may remain entitled to Article 10 protection. In recognition of the need for a reportage defence, the ECtHR in *Thoma v. Luxembourg*[162] provided that '[A] general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or

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[154] See, *inter alia*, *Bladet Tromso and Stensaas v. Norway*, above. n. 88, paras. [59] and [64], *Bergens Tidende v. Norway*, above, n. 89, para. [49] and *Pedersen v. Denmark*, App. No. 49017/99, 19th June 2003. It is to be noted that although most political expression cases before the Court involve press freedom and a competing Convention right, the Court has also recognised the importance of engagement in political expression by political parties (*United Communist Party of Turkey v. Turkey*, above, n.83, para. [44]), opposition members of government (*Castells v. Spain*, above, n.117), *Jerusalem v. Austria* (2003) 37 E.H.R.R. 25, para. [36], *Incal v. Turkey* (2000) 29 E.H.R.R. 499, para. [46], campaign groups (*Steel and Morris v. United Kingdom*, above, n.112, para. [89]) and members of the public (*Barfod v. Denmark* (1991) 13 E.H.R.R. 493, para. [29] and *Maronek v. Slovakia* (2004) 38 E.H.R.R. 5).

[155] Above, n. 86.

[156] *Ibid.*, at paras [41] and [42]. See also *Sunday Times v. UK*, above, n. 35, para. [65] and Castells v. Spain, above, n. 117, para. [43].

[157] *Bladet Tromso* and Stensaas *v. Norway*, above, n.88, para [59]; *Dalban v. Romania* (2000) 8 B.H.R.C. 91, para. [49]. See Schermers, H.G.,*'Freedom of Expression'* in L. Heffernan (ed) Human Rights: A European Perspective, (Round Hall Press: Dublin, 1994), where he uses the phrase 'professional expression' to describe expression by the press.

[158] Above, n. 28.

[159] *Ibid.*, para. [59].

[160] See Chapter 1.

[161] See *Von Hannover v. Germany*, above, n. 145, where in the context of balancing Article 8 and 10 rights in a media context, the ECtHR focused on whether photographs of Princess Caroline of Monaco contributed to a matter of debate in a democratic society.

[162] (2003) 36 E.H.R.R. 21, para. [64]. This was recently re-affirmed in *Verlagsgruppe Gmbh v. Austria*, App. No. 76918/01, 14th December 2006.

provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas....'[163]

The Role of Journalistic Ethics

[4-38] Despite repeated commitment to the press by consecutive Strasbourg benches, the public interest value of a publication does not afford it unlimited Article 10 protection and journalists '...must not overstep certain bounds, in particular in respect of the reputation and rights of others....'[164] The Court explained in *Bergens Tidende v. Norway*[165] that:

> '[B]y reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism....' [166]

[4-39] The ECtHR has given quite wide latitude to journalists in the manner of presentation of material,[167] the techniques of reporting adopted[168] and has protected the use of provocative language.[169] The Court has pointed out that the use of provocative language must be viewed not solely by reference to the disputed article but in the wider context of the newspaper's coverage of the particular issue.[170] It has imposed an obligation on the media to verify defamatory factual statements although it has been held that this requirement may be removed depending on the nature and degree of the defamation and the extent to which the newspaper could reasonably regard a report as reliable.[171] Therefore, although journalists are obliged to engage in research,[172] it has been held that '...no general duty to verify the veracity of statements contained in such documents can be

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[163] *Ibid.*, para. [33]. The Court previously highlighted this type of defence in *Radio France v. France*, above., n.144, para. [37].
[164] *De Haes & Gijsels v. Belgium* (1998) 25 E.H.R.R. 1, para. 37.
[165] Above, n. 89.
[166] *Ibid.*, para. [53].
[167] *Jersild v. Denmark* (1995) 19 E.H.R.R. 1, para. [31], *Stoll v. Switzerland*, above, n.128, para. [56].
[168] *Bergens Tidende v. Norway*, above, n.89, para. [57].
[169] *Prager and Oberschlick v. Austria*, (1996) 21 E.H.R.R. 1, para. [38], *Steel and Morris*, above, n. 114, para. [90]. The Court spoke of protection for 'political rhetoric' in *Ukranian Media Group v. Ukraine*, App. No. 72713/01, 29th March 2005, para. [66]. The permissible use of provocative language depends on the circumstances: see *Oberschlick v. Austria(No. 2)*, above, n. 84, para. [34] and *De Haes & Gijsels v. Belgium* (1998), above, n.164, para. [48].
[170] *Bladet Tromso and Stensaas v. Norway*, above, n. 88, para. [63].
[171] *Ibid.*, para. [65]. See also *Selistö v. Finland* (2006) 42 E.H.R.R. 8.
[172] *Busuioc v. Moldova* (2006) 42 E.H.R.R. 14, para. [90], *Prager and Oberschlick v. Austria*, above, n.169, para. [37].

imposed on reporters and other members of the media, who must be free to report on events based on information gathered from official sources.'[173] As regards the nature and degree of the defamation, the more serious the allegation(s), the stricter the obligation on journalists to provide a sufficient factual basis.[174] The Court has welcomed the printing alongside the impugned article of the declarations of the person referred to in the article,[175] even where the latter were not published simultaneously but where there was a high degree of timed proximity which created an overall picture of balanced news reporting.[176] It has also highlighted the importance of allowing a defendant to have an opportunity to defend himself.[177]

[4-40] Some of the factors which guide the ECtHR as to whether the duties and responsibilities of the press are met are similar to the test for responsible journalism established by Lord Nicholls in *Reynolds v. Times Newspapers*.[178] Indeed, in *Times Newspapers v. United Kingdom*,[179] the ECtHR held that far from the test for qualified privilege in *Reynolds* creating uncertainty '...that, by identifying the most important of those factors, the House of Lords...helped to limit the scope of that discretion.'

The Media's Obligation to Verify: The Distinction between Facts and Value Judgments

[4-41] In *Lingens v. Austria*, [180] the Court drew a distinction between facts and value judgments [181] by explaining that '[A] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of

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[173] *Selisto v. Finland* (2006) 42 E.H.R.R. 8, para. [60], *Bladet Tromso and Stensaas v. Norway*, above, n.88, para. [68]. The reasonableness of the newspaper's reliance on an official but unpublished report in *Bladet Tromso* was not accepted by Palm, Fuhrmann and Baka JJ. in issuing a joint dissenting opinion.
[174] *Cumpana and Anor. v. Romania*, above, n.86, paras. [101] and [102].
[175] *Lopes Gomes da Silva v. Portugal* (2002) 34 E.H.R.R. 56, para. [35].
[176] *Bladet Tromso and Stensaas v. Norway*, above, n.88, para. [63].
[177] *Bergens Tidende v. Norway*, above, n.89, para. [58] and *Prager and Oberschlick v. Austria*, above, n.169, para. [37].
[178] Above, n.5. McGonagle has observed however that '[I]t may be argued that the House of Lords in *Reynolds* starts from the premise that the defence is only available if key factors are met, whereas the European Court starts from the premise that freedom of expression requires the defence unless in the totality of the situation certain key factors exist or are missing such as to cause the loss of the defence.' *Op. cit.*, n.113, p. 127.
[179] App. No. 23676/03, 11th October 2005.
[180] Above, n.84.
[181] Whether a statement is classified as a statement of fact or as a value judgment is a matter which firstly falls within the margin of appreciation of the national authorities, particularly the domestic courts. See *Prager and Oberschlick v. Austria*, above, n. 169, para. [36] and *Pedersen v. Denmark*, App. No. 49017/99, 17th December 2004, para. [76].

value-judgments is not susceptible of proof.' [182] The Court characterised Lingens' statements as value judgments, based on undisputed facts and published in good faith in the absence of tying these principles to the status of the politician. However, the Court has qualified the level of protection afforded to value judgments by the requirement that: '...even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.'[183] In *Feldek v. Slovakia*,[184] the Court stressed that the necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances.[185] The judgment in *Dichand v. Austria* [186] emphasised that if a national court characterises a statement as one of fact rather than a value judgment, it must afford the maker of the statement an opportunity to adduce evidence to support the statement.[187] The same judgment did not condone as a violation of reputation, criticism which alleged a conflict of interest by a politician on '...a slim factual basis.' [188] Evidence which clearly revealed the falsity of one of the claims in *Thorgeirson v. Iceland* did not convince the ECtHR that the articles lacked an adequate factual basis, leading one commentator to conclude that '[T]he publisher must provide some evidence to support his good faith in believing public opinion (in this case, a police officer recently had been convicted for brutality), but the burden appears to be light.' [189]

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[182] Above, n.86, para. [46]. Subsequently, in *Pedersen v. Denmark*, *ibid.*, para. [76], the Court said that '[T]he requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10....' The Court held in *Steel v. United Kingdom*, above, n.112 that in some circumstances, the presumption of falsity can violate Article 10. See, O'Dell, 'Defamation Reform in England and Ireland After McLibel' (2005) *L.Q.R.* 395.

[183] *Pedersen*, above. n. 169 para. [76]. This repeats the principle from earlier cases; see *Jerusalem v. Austria* , above, n. 154, para.[43], *De Haes & Gijsels v. Belgium*, above, n.164, para.[47] and *Oberschlick, v. Austria (No.2)*, above, n. 84 , para. [33].

[184] App. No. 29032/95, 12th July, 2001.The Court had to consider the use of the term 'fascist past' written by a journalist about a Minister serving in the newly formed Slovakian government. The term was examined in the context in which it was made; as part of a political debate on matters of general and public concern relating to the history of Slovakia, which might have repercussions on its future democratic development. It classified the phrase as a value judgment based on facts that had been published by the relevant Minister and the press prior to its publication. It also explained that it considered the term to be a broad one which can connote the participation by a person in a fascist organisation even if not coupled with specific activities propagating fascist ideals.

[185] In the particular case, the Court rejected the argument that a value judgment could only be considered as such if joined by the facts on which the judgment was based.
Despite the production of evidence by the Icelandic government in *Thorgeirson v. Iceland* , above, n. 90, which clearly showed the falsity of one of the applicant's claims, the ECtHR was nonetheless satisfied that the articles had an adequate factual basis.

[186] App. No. 29271/95, 29th February 2002, paras. [45] and [46].

[187] See also *Castells v. Spain*, above, n. 117.

[188] This follows the earlier lead set by the Strasbourg bench in *Oberschlick v. Austria (No.2)*, above, n.84, where it said that an opinion would be excessive in the absence of any factual basis.

[189] Coliver, *loc. cit.*, n. 96, p. 252. Starmer observes that the case suggests that from a Strasbourg standpoint good faith, sincerity and proportionality are the proper basis for value judgments, opinions and/or comments, *op. cit.*, n.7, p. 616.

[4-42] The ECtHR has addressed what a sufficient factual basis means [190] in the absence of any clear distinction between political and private libels.[191] For example, in *Maronek v. Slovakia* [192] where a private person allegedly defamed another private person, the focus lay on the nature of the public interest raised by the publication with little attention devoted to private as distinct from political or public reputation. More recently, in *Furihumer v. Austria*,[193] in the context of allegations of 'abuse of authority' by a father about teachers' conduct, the Court re-affirmed in a private context its general principle distinguishing facts and value-judgments.[194]

DAMAGES

[4-43] The language of chilling effect in respect of reporting on matters of general public interest has featured in ECtHR jurisprudence.[195] The Court has insisted that any national measures capable of discouraging the press from disseminating information on matters of legitimate public concern call for careful scrutiny of their proportionality.[196] Although many of the free speech cases in the defamation context concern criminal libel, the ECtHR has addressed libel as a tort in the context of damages awards in a handful of cases. It is clear from Chapter 5 that beginning in the early 1990s, the English courts and legislature accepted that regulation of jury awards in defamation cases was required if the right to freedom of expression was not to be seriously undermined. It is submitted that this reality has not been fully acknowledged in Irish legislation or jurisprudence(see Chapter 3). This section of the chapter demonstrates the ECtHR's assessment of the English and Irish developments in which it relied heavily on the principle of proportionality. Whether a proportionate balance has been achieved between the competing rights is questioned and returned to for further analysis in Chapter 9.

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[190] In *Schwabe v. Austria*, App. No. 13704/88, 28th August 1992, para. [34], the Court noted approvingly that the facts on which a value-judgment were based were 'substantially correct.'

[191] For further discussion, see A.L. Young, 'Fact, Opinion, and the Human Rights Act 1998: Does English Law Need to Modify its Definition of 'Statements of Opinion' to Ensure Compliance with Article 10 of the European Convention on Human Rights?' (2000) 20 *O.J.L.S* 89. For example, in *Savitchi v. Moldova*, App. No. 11039/02, 11th October 2005, the Court focused on the content of remarks and the context in which they were made. In *Standard Verlags GmbH and Krawagna-Pfeifer v. Austria*, App. No. 19710/02, 2nd November 2006, the Court emphasised whether the facts were already known to the public rather than the status of the defamed party, in terms of the necessity to provide the facts underlying a value judgment.

[192] (2004) 38 E.H.R.R. 5.

[193] App. No. 30547/03, 1st February 2007.

[194] *Ibid.*, para. [26].

[195] *Cumpana and Anor. v. Romania*, above, n.86, paras. [113] and [114] and *Nikula v. Finland*, above, n.122, para. [54].

[196] *Selisto v. Finland*, above, n. 132, para. [53].

[4-44] In *Tolstoy Miloslavsky v. United Kingdom*[197] (hereafter *Tolstoy*) the ECtHR considered a jury award of £ 1,500,000 to Lord Aldington against the historian Nicolai Tolstoy for allegations in a pamphlet that he had been responsible for handing over Cossack prisoners to the Soviet authorities in 1945. The applicant maintained that the quantum of damages awarded against him could not be considered to have been prescribed by law as it did not allow him to foresee to a reasonable degree that the amount would be as high as the figure awarded. He also alleged that the size of the award had been disproportionate to the aim of protecting reputation. [198]

[4-45] The ECtHR noted the exceptionally serious nature of the libel[199] and accepted the necessity for a considerable degree of flexibility to enable juries to assess damages tailored to the facts of the particular case.[200] Given these realities, the Court held that it could not be a requirement of being prescribed by law that the applicant, even with appropriate legal advice, could anticipate with any degree of certainty the quantum of damages likely to be awarded.[201] However, it went on to explain that juries were not free to make any award since under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury suffered to reputation.[202] The Court noted that the award was three times greater than the largest amount previously awarded by a libel jury and no comparative award had been made since.[203] In this regard, it expressed concern at the latitude national law afforded to the jury such that an award could not be set aside on appeal on the grounds of being excessive but only if the award was so unreasonable that it must have been arrived at capriciously, unconscionably or irrationally.[204] It welcomed the development in *Rantzen v. Mirror Group Newspapers Ltd*[205] such that any award had to be proportionate and necessary to provide adequate compensation and re-establish reputation.[206] The Court found a violation of Article 10 having regard to the size of the

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[197] Above, n.49. For an in-depth account of this case, see I. Mitchell, *The Cost of a Reputation*, (Tropical Books, 1997).
[198] *Ibid.*, para. [33].
[199] Above, n.49, para. [40].
[200] Above, n.49, para. [41].
[201] Above, n.49, para. [41].
[202] Above, n.49, para. [49]. It should also be pointed out that exemplary damages are not awarded under the ECHR.
[203] Above, n.49, para. [49].
[204] *Broome v. Cassell & Co. Ltd* [1972] A.C. 1027; [1972] W.L.R. 645.
[205] [1993] W.L.R. 953, [1993] 4 All E.R. 975.
[206] *Ibid.*, para. [50].

award in conjunction with the lack of adequate and effective safeguards at the time of the award against a disproportionately large award. [207]

[4-46] The requirement of proportionality in the level of damages awards in defamation cases re-appeared in *Steel and Morris v. United Kingdom.*[208] The case concerned the epic battle between London Greenpeace campaigners and the McDonald's corporation. The judgment illustrated that the English courts may have to rethink the appropriate level of damages in cases concerning inequality of arms between the parties. Following the publication by Helen Steel and David Morris of a leaflet for Greenpeace entitled 'What's Wrong with McDonald's?', they were sued by McDonald's and damages of £36,000 and £40,000 were awarded against them respectively. The ECtHR considered that the size of the award had failed to strike the right balance. It explained that although the awards were '...relatively moderate by contemporary standards in defamation cases in England and Wales...', they were considered to be '...very substantial when compared to the modest incomes and resources of the two applicants.'[209] The Court also held that since McDonald's had not established that the distribution of the leaflets had caused any financial loss, the award of damages was not proportionate to the injury suffered. This judgment appears to introduce a requirement that the means of the defendant are taken into consideration prior to awarding damages, in order to meet proportionality requirements under the Convention.

[4-47] The measurement of compensatory damages by reference to the financial resources of an applicant is not an accepted principle in Irish law generally. Professor Binchy argues that '[T]here seems no prospect that an Irish court would hold, with respect to the general corpus of tort law, that a tortfeasor of modest economic circumstances should, on that account, be entitled to pay less than full compensation for the wrong caused. On the contrary, a distinction made on this basis would appear to conflict with Art. 40.1.'[210] However, it is submitted that use of the proportionality doctrine by reference to the modest resources of applicants may be explained in *Steel and Morris v. United Kingdom* on two grounds: (i) the overall context and (ii) the protection of public interest speech.

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[207] Para. [51].
[208] Above, n. 112.
[209] Above, n.112, para. [96].
[210] R. Byrne and W. Binchy, *Annual Review of Irish Law 2005*, (Thomson Round Hall, 2006), pp. 727-728.

[4-48] The ECtHR pointed to the need to ensure equality of arms '...in order to safeguard the countervailing interests in free expression and open debate....'. [211] In this respect, the Court was informed that McDonald's were represented throughout by Queen's Counsel and junior counsel specialising in libel law, where as the applicants were assisted by lawyers working *pro bono*. The Court observed the difficulties in lawyers volunteering help, as the case was too complicated for someone else to just "dip into". Finally, judicial reference was made to the difficulties associated with carrying the burden of proving the truth of a large number of allegations covering a range of difficult issues. It is submitted that these factors form part of the wider balancing to be carried out under ground (ii), namely the protection of public interest speech. The danger of stifling discussion of campaign groups on matters of public significance such as health issues, particularly in respect of a large multinational which should be subject to wide criticism, although reducing the level of reputational protection for commercial entities, arguably effected the correct balance to ensure protection of Article 10 rights.

[4-49] The issue of defamation damages returned before the Strasbourg bench in *Independent Newspapers v. Ireland*.[212] The applicants' claim essentially was that given the exceptional damages award of £300 000 and the absence of adequate safeguards against disproportionate awards, their Article 10 rights had been violated under Irish law. It was submitted that the case was not distinguishable from *Tolstoy*.[213] The Government submitted that the issue before the Court was to ensure that the award was proportionate to the reputational harm suffered. Significantly, the Government considered 'indirect and remote' any possibility of a chilling effect on political commentary by the press by the award in this case or other damages awards.[214] The majority ECtHR judgment is addressed under the following headings, namely: the size of the award, safeguards against disproportionate awards at first instance and finally, safeguards against disproportionate awards at second instance.

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[211] Above, n.112, para. [95].
[212] (2006) 42 E.H.R.R. 46. For commentary, see N. Cox, *Defamation Law*, (First Law, 2007), pp. 470-473, P. Leonard, '*Independent News and Media v. Ireland*: The Judgment of the European Court of Human Rights' (2005) 10(4) *B.Rev.* 117 , R. Ryan and D. Ryan, 'Assessing Proportionality in Damages for Defamation: *Independent Newspapers v. Ireland*' (2005) 23 *I.L.T.* (n.s) 220 and M. Kealey, 'ECHR Gives Press Bad News' (2005) 99(6) *L. Soc. Gaz.* 7 and E.O'Dell, *loc. cit.*, n. 181.
[213] *Ibid.*, para. [90].
[214] Above, n. 212,para. [89].

The Size of the Award

[4-50] The ECtHR was influenced in its judgment in *Tolstoy* by the fact that the award of the Court of Appeal was three times greater than the largest amount previously awarded by a libel jury and no comparative award had been made since. In contrast to *Tolstoy*, the ECtHR observed that juries had prior to *De Rossa v. Independent Newspapers* [215] already made relatively similar awards in libel cases indicating that the award against *Independent Newspapers* was not as unusual as that awarded in *Tolstoy*. Although constituting 'a relevant point of distinction'[216] between the two cases, the ECtHR nonetheless considered the award in *De Rossa*, as remaining '...sufficiently unusual as to require...review of the adequacy and effectiveness of the domestic safeguards against disproportionate awards.'[217] In dissent, Judge Barreto concluded however that the damages awarded, notwithstanding the review conducted by the Supreme Court, were so high that the reasonable relationship of proportionality between the interference with Article 10 rights and the legitimate aim pursued had not been observed.

Safeguards Against Disproportionate Awards at First Instance

[4-51] The ECtHR made clear that the main purpose of the Convention is to lay down certain international standards such that absolute uniformity is not required. While it endorsed the developments in English law in *Tolstoy*, the ECtHR did not consider the *Rantzen* mechanisms as the only means of preventing disproportionate awards. Rather, the question to be addressed was whether, having regard to the entire proceedings, the protection against disproportionate awards was sufficient. Although the trial judge in *De Rossa* and *Tolstoy* failed to give express guidance to the respective juries on the issue of proportionality in defamation awards, the ECtHR ruled that there were points of distinction between the jury directions in the cases. It explained that the trial judge's directions in *De Rossa* were more specific than those in *Tolstoy*. In *De Rossa*, the judge provided an example of a relatively minor defamatory comment to allow the jury assess the relative seriousness of the defamatory article in the proceedings before them and followed up that example by directing the jury that if it was to award damages, they would have to be substantial. It is arguable that the lack of adequate safeguards under Irish law against

[215] [1999] 4 I.R. 432.
[216] Above, n.212, para. [118].
[217] Above, n.212, para. [118].

disproportionately large awards at trial and the resultant chilling effect for journalists reporting in the public interest escaped detailed scrutiny.[218] This position stands at odds with the more established ECtHR jurisprudence which has emphasised the importance of political commentary in a democratic society and has closely scrutinised any restrictions thereto.[219]

Safeguards Against Disproportionate Awards on Appeal

[4-52] As noted above, the appeal test set down prior to *Rantzen* was declared incompatible with Article 10 in *Tolstoy* as not offering adequate and effective safeguards against disproportionately large awards. [220] In replacement of this test, it welcomed the *Rantzen* decision which directed the Court of Appeal when reviewing a libel award to consider whether the sum was necessary to provide adequate compensation and re-establish reputation. The Irish courts had rejected the revised English test on the basis that to introduce a lower standard of review in defamation cases would usurp the role of the jury by removing from its award the unusual and emphatic sanctity afforded in defamation cases. Such interference would create a strong possibility that an appeal court's award should be preferred to that of a jury.

[4-53] It is evident that the Irish test in *Barrett v. Independent Newspapers Ltd* [221] of asking whether a reasonable jury applying the law to all the relevant considerations could reasonably have made the award and whether it was so disproportionately high that it could not stand represents a higher threshold than the test in *Rantzen*. The question therefore became whether, if the Irish courts did not adopt a test along the line of that devised by Neill LJ in *Rantzen*, were they still operating in line with the requirements of Irish constitutional provisions and Article 10, the very instruments relied upon by the Supreme Court to justify the continued use of the *Barrett* formulation? From the mid 1980s, a test based on the combined elements of objectivity and proportionality had been employed by

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[218] McGonagle makes the point that '[S]omewhat surprisingly, the Court considered that the *Tolstoy Miloslavsky* judgment must be its point of departure in examining the case. What follows therefore, is a very truncated and narrowly focused judgment dealing solely with the two issues of safeguards and amount of damages as they arose in the two cases.' See M.McGonagle, 'Recent Developments in Defamation law' (2005/6) 1(1) *Qtly. Rev. Tort Law* 7.

[219] See, *inter alia*, *Lingens v. Austria*, above, n.84 and *United Communist Party of Turkey v. Turkey* (1998) 26 E.H.R.R. 121. As noted above, the chilling effect as a concept has been recognised in the Court's jurisprudence.

[220] Above, n. 212, paras. [50] and [51].

[221] [1986] I.R. 13;[1986] I.L.R.M. 601.

the Irish Supreme Court as is evident from *Barrett*. The Supreme Court in *De Rossa* [222] endorsed the employment of the proportionality test as meeting the obligations of the Constitution and the Convention. Although the ECtHR had stressed the need for an element of proportionality in libel awards, it also called on domestic courts to ensure that any restrictions placed on the exercise of the right of freedom of expression, such as damages, should be necessary in a democratic society. The English courts adhered to this requirement in *Rantzen* whereas this element of the review test is missing in Irish law. The ECtHR considered the level of appellate review to be one of the primary points of distinction between *Tolstoy* and *De Rossa*. Although the standard of appellate review was not deemed to be as 'intrusive' as that formulated in *Rantzen*, the ECtHR emphasised the requirement of proportionality in Irish law which had been absent in English law at the time of the *Tolstoy* decision. The ECtHR was further convinced of the difference between the cases from the actual review conducted by the Supreme Court in *De Rossa* when it took account of a number of relevant factors including the gravity of the libel, its effect on the defamed party and his negotiations to form a government at the time of publication, the extent of publication and the conduct of the newspaper. Although there are undoubtedly clear points of distinction between Irish and English law, thereby allowing the ECtHR to distinguish *Tolstoy*, it represented a disappointing decision for the media, for its failure to give proper consideration to the lack of guidance given to juries at first instance by unduly focusing on the standards applicable at review level. These observations are returned to in Chapter 9.

CONCLUSION

[4-54] The firm commitment by the ECtHR to the democratic discourse theory of free speech has established the values to be applied in the interpretation and application of Article 40.6.1°(i). As a signatory State which has also incorporated the Convention into domestic law, Ireland is obliged to use the tests of democratic necessity and proportionality in resolving clashes between freedom of expression and other rights. Although both of these elements of ECtHR jurisprudence have been engaged with in more recent Irish jurisprudence (see Chapter 1), the future obligation is to develop them further to establish a workable Convention based constitutional framework. Both of these elements and the relevant jurisprudence discussed throughout this chapter are explored further in the Irish context in Chapters 8 and 9.

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[222] See also *O'Brien v. Mirror Group Newspapers* [2001] 1 I.R. 1.

CHAPTER 5

ENGLISH DEFAMATION LAW: THE PUBLIC INTEREST DEFENCE AND DAMAGES

INTRODUCTION

[5-01] The last fifteen years has produced some significant English jurisprudence which has strengthened the protection of public interest speech when balanced against the right of reputation in the context of defamation law.[1] Developments in political libel law have sought to address the rights of the media within the operation of the tort of defamation. In line with the two central themes of the thesis, this chapter addresses English developments in respect of the protection of public interest speech by the media with the creation of a public interest defence and damages awards in defamation cases.

[5-02] As discussed in Chapter 3, the combination of the Irish High Court cases of *Hunter v. Duckworth and Co. Ltd & Anor*[2] and *Leech v. Independent Newspapers (Ireland) Ltd*[3] and section 24 of the Defamation Bill 2006 support a public interest defence in defamation law. These developments to some extent reflect similar developments in English defamation law, commenced in *Reynolds v. Times Newspapers Ltd*[4] (hereafter *Reynolds*) and more recently developed in *Jameel v. Wall Street Journal Sprl*[5] (hereafter *Jameel*). It is therefore necessary and instructive in the analysis of Irish defamation law to consider the *Reynolds* judgment and both its subsequent application and recent consideration by the House of Lords in *Jameel*. As regards damages awards in defamation cases, the English system has developed important and helpful principles in recognition of the dangers that restrictions in the form of disproportionate and unregulated damages can produce on the dissemination of public interest material by the media. Many of these principles have been considered by the Irish courts and more recently, by the legislature in the Defamation Bill 2006. The Irish system is now somewhat out of line with English developments in the area

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[1] On free speech in England generally, see E. Barendt, *Freedom of Speech*, 2nd ed.,(Oxford University Press, 2005) and by the same author, 'Libel and Freedom of Speech in English Law' [1993] *P.L.* 449. See also G. Robertson and A. Nicol, *Media Law* 5th ed., (Sweet and Maxwell, 2007).
[2] [2003] I.E.H.C. 81.
[3] [2007] I.E.H.C. 223.
[4] [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010.
[5] [2007] 1 A.C. 359.

of defamation damages and it is important to understand the English case law and legislation so as to appreciate whether Irish defamation law supports a sufficient level of protection for public interest speech when balanced alongside reputation in this respect.

[5-03] This chapter commences with a necessarily brief account of public interest speech in English defamation law prior to the significant developments in *Reynolds* and *Jameel*. The development of the public interest defence in *Reynolds* and its subsequent application is next addressed. The uncertainties which lingered post-*Reynolds* were considered at some length by the House of Lords in *Jameel* and the leading observations of the Law Lords are discussed in this regard. The chapter then turns to the system for damages awards, which through legislation and case law, has introduced substantial changes to effect a more balanced relationship in the reconciliation of expression and reputation rights.

PUBLIC INTEREST SPEECH IN ENGLISH DEFAMATION LAW IN THE PRE-REYNOLDS ERA

[5-04] To appreciate the significance of *Reynolds v. Times Newspapers Ltd*,[6] it is necessary to briefly explain the traditional scope of protection for public interest speech when balanced against the right of reputation prior to this seminal decision.[7] In discussing Irish defamation law in Chapter 3, it was noted that the operation of the common law defence of qualified privilege through a duty/interest test did not expand to protect the media when communicating matters of public importance to citizens. The traditional defence of qualified privilege in English law applied in much the same manner.[8] The rationale of the defence was explained by Parke B. in *Toogood v. Spyring*[9] as operating to

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[6] Above, n. 4.

[7] For analysis on how the media was affected prior to *Reynolds v. Times Newspapers Ltd*, above. n. 4, see R. L. Weaver and G.J.G. Bennett, 'Is the *New York Times* "Actual Malice" Standard Really Necessary? A Comparative Perspective' (1993) 53 *La. L. Rev.* 1153.

[8] See generally P. Milmo and W.V.H. Rogers, (eds.), *Gatley on Libel and Slander*, 10th ed., (Sweet and Maxwell, 2004), chapters 14 and 16, P.F. Carter-Ruck and H.N.A. Starte, *Carter-Ruck on Libel and Slander*, 5th ed., (Butterworths, 1997), chapter 13, Sir B. Neill and R. Rampton, *Duncan and Neill on Defamation*, 2nd ed., (Butterworths, 1983), chapter 14 , G. Robertson and A. Nicol, *Media Law*, *op. cit.*, n.1, paras. [3-061-3-075] and D. Price and K. Duodo, *Defamation Law, Procedure and Practice*, 3rd ed., (Sweet and Maxwell, 2004), chapters 12 and 13. For a more historic account of the defence, see, W.S. Holdsworth, 'Defamation in the Sixteenth and Seventeenth Centuries' (1925-1926) *L.Q.R.* 397, P. Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005), chapter 7 and I. Loveland, Political libels and qualified privilege: a British solution to a British problem' [1997] *P.L.* 428.

[9] (1834) 1 CM & R 181.

protect communications 'for the common convenience and welfare of society.'[10] The constituent elements of the defence were clearly set out in *Adam v. Ward* [11] as follows:

> 'A privileged occasion is...an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'[12]

[5-05] Although there were instances where publications to the public at large were protected by common law qualified privilege[13] or statutory privilege,[14] the defence was often defeated by the breadth of the publication.[15] Even by the 1980s, that a less free speech-ish era existed is evident when the Court of Appeal in *Blackshaw v. Lord*[16] held that '[N]o privilege attaches yet to a statement on a matter of public interest believed by

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[10] *Ibid.*, p. 193. Mitchell, *op. cit.*, n.8, p. 152, writes that the defence can be traced earlier than this case and refers to two textbooks in this respect: T. Starkie, *Law of Slander, Libel, Scandalum Magnatum and False Rumours* (London, 1812) and J. Borthwick, *A Treatise on the Law of Libel and Slander* (Edinburgh, 1826). According to Loveland '[T]his is a test of potentially broad application, but it has traditionally been interpreted rather restrictively.' See I. Loveland, 'Reforming Libel Law: The Public Law Dimension' [1997] 46 *I.C.L.Q.* 561, 577 and by the same author, 'Qualified Privilege as a Defence for Political Libels Against Elected Politicians: Going Back to *Derbyshire's* American Roots' [1997] *Anglo-American L. Rev.* 175.

[11] [1917] A.C. 309.

[12] *Ibid.*, p. 334. Thus, Loveland has argued in respect of common law qualified privilege that '[T]he "public interest" argument which underpins the defence does not lie in public consumption of the information *per se*, but in facilitating the flow of information between particular parties.' See I. Loveland, 'The Constitutionalisation of Political Libels in English Common Law?' [1998] *P.L.* 633, 638.
The duty/interest elements still exist in the operation of traditional common law qualified privilege. See for example, *Kearns v. General Council of the Bar* [2002] 4 All E.R. 1075, para. [35], *per* Eady J.

[13] *Cox v. Feeney* (1863) 4 F & F 13, *Allbutt v. General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400, *Perera v. Peiris* [1949] A.C. 1 and *Webb v. Times Publishing Co Ltd* [1960] 2 Q.B. 535.

[14] See section 15 and Schedule 1 of the Defamation Act, 1996, which modified previous provisions in the Schedule to the Defamation Act, 1952.

[15] *Duncombe v. Daniel* (1837) 8 Car & P 222 and *Davis v. Shepstone* (1886) 11 A.C. 867. Of course, the defence was also defeated where it was held that the duty/interest test was not satisfied, even where there was no wide publication, see, *inter alia*, *Dickenson v. Hilliard* (1874) L.R. 9 Ex. 79 and *Hebditch v. MacIlwaine* [1894] 2 Q.B. 54 or where the defendant was actuated by malice. However, in respect of the malice element of the defence, Mitchell explains that: '[M]alice is only relevant in that the defence is lost if the claimant proves that the defendant spoke the words maliciously. In short, the emphasis is on the existence of relevant duties and interests, not the defendant's state of mind.' *Op. cit.*, n.8, p. 145.
For discussion of these and other early cases on the operation of qualified privilege, see generally I. Loveland, *Political Libels: A Comparative Study*, (Hart, 2000). See also, C. Dent, ''The Privileged Few' and the Classification of *Henwood v. Harrison*, *Foucault*, Comment and Qualified Privilege' (2005) *Griffith L. Rev.* 34, pp. 38-42, 44-50, M. O'Callaghan, *'Taking Liberties: George Wither's A Satyre, Libel and the Law'*, in Literature, Politics and Law in Renaissance England, E. Sheen and L. Hutson (eds) (Palgrave Macmillan, 2003), pp. 146-149 and P. Mitchell, 'Duties, Interests and Motives: Privileged Occasions in Defamation' (1998) 18 *O.J.L.S.* 381.

[16] [1984] 1 Q.B. 1; [1983] 2 All E.R. 311; [1983] 3 W.L.R. 283.

the publisher to be true and in relation to which he has exercised reasonable care.'[17] This position forced defendants to rely on the defences of fair comment and justification which unlike the qualified privilege defence, required proof of the truth of the publication and when combined with the presumption of damages in defamation law, created very real restrictions on the publication of political or public interest material.[18]

[5-06] The lack of an express constitutional guarantee for freedom of expression[19] did not however prevent developments in the protection of political speech[20] in England from the early 1990s. In *Derbyshire County Council v. Times Newspapers*,[21] fearful of the chilling effect of certain restrictions on freedom of expression, the House of Lords held that to permit organs of government, whether central or local,[22] to sue for libel,[23] did not serve and was contrary to the public interest.[24] The *Derbyshire* principle was subsequently extended

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[17] [1984] 1 Q.B. 1, 26; [1983] 2 All E.R. 311, 327, [1983] 3 W.L.R. 283, 301. For a similar interpretation of the scope of the defence of qualified privilege, see *London Artists v. Littler* [1968] 1 All E.R. 1075; [1968] 1 W.L.R. 607, *per* Cantey J.

[18] For empirical material in support of this see E. Barendt, L. Lustgarten, K. Norrie and H. Stephenson, *Libel and the Media: the Chilling Effect*, (Clarendon Press, 1997).

[19] See generally T.R.S. Allen, 'Constitutional Rights and Common Law' (1991) 11 *O.J.L.S.* 453 and Sir J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] *P.L.* 59. In *R. v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115, 131; [1999] 3 All E.R. 400, 412; [1999] 3 W.L.R. 328, 341, Lord Hoffman explained that the English courts '...apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

[20] For the historic position of freedom of speech in England, see W. Blackstone, *Commentaries on the Laws of England*, Book IV, (University of Chicago Press, 2002), in particular, pp. 151-2. For a modern appraisal of Blackstone's position, see A. Boyle, 'Freedom of expression as a public interest in English law' [1982] *P.L.* 574. Blackstone's narrow approach of limiting protection for freedom of speech to prohibit prior restraints was subsequently widened but remained according to Dicey, writing in 1959, '...little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.' A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th ed., Macmillan, 1959), pp. 246-247.

[21] [1993] A.C. 534.

[22] The principle was applied to an 'arm of government' in *British Coal v. National Union of Mineworkers*, (Unreported, Q.B. Div., 28th June, 1996).

[23] The publication had insinuated maladministration of a local authority's superannuation fund.

[24] For a similar Australian position, see *Ballina Shire Council v. Ringland* (1994) 33 N.S.W.L.R. 680. Prior to this decision, there had only been two English cases involving proceedings by a local authority as to whether local government had a governing reputation which could be protected and they were in direct conflict with one another. See *Manchester Corporation v. Williams* [1891] 1 Q.B. 94 and *Bognor Regis Urban District Council v. Campion* [1972] 2 Q.B. 169. For analysis of the latter, see, T. Weir, 'Local Authority v. Critical Ratepayer – A Suit in Defamation' [1972] *C.L.J.* 238. The *Derbyshire* decision has been written on extensively, see *inter alia*, E. Barendt, 'Libel and Freedom of Speech in English Law', *loc. cit.*, n.1, I. Loveland, 'Defamation of Government: Taking Lessons from America?' [1994] 14(2) *L.S.* 206, E. Grant and J.G. Small, '*Derbyshire County Council v Times Newspapers* in the House of Lords: Molecular rather than Molar Motion' (1994) *O.J.L.S.* 287, Beloff M.J. *'Politicians and the Press'* in Freedom of expression and Freedom of Information: Essays in Honour of Sir David Williams', by J. Beatson and Y. Cripps, (eds.) (OUP, 2000) pp. 63-85 and within the same publication, Forsyth, C., *'The Protection of Political Discourse: Pragmatism or Incoherence?'*, B. Bix and A. Tomkins, 'Local Authorities and Libel Again' (1993) 56 *M.L.R.* 738, Fleming, 'Defamation: Political Speech' (1993) 109 *L.Q.R.* 12 and C. Gearty, 'There's Life in the Old Common Law Yet' [1994] *K.C.L.J.* 77.

in *Goldsmith v. Bhoyrul* [25] to prevent a political party suing for libel. In *Goldsmith*, Buckley J. adopted the following rationale for the decision:

> '...the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is also sufficiently strong to justify withholding the right to sue. Defamation actions or the threat of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none...'[26]

[5-07] Although these developments in the law of defamation addressed questions on the standing of libel plaintiffs, they are nonetheless relevant to the public interest defence in a number of respects. Firstly, they signalled awareness on the part of the English courts of the chilling effect posed by certain restrictions on freedom of speech. Secondly, they acknowledged the importance of the public receiving information on public interest matters.[27] These cases which removed some fetters[28] on political expression soon came to encourage other significant developments in defamation law in respect of the communication by the media of matters of public interest. Of course, any liberalisation of the protection of defamatory public interest speech had to be balanced against the competing right to reputation.[29] It is to the seminal *Reynolds*[30] judgment, which addresses both freedom of expression and reputation in the context of public interest speech, to which this chapter now turns.

Protection of governmental reputation was long-established in criminal law. See, *inter alia*, L.W. Maher, 'The Use and Abuse of Sedition' (1992) 14 *Syd. L. Rev.* 287 and P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stanford L. Rev.* 691.

[25] [1997] 4 All E.R. 268; [1998] 2 W.L.R. 435. For discussion, see I. Loveland, *loc. cit.*, n.,12, pp. 635-637.

[26] [1997] 4 All E.R. 268, 270-271; [1998] 2 W.L.R. 435, 438.

[27] The importance of communication between public officials and their constituents had previously been stressed by Cockburn C.J. in *Wason v. Walter* [1868] L.R. 4 Q.B. 73, 91. More recently, in *R. v. Shayler* [2003] 1 A.C. 247; [2002] 2 All E.R. 477, 492; [2002] 2 W.L.R. 754, 769 the House of Lords explained: '[M]odern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the argument for and against different solutions and the facts underlying these arguments...'

[28] Milmo and Rogers made the point that '[S]ince the decision rests upon the necessity for free discussion of public affairs, it may appear curious that it explicitly rejects any parallel limitation upon the right of an individual politician or public servant to sue for defamation, though as a practical matter individual claimants are of course more likely to be constrained by the risks of litigation than would be the public body which they serve.' *Op. cit.*, n. 8, para. [14.92].

[29] In *Silkin v. Beaverbrook Newspapers* [1958] 1 W.L.R. 743, 746, it was explained that '[I]n the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men.' For criticism of the approach of taking reputation as the starting point or the 'first place', see I. Loveland, *loc. cit.*, n. 12, p. 642.

[30] Above, n.4.

THE PUBLIC INTEREST DEFENCE:

REYNOLDS V. TIMES NEWSPAPERS LTD

Background

[5-08] Following the resignation of Mr. Albert Reynolds, the (then) Taoiseach of Ireland, the *Sunday Times* newspaper published an article titled 'Goodbye gombeen man' in its London edition. Mr. Reynolds instituted libel proceedings claiming that the sting of the article was to the effect that he had deliberately and dishonestly misled the Dáil, his cabinet colleagues and the (then) Tánaiste in respect of information concerning the appointment of the (then) Attorney General as President of the Irish High Court. The newspaper article had failed to include or refer to Mr. Reynolds's explanation of events that he had given in the Dáil. In contrast, the Irish edition of the *Sunday Times* had carried a longer and more balanced report of events surrounding Mr. Reynolds's resignation. At trial, the jury rejected the defence of justification but found that the newspaper had not acted maliciously and awarded no damages. The trial judge awarded the plaintiff one penny. [31] Both sides appealed; the plaintiff on the ground that the judge had misdirected the jury and the defendants on the ground of the judge's ruling that they were not entitled to rely on qualified privilege.

Court of Appeal [32]

[5-09] In the context of the defence of qualified privilege, the submissions of Lord Lester, counsel for *The Times* were of most relevance and interest. Limited by the traditional defences on offer, Lord Lester used the chilling effect argument accepted in *Derbyshire v. Times Newspapers Ltd*[33] in respect of central and local government, to argue that publication of criticism of an individual politician would be chilled in exactly the same manner. He proposed the expansion of traditional qualified privilege to protect publication to the world at large arising out of the discussion of political matters, with the onus on the plaintiff to prove express malice. Essentially, he was asking the Court of Appeal to protect this type of political expression as a generically privileged class of communication. As regards the definition of political matters, Lord Lester adopted the approach of the

[31] The plaintiff was ordered to pay the defendants' costs as from the date of payment into court but no order was made as to costs down to the date of payment in.

[32] [1998] 3 All E.R. 961; [1998] 3 W.L.R. 862. For a casenote on the Court of Appeal judgment, see R. Mullender, 'Defamation, Qualified Privilege and the European Convention on Human Rights' (1999) 58 *C.L.J.* 15.

[33] Above, n. 21.

Australian High Court in *Lange v. Australian Broadcasting Corporation*[34] and therefore proposed that the privilege should operate to protect '...information, opinions and arguments concerning government and political matters that affect the people of the United Kingdom...'.[35] Having commended *New York Times v. Sullivan* [36] for its protection of political speech, Lord Lester did not propose offering protection for freedom of speech based on the public figure status of the plaintiff rather than the public interest value of the speech.[37]

[5-10] The generic privilege approach as pleaded for by the defendants was rejected. The Court of Appeal explained that to protect political expression in this manner would expose some to false and defamatory statements with no protection other than to prove that the publisher lacked an honest belief in the truth of the statement, a task which will often be difficult or impossible. The Court of Appeal also considered political speech too narrow a category to receive this heightened protection given that '...there are after all, many matters which affect the public interest and health of society much more profoundly than the small change of political controversy.'[38]

[5-11] Despite rejecting the defendants' approach, the Court of Appeal developed the existing defence of qualified privilege. Henceforth, in addition to satisfying a duty/interest test, libel defendants would also have to pass the 'circumstantial test' such that in all the circumstances including the nature, status and source of the material, the publication was in the public interest.[39] As regards the duty/interest limb of the defence, the Court of

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[34] (1997) 189 C.L.R. 520. For comparison of the English and Australian approaches, see A. Kenyon, *Defamation, Comparative Law and Practice* (UCL Press, 2006), chapter 7 and by the same author, '*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice' [2004] 28 *Melb. Univ. L. Rev.* 406. See also R. Baker, 'Extending Common Law Qualified Privilege to the Media: A Comparison of the English and Australian Approaches' (2002) 7 *Media and Arts L. Rev.* 87.

[35] [1998] 3 All E.R. 961, 989; [1998] 3 W.L.R. 862, 894.

[36] (1964) 376 U.S. 254.

[37] The Neill Committee had previously rejected the introduction of the public figure doctrine into English law: Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation*, ('Neill Report'), (London, 1991), para. [164].

[38] [1998] 3 All E.R. 961, 1005; [1998] 3 W.L.R. 862, 910. However, the Court did provide a definition for public interest speech as '[M]atters relating to the public life of the community and those who take part in it, including...activities such as the conduct of government and political life, elections...and public administration...[Also,] matters such as...the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private such that there is no public interest in their disclosure.' [1998] 3 All E.R. 961, 1004; [1998] 3 W.L.R. 862, 909.

[39] For criticism of the circumstantial test, see *inter alia*, S. Spilsbury, 'Bloodhounds and Watchdogs – Qualified Privilege, Malice and the Publication of Material in the Public Interest' (2000) 11(3) *Ent. L. Rev.* 43, 44-45 and F.A. Trindade, 'Defaming Politicians – the English Approach' (1999) 115 *L.Q.R.* 175, K. Williams, 'Defaming Politicians: The Not So Common Law' (2000) M.L.R. 748 and Shillito, R. and Barendt, E., 'Libel Law' in E. Barendt and A. Firth (eds) (2000) *Yearbook of Ent. And Media Law* 391.

Appeal read the well-established 'common convenience and welfare' test beyond the needs of a limited recipient group in recognition of the important role the media plays in communicating matters of public interest to the community. It explained:

> 'As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large. In modern conditions what we have called the duty test should, in our view, be rather more readily held to be satisfied.
>
> Corresponding to the duty of the media to inform is the interest of the public to receive information. Article 10 of the Convention lays down a right to receive information. We have no doubt that the public also have an interest to receive information on matters of public interest to the community (as opposed, of course, to information about matters in which the public may happen to be interested). The cases have accepted that the public generally may have an interest to receive information published in a newspaper, so satisfying that we have called the interest test. In modern conditions the interest test should also, in our view, be rather more readily held to be satisfied.'[40]

[5-12] Although both duty and interest were interpreted more broadly than previously, the circumstantial test was an added element on a defendant publisher not included in traditional qualified privilege. Lord Bingham explained the need for the inclusion of the test on the following basis:

> 'Whilst those who engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact, unless the circumstances of the publication are such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice.'[41]

[5-13] The Court of Appeal held that the circumstances in which Mr. Reynolds's government fell from power were matters of undoubted public interest to the people of

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[40] [1998] 3 All E.R. 961, 1004, [1998] 3 W.L.R. 862, 909.
[41] [1998] 3 All E.R. 961, 1004-1005, [1998] 3 W.L.R. 862, 909-910.

Great Britain and so passed the duty/interest test. However, the defendants were not successful in satisfying the circumstantial test due to the unauthoritative source relied upon for the allegation that Mr. Reynolds had lied, the failure to obtain the plaintiff's observations on the allegations and the inconsistent versions of the story in the British and Irish editions of the newspaper.

[5-14] The decision was clearly significant on a number of grounds. Firstly, it recognised that the operation of the existing defence of qualified privilege had failed to offer sufficient protection to the media in the dissemination of public interest material. To this end, the Court of Appeal recognised that the traditional duty/interest limb of the defence must be interpreted in a broader sense in recognition of the democratic role of the media vis-à-vis the public. Secondly, having read the duty/interest test in this broader fashion, it then considered it necessary to balance this with the introduction of the circumstantial test and its focus upon the nature, status and source of the material. Finally, the judgment offered a definition of public interest speech which ran beyond political expression in the strict sense. However, on appeal, the House of Lords supported some, but was critical of other elements of these developments in the existing defence of qualified privilege. This chapter now turns to this seminal judgment.

House of Lords[42]

[5-15] On appeal to the House of Lords on the ground of privilege, counsel for *The Times* re-submitted that common law qualified privilege should be extended to protect political expression as a generically privileged category of speech. Political expression was defined as concerning the conduct of government in a democratic society. The defendants also argued that the Court of Appeal's circumstantial test was uncertain and overbroad and went further than necessary in a democratic society to protect individual reputations. The defendants submitted that the Court of Appeal had erred in law in applying the circumstantial test to the threshold question of whether the occasion is one to which qualified privilege applies rather than confining its application to the question of malice. Counsel for the plaintiff argued that adoption of the generic privilege approach in qualified privilege would render justification and fair comment redundant defences. They also argued that there is nothing intrinsically objectionable in chilling false and defamatory

[42] Above, n.4. See generally I. Loveland, '*Reynolds v. Times Newspapers* in the House of Lords' [2000] *P.L.* 351 and by the same author, 'A New Legal Landscape: Libel Law and Freedom of Political Expression in the United Kingdom' [2000] *E.H.R.L.R.* 476.

statements of fact in order to reflect the importance of protecting individual reputation. Finally, they criticised the defendant's generic privilege proposition for its failure to make clear its scope beyond the strictly political.

[5-16] Unlike the Court of Appeal, the House of Lords held that the circumstances of the publication, including the behaviour of the defendant, forms part of whether a privileged occasion exists. The Law Lords explained that the traditional duty/interest test may be defeated in circumstances where publication occurred in the absence of proper journalistic behaviour. Significantly, when discussing the duty/interest test, Lord Nicholls assimilated both limbs into a test of 'whether the public was entitled to know the particular information.'[43] In order to maintain a fair balance between the rights of speech and reputation, the House of Lords rejected a generic privilege for political expression[44] and so Lord Lester's fallback position which had proposed that qualified privilege should apply to political discussion unless the plaintiff could prove that the newspaper had exercised reasonable care was also rejected.

[5-17] In delivering the leading judgment, Lord Nicholls used freedom of expression as his starting point, (heavily influenced by the Human Rights Act 1998 to incorporate the European Convention on Human Rights and Fundamental Freedoms into English law, passed but not yet in force)[45] and stressed the importance of the role of the media in the communication of political material. Nonetheless, he also pointed to reputation as an important right for the individual and society more generally by explaining that reputation

> '...forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded

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[43] [2001] 2 A.C. 127, 197; [1999] 4 All E.R. 609, 619; [1999] 3 W.L.R. 1010, 1020.

[44] For arguments against creating a public official defence in English libel law so as to protect political reputations, see more generally K. Schilling, 'The Americanisation of English Libel Law' (2000) 3 *Ent. L. Rev.* 48. In contrast, see D. W. Vick and L. Macpherson, 'An Opportunity Lost: The UK's Failed Reform of Defamation Law' (1997) 49 *Fed. Comm. L. J.* 621, 649-651.

[45] This piece of legislation has been written on extensively. See, *inter alia*, H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), J. Wadham et al., *Blackstone's Guide to the Human Rights Act* (Oxford University Press, 2007), J. Coppel, The Human Rights Act 1998 (J. Wiley,1999), A. Lester and D. Pannick, *Human Rights Law and Practice* (Butterworths, 1999), R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), D. Feldman, *Civil Liberties and Human Rights in England and Wales*, (Oxford University Press, 2001), A. Chandran, *A Guide to the Human Rights Act 1998* (Butterworths, 1999, J. Jowell and J. Cooper, *Delivering Rights: How the Human Rights Act is Working* (Oxford-Portland, 2003). For a general review of the relationship between Article 10 and English common law in a variety of areas including defamation, see Browne, D *'Article 10 ECHR and freedom of expression: What has it added to the common law?'* in M.Saville and R. Susskind, (eds) Essays in Honour of Sir Brian Neill: The Quintessential Judge, (Lexis-Nexis, 2003), pp. 117-142.

allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.' [46]

[5-18] Clearly, the concern with individual reputation was not limited to the defamed party but also involved the public interest in making informed electoral choices.[47] In addition to the need for libel law to properly protect reputation, the generic privilege for political expression was not favoured for its singling out of political expression when there are many other matters relating to government and politics, equally as important to the community.[48] Furthermore, given the protection afforded to protection of journalists' sources,[49] Lord Nicholls argued that it would be unduly difficult for a plaintiff to prove that the newspaper had been actuated by malice[50] and had published recklessly in order to defeat the defence.[51] Significantly, commenting on the media, Lord Nicholls opined that

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[46] On the importance of the right of reputation, Lord Hobhouse said: '[T]he law of civil defamation is directly concerned with the private law right not to be unjustly deprived of one's reputation and recognises the defence of privilege.' [2001] 2 A.C. 127, 238; [1999] 4 All E.R. 609, 657; [1999] 3 W.L.R. 1010, 1059.

[47] However, according to Loveland, '[T]he electorate's interest in consuming political information certainly influenced the balance which was struck, but would more appropriately be designated as part of the superstructure of the judgment than its foundation.' See I. Loveland, 'The English Position' (1999) N.L.J. 1796, 1797.

[48] The Faulks Committee had earlier rejected proposals for a defence of public interest statements believed to be true and published with reasonable care. See *Report of the Committee on Defamation*, (Cmnd. 5909, 1975) paras. [53]-[55]. For commentary to the effect that despite rejection of political expression as a generic category to be protected, the judgment provides protection for responsible press coverage of political and public interest matters, see P. Mitchell, 'Political Qualified Privilege' (2000) 11 *K.C.L.J.* 114 and I. Loveland, 'Freedom of Political Expression: Who Needs the Human Rights Act?' (2001) *P.L.* 201.

[49] Section 10 of the Contempt of Court Act 1981 protects newspapers from having to reveal sources unless it is established that such disclosure is necessary in the interests of justice, or national security or the prevention of disorder or crime.

[50] Lord Steyn emphasised the difference between the United Kingdom and United States positions on proving malice, such that the latter, unlike the former, allows for extensive pre-trial enquiry into the story's sources. He also made the point that '[M]isleading people and the purveying as facts statements which are not true is as destructive of democratic society and should form no part of such a society.' [2001] 2 A.C. 127, 238; [1999] 4 All E.R. 623, 657; [1999] 3 W.L.R. 1010, 1059. See on the United States position, *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir.), cert. denied, 125 S.Ct. 2977 (2005) amended by 438 F. 3d 1141 (D.C. Cir. 2006).

[51] Other Law Lords expressed similar concerns, see Lord Cooke, [2001] 2 A.C. 127, 219-220, [1999] 4 All E.R. 609, 640, [1999] 3 W.L.R. 1010, 1041-1042, Lord Hope, [2001] 2 A.C. 127, 230, [1999] 4 All E.R. 609, 649-650, [1999] 3 W.L.R. 1010, 1051 and Lord Hobhouse, [2001] 2 A.C. 127, 240, [1999] 4 All E.R. 609, 659, [1999] 3 W.L.R. 1010, 1061.

'...the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve does not always command general confidence.' [52]

[5-19] Despite rejection of the defendants' approaches, the House of Lords took the opportunity to considerably expand the traditional duty/interest test. The success or otherwise of the qualified privilege defence would include assessment of the behaviour of the defendant. Lord Cooke endorsed a '...standard of reasonable care and skill in all the circumstances.'[53] The move away from strict liability[54] to a fault based standard signalled a clear re-balancing of the rights of speech and reputation. To assess the fault standard, a non-exhaustive list of ten factors[55] was set out to determine whether the behaviour objectively complied with journalistic good practice. These are as follows:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.[56]

2. The nature of the information and the extent to which the subject-matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.[57]

4. The steps taken to verify the information.[58]

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[52] [2001] 2 A.C. 127, 202; [1999] 4 All E.R. 623, 657; [1999] 3 W.L.R. 1010, 1024. The judgment was delivered on the same day as the House of Lords sitting as the Privy Council handed down a decision in an appeal from the New Zealand Court of Appeal in *Lange v. Atkinson* (New Zealand) [1999] U.K.P.C. where it held that '[O]ne feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press.'

[53] [2001] 2 A.C. 127, 224; [1999] 4 All E.R. 609, 644; [1999] 3 W.L.R. 1010, 1046.

[54] Whether the operation of the principle of strict liability adequately protected freedom of expression was seriously questioned by Morland J. in *O'Shea v. MGN Ltd* [2001] E.M.L.R. 40. The judge held the principle should not cover the 'lookalike situation'. For further discussion, see J. Coad, '"Pressing Social Need" and Strict Liability in Libel' (2001) 12(7) *Ent. L. Rev.* 199.

[55] For criticism of the lack of guidance as to the weight to be attached to each factor, see K. Williams, *loc. cit.*, n. 39, p.754.

[56] Robertson and Nicol argue that this factor cuts both ways in that an allegation which is not serious will not have the genuine public interest which is a pre-condition of the privilege. *Op. cit.*, n. 1, p. 130.

[57] Lord Nicholls considered that a newspaper's unwillingness to reveal the identity of its sources should not weigh against it. In contrast, Lord Steyn argued that '[I]f a newspaper stands on the rule protecting its sources, it may run the risk of what the judge and jury will make of the gap in the evidence.' [2001] 2 A.C. 127, 214; [1999] 4 All E.R. 609, 634; [1999] 3 W.L.R. 1010, 1036.

[58] To what extent corroboration is required was not made clear.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.[59]

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.[60]

8. Whether the article contained the gist of the plaintiff's side of the story.[61]

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.[62]

[5-20] Having set out factors listed above,[63] Lord Nicholls explained that the list was not exhaustive and that the weight to be given to each of the factors would vary from case to case. He suggested that over time, a useful body of case law will develop on the application of the factors. Of course, if equal weight is given to all the factors, then the conduct factors listed from three to ten could easily outweigh the public interest value of speech. Perhaps Lord Nicholls has this possibility in mind when he stressed the importance of the media when communicating on matters of public interest[64] as follows:

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[59] This mirrors the reasoning of the ECtHR in *Oberschlick v. Austria* (1991) 19 E.H.R.R. 389, para. [59]. This factor could also be used to argue that if it is not pressing to publish a publication, then regardless of whether the allegation is serious or not, comment should be sought.

[60] This and factor number eight relate to fairness in behaviour.

[61] This was further clarified by Lord Nicholls when he described it as '...elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. An article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported allegation proves to be true.' [2001] 2 A.C. 127, 206; [1999] 4 All E.R. 609, 627; [1999] 3 W.L.R. 1010, 1028.

[62] This is a catch-all type factor.

[63] Mitchell criticised the factors for the lack of clarity as to whether they are linked to the occasion or to malice and argued that there was no coherent definition given of the relationship between privilege and fault. *Op. cit.*, n. 8.

[64] According to Lord Nicholls, '[W]ithout freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting is part of the vital role of the press and media generally.' [2001] 2 A.C. 127, 200; [1999] 609, 622; [1999] 3 W.L.R. 1010, 1023. This statement was surely intended to be a clear indication that although political expression is not generically protected, it will receive strong protection, a principle subsequently endorsed in *Sanders v. Kingston* [2005] E.W.H.C. 1145, paras. [65] –[85], *per* Wilkie J.

'Above all the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.'

[5-21] The House of Lords concluded that the *Sunday Times* could not rely on the defence at retrial. Lord Nicholls was particularly exercised by the failure to mention Mr. Reynolds' own explanation to the Dáil. He did not consider that an article omitting all reference to the statement made in the Dáil could be a fair and accurate report of such proceedings. Lord Nicholls also emphasised the lack of the gist of the explanation already given by Mr. Reynolds. Accordingly, '[A]n article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true.'[65]

REYNOLDS PRIVILEGE:
A NEW PUBLIC INTEREST DEFENCE?

[5-22] Whether *Reynolds* introduced a new public interest defence or extended the traditional qualified privilege defence in a move away from the approach in case law such as *Blackshaw v. Lord*[66] received mixed judicial responses. Lord Phillips in *Loutchansky v. Times Newspapers Ltd (Nos. 2-5)*[67] recognised *Reynolds* privilege '...as a different jurisprudential creature from the traditional form of privilege from which it sprang....'.[68] He further explained that '[W]hereas previously it could truly be said of qualified privilege that it attaches to the occasion of the publication rather than the publication, *Reynolds* privilege attaches, if at all, to the publication itself: it is impossible to conceive of circumstances in which the occasion of publication could be privileged but the article itself not so.'[69] By way of contrast, in *McCartan, Turkington Breen v. Times Newspapers Ltd* [70] Lord Cook commented that '...*Reynolds* was less a breakthrough than a reminder of the

[65] [2001] 2 A.C. 127, 206; [1999] 4 All E.R. 609, 627; [1999] 3 W.L.R. 1010, 1028.
[66] Above, n.16.
[67] [2002] Q.B. 783.
[68] *Ibid.*, para. [35].
[69] Above, n. 67, para. [33].
[70] [2001] 2 A.C. 277; [2000] 3 W.L.R. 1670; [2000] 4 All E.R. 913.

width of basic common law principles as to privilege, although undoubtedly it is much more encouraging of their invocation than previous English decisions.'[71]

[5-23] While some observers have suggested that the dichotomy is likely to be of little practical importance,[72] others have argued that retention of the duty/interest framework ensured that *Reynolds* privilege was usually rejected by judges adopting the traditional approach to freedom of speech such that the duty/interest test was often not satisfied by the dissemination of public interest material by the media.[73] While it is correct to conclude that *Reynolds* privilege was often rejected in the subsequent case law (which will be discussed in the next section), the case law seems to suggest that this had less to do with duty/interest and more to do with journalistic ethics.[74] The transfer of judicial focus away from the occasion of publication to the manner of publication by Lord Nicholls' ten factors is, it is submitted, too stretched to comfortably argue that *Reynolds* privilege merely stands for a liberalisation of traditional qualified privilege.[75] As regards the manner of publication, the Law Lords in *Reynolds* failed to reconcile the test of malice which can defeat a publication to the world at large under traditional qualified privilege with the concept of journalistic ethics,[76] suggesting that it was envisaged that *Reynolds* privilege would operate as a separate defence.[77] In fact, post-*Reynolds* case law reveals that counsel have on occasion pleaded the traditional duty/interest test and not a *Reynolds* defence[78] and furthermore, that the publication of a public document does not automatically rule out the application of the

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[71] [2001] 2 A.C. 277, 301; [2000] 3 W.L.R. 1670, 1690; [2000] 4 All E.R. 913, 932.

[72] A.Scott, 'The Same River Twice? *Jameel v Wall Street Journal Europe*' (2007) 12(2) *Comms. L.* 52.

[73] Robertson and Nicol, *op. cit.*, n. 1, p. 160.

[74] As Cox has suggested, '[I]ndeed to some extent, the concern with such standards of ethics actually overtakes the focus on the presence of reciprocal duties and interests.' See N. Cox, *Defamation Law* (First Law, 2007), p. 311.

[75] For a similar position, see D. Price and K. Duodo, *op. cit.*, n. 8, para. [13-01].

[76] This may be contrasted with the Court of Appeal's circumstantial test.

[77] The comments of Cox should be noted in this regard: '[N]aturally, if a defendant has crossed the very many hurdles established in the *Reynolds* principles it will be very difficult to show that the occasion of privilege is somehow being abused – the theoretical definition of malice within the classical qualified privilege formula.' (footnote omitted). *Op. cit.*, n. 74, p. 329. The same point is made by Gatley, *op. cit.*, n. 8,para. [16.21] and D. Price and K. Duodo, *op. cit.*, n.8, para. [13-15]. The role of malice was questioned by Lord Phillips in *Loutchansky*, above, n.67, para. [34], in the following manner: 'Once the publication of a particular article is held to be in the public interest on the basis of the public's right to know, can the privilege really be lost because the journalist (or editor?) had the dominant motive of injuring the claimant rather than fulfilling his journalistic duty? It is a surprising thought.' See also *GKR Karate (U.K.) Ltd. v. Yorkshire Post Newspapers Ltd* [2001] 1 W.L.R. 2571.

[78] In *Hewitt v. Grunwald* [2004] E.W.H.C. 2959, counsel for the claimants submitted that a court cannot simply rule out a defence of conventional privilege automatically because the publication appeared on the internet. Eady J. held that the defence of a privilege is arguable and would have to be determined in the light of the evidence.

traditional defence.[79] It appears in the Irish context from *Leech v. Independent Newspapers (Ireland) Ltd* [80] and sections 16 and 24 of the Defamation Bill 2006 that *Reynolds* style privilege is to operate as a separate defence to traditional qualified privilege so that the new defence is less likely to be rejected in the manner that occurred in many of the English cases which applied *Reynolds* privilege.

[5-24] As part of the wider question as to what type of defence *Reynolds* is, lies the issue of the role of the jury in its operation. Some concern has been expressed that the role of the jury has been eroded. Thus, Mitchell[81] has argued:

> 'Now it is clear that judges can take into account so many factors when deciding if the occasion is privileged, there is a greater chance of privilege being withdrawn from the jury altogether. Where defences of privilege do go before a jury it is unlikely that there will be evidence of malice: if there had been such evidence (for instance, in the tone of the language...), the judge would probably have held that there was no occasion of qualified privilege to start with....[T]he judge's decision either way is likely to be final.'[82]

[5-25] If *Reynolds* is accepted as a media defence premised on journalistic ethics so that the emphasis has moved from the duty/interest test or the conventional terminology to a focus upon reasonable media conduct, then if anything, the role of the jury should increase. The occasion of publication, traditionally a judicial determination, is *prima facie* satisfied and may only be defeated by the application of the *Reynolds* checklist, which is in the first instance a jury function.[83] Some of the case law post-*Reynolds* has emphasised the importance of adopting an overall approach in the application of the defence rather than ticking off every factor in the checklist.[84] If this approach is carried forward, then juries will be less likely to be relied upon for complex defamation questions but rather asked to

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[79] The case of *Meade v. Pugh* [2004] E.W.H.C. 408 concerned the publication of a feedback report in the employment context.
[80] Above, n. 3.
[81] P. Mitchell, 'Political Qualified Privilege', *loc. cit.*, n. 48, p. 114.
[82] *Ibid.*, p. 117
[83] Eady J. in *Jameel v. Wall Street Journal Sprl* [2004] E.W.H.C. 37; [2004] All E.R. (d) 127, para. [4] explained that '[I]t is now almost inevitable that in cases of publication to the world at large, where the defence is that of qualified privilege, the jury will be asked to answer a series of questions in order for the court to arrive at the necessary factual substratum upon which to base the ruling.' It is important to note that the judge went on to provide: '[A]ny value judgments, and to a large extent also any inferences to be drawn from the raw data, are reserved to the judge in determining the ultimate question of whether privilege applies.'
[84] *Henry v. British Broadcasting Corporation* [2006] 1 All E.R. 154.

take a common sense view, of whether in all the circumstances, they considered the media defendant acted reasonably including whether the subject matter was one of public concern at the time of publication.

[5-26] The importance of protecting the role of the jury in Irish defamation litigation was addressed in Chapters 2 and 3 in terms of providing its members with workable tools to assist in the delivery of rational determinations. In this respect, the *Reynolds* factors could be seen as tools to be utilised by the jury in determining fault or otherwise. The Irish position, both legislative and judicial, on the role of the jury in the operation of this type of defence seems far more settled than in England so that this element of *Reynolds* uncertainty is eliminated.[85] Section 24(2) of the Defamation Bill 2006 supports the use of the jury[86] in the determination of whether a publication was fair and reasonable in all the circumstances and lists certain relevant matters to assist in the determination. Most recently, in terms of the jury's role in the two stages of the public interest defence, Charleton J. in *Leech v. Independent Newspapers (Ireland) Ltd*[87] said:

> 'Now, I don't accept that in this country it would be right for me to decide these issues, and to, in effect, overturn the statute, which requires a jury trial of this defamation matter, by making a ruling. I can of course, make a ruling in relation to whether or not the Plaintiff has made out a case. She clearly has made out a case of libel sufficient to be considered by the jury, and I am equally entitled to make a ruling as to whether a defence arises on the evidence that is fit to be considered by a jury. If this defence were to be put by the court, it would be put to the jury as a matter of fact, and appropriate questions related to the tests based on the two aspects of *Jameel*, would be put to them.'

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[85] The Irish Law Reform Commission in its 1991 Report recommended that in the High Court the parties to defamation actions should continue to have the right to have the issues of fact other than the assessment of damages determined by a jury.' See *Report on the Civil Law of Defamation*, (LRC-67, Dublin 1991), p. 77.

[86] Section 24(5) of the 2006 Defamation Bill explains that the reference to 'court' in relation to a defamation action brought in the High Court means the jury if the High Court is sitting with a jury.

[87] Above, n. 3. In *Hunter v. Duckworth and Co. Ltd & Anor*, above, n. 2, Ó'Caoimh J. did not discuss what type of defence *Reynolds* is and in turn did not address the issue of the role of the jury in the operation of the defence.

[5-27] There exists a body of case law which has attempted to address standards expected of responsible journalists post-*Reynolds*. Although the section 24 defence of fair and reasonable publication in the Defamation Bill 2006 is not identical to *Reynolds*, it clearly derives from Lord Nicholls' list. In this respect, the application of the ten factors have continuing relevance in Irish defamation law. Moreover, the *Reynolds* application process has already commenced in domestic case law with the discussion by Charleton J. in *Leech v. Independent Newspapers (Ireland) Ltd* [88] of elements of responsible and fair publication such as whether the article contained the gist of the plaintiff's side of the story and whether the plaintiff was contacted for comment.

The Application of the Ten Factors

[5-28] Lord Nicholls had acknowledged in *Reynolds* that the non-exhaustive list of factors produced an 'elastic test'. [89]Although a point disagreed with by some,[90] one observer[91] has argued that '[T]he reality is that some uncertainty is simply inevitable in this area...' but that '[B]y listing the most important of those factors, the *Reynolds* test has helped to limit that discretion.'[92] Furthermore, it is also significant that such a case by case assessment allows the media to argue that the defence applies to any material that is of legitimate public concern and not just to political information.[93] However, the instruction from Lord Nicholls had been to resolve any 'lingering doubts' in favour of freedom of expression to adequately protect the media in the communication of matters of political discussion. Whether this instruction would be followed to offer broad protection or whether the factors would be used to require strict adherence in their totality remained to be seen.[94]

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[88] Above, n. 3.
[89] [2001] 2 A.C. 127, 204; [1999] 4 All E.R. 609, 625; [1999] 3 W.L.R. 1010, 1027.
[90] For criticism of the *Reynolds* approach for its uncertainty, see R. Clayton and H. Tomlinson, *The Law of Human Rights* (OUP, 2000), para. [15.249]. The uncertainty of the guidelines was a principal reason for the rejection of *Reynolds* privilege in New Zealand in *Lange v. Atkinson* [2000] 3 N.Z.L.R. 383.
[91] R. Dunlop, 'Article 10, the *Reynolds* Test and the Rule in the Duke of Brunswick's Case – The Decision in *Times Newspapers Ltd v United Kingdom* (2006) 3 *E.H.R.L.R.* 327.
[92] *Ibid.*, p.336. The ECtHR itself in *Times Newspapers v. United Kingdom* (App. No. 23676/03), 11th October 2005, reached this very conclusion.
[93] K. Rimell, 'A New Public Interest Defence for the Media' (2000) 11 *Ent. L. Rev.* 36, 38.
[94] See generally, I. Loveland, 'The Ongoing Evolution of *Reynolds* Privilege in Domestic Libel Law' (2003) *Ent. L. Rev.* 178. See also R. Ryan and D. Ryan, 'Defamation: Recent Developments in Relation to the *Reynolds* Case' (2006) 24 *I.L.T.* 311.

[5-29] The first point of observation on the post-*Reynolds* case law is that the concept of public interest reporting has been held to cover a range of areas such as sports,[95] child labour,[96] alleged incompetence of a government-owned company,[97] alleged political corruption[98] and alleged police corruption.[99] Nonetheless, where the subject matter is of very substantial public concern, the defence may be defeated by sensationalist reporting as in *Grobbelaar v. News Group Newspapers.*[100] The case of *James Gilbert Ltd v. Mirror Group Newspapers Ltd* [101] further revealed how the courts initially approached the concept of responsible journalism. The defence failed due to an unreliable source, inadequacy in the verification of information, lack of urgency in publishing the material, failure to give the claimant an adequate opportunity to comment and presentation of the material as fact rather than allegations.[102]

[5-30] In response to a 'powerful and sustained critique' of *Reynolds* by Lord Lester in *Loutchansky v. Times Newspapers Ltd (Nos. 2-5)*[103] the Court of Appeal held, that although the reasoning was powerful, it was bound to follow *Reynolds.*[104] The Court however went on to set out some key considerations in judicial determination of whether the standard of responsible journalism had been met. It explained that if the publication is privileged, then effectively this will provide a publisher with a complete defence given that a finding of privilege in this class of case essentially pre-empts a finding of malice. It highlighted the potential adverse consequences of setting the standard of journalistic responsibility too low

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[95] *Grobbelaar, v. News Group Newspapers* [2002] 1 W.L.R. 3024 *GKR Karate (UK) Ltd v. Yorkshire Post Newspapers Ltd* [2000] 2 All E.R. 931 and *Armstrong v. Times Newspapers Ltd* [2005] E.M.L.R. 33.

[96] *James Gilbert Ltd v. Mirror Group Newspapers Ltd* [2000] E.M.L.R. 680.

[97] *Bonnick v. Morris* [2003] 1 A.C. 300.

[98] *Galloway v. Telegraph Group Ltd.* [2006] EWCA Civ. 17.

[99] *Charman v. Orion Group Publishing Ltd* [2007] 1 All E.R. 622.

[100] Above, n. 95. Judicial disapproval of tabloid style publication methods is evident and has divided opinion as to whether it unduly restricts journalistic practices. For commentary which argues that it penalises tabloid newspapers, see S. Thomas, 'Red Devils', *The Guardian* (London), 4th November 2000 and J. McDermott, 'Can you do the Jigsaw?', *The Guardian* (London), 9th April 2001. For an opposing view, see P. Robertshaw 'The Review Roles of the Court of Appeal: *Grobelaar v News International'* (2001) 64 *M.L.R.* 923.

[101] Above, n. 96.

[102] It is to be noted that when the publication is foreign but there is some readership in England, the English courts have held that the test of responsible journalism must be judged against the international law dimension so that it cannot be presumed that the laws of the foreign countries on responsible journalism operate in the same manner as those in England. See *Lukowiak v. Unidad Editorial SA*, Q.B.D., 23rd July 2001, paras. [46], [61] and [62] and *Al Misnad v. Azzzaman Ltd and Ors.* [2003] EWHC 1783 (Q.B.); [2003] All E.R. (D) 338, paras. [34], [37], [44], [45], [46] and [48].

[103] [2002] Q.B. 783.

[104] The Court of Appeal explained: '[C]omplain as he may that their approach conflates a two-part test and effectively pre-empts the jury's role in deciding malice, Lord Lester must recognise the constraint of binding authority. The most we can do is attempt to illuminate the single composite test which Reynolds's case undoubtedly dictates and to identify certain of the crucial considerations likely to influence its application.' *Ibid.*, p. 803.

including the encouragement of the publication of defamatory matter which would harm the defamed individual,[105] the public and the media itself given that the public will '...cease to believe any communications, true or false.'[106] Finally, setting the standard of journalistic responsibility too high would deter newspapers from keeping the public informed.

[5-31] Empirical research on the operation of the *Reynolds* defence in the seven years following the decision reveals that the two factors which have been central to pre-publication conduct are whether the publisher attempted to contact the subjects of the potential publications[107] and what sort of tone or balance the publications adopted.[108] The same research revealed that a sizeable number of leading English libel law practitioners accepted that although post-*Reynolds* case law assisted in clarifying the scope and strength of the defence, the uncertainty inherent in such a case by case approach would necessarily continue.

[5-32] Finally, in the context of the application of *Reynolds*, it is important to refer to the emergence of the reportage defence. Post-*Reynolds* case-law has supported the application of the *Reynolds* defence to newspaper publications which neutrally report attributed allegations so long as the allegations are not adopted as being true.[109] Although the defence of neutral reportage was established in the context of a political dispute in *Al Fagih v. H.H. Saudi Research & Marketing (UK) Ltd*,[110] willingness to extend the defence beyond the

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[105] For academic commentary which argues that *Reynolds* and later case law have eroded the rights of the individual to redress or vindication for reputational damage, see J. Coad, '*Reynolds* and Public Interest – What About Truth and Human Rights?' (2007) 18(3) *Ent. L. Rev.* 75 and by the same author, 'The Irrelevance of Truth and Falsity in the New Law of Defamation' (2002) 13(5) *Ent. L. Rev.* 95. See also, The Simkins Partnership, 'The Price of Truth in the New Law of Libel' (2003) *N.L.J.* 600. However, the courts have made clear that in the application of the ten factors, the protection of the public interest also lies in the protection of reputation through the civil law of defamation – see *Buchanan v. Jennings* [2005] 1 A.C. 115; [2005] 2 All E.R. 273; [2004] 3 W.L.R. 1163 and *Greene v. Associated Newspapers Ltd* [2005] 1 All E.R. 30; [2005] Q.B. 972.

[106] Above, n.3, para. [41].

[107] The defence may not fail if allegations not put to claimant, see *Armstrong v. Times Newspapers Ltd*, above, n.95.

[108] A. Kenyon, *op. cit.*, n. 34, p. 223. The first of these factors was recently emphasised in *Galloway v. Telegraph Ltd* [2006] EWCA Civ. 17. For further analysis, see D. Bloy, 'What Price Irresponsible Journalism? Reflections on the *Galloway* Litigation' (2006) 11(1) *Comms. L.* 13.

[109] For an example of where the defence failed as the newspaper did not adopt allegations in a neutral fashion but was held to have embraced and embellished them, see *Galloway v. Telegraph Group Ltd*, above, n.98, para. [73].

[110] [2001] E.W.C.A Civ. 1634. It is also worth noting the comments of Simon Brown L.J. more generally at para. [26] on *Reynolds* privilege such that it '...is designed to enable a proper balance to be struck between on the one hand the cardinal importance of freedom of expression by the media on all matters of public concern, and on the other the right of an individual to his good reputation. Neither right is absolute, but the

political was indicated[111] by Simon Brown L.J. in *Mark v. Associated Newspapers.*[112] The reportage defence was endorsed in *Jameel v. Wall Street Journal Sprl*[113] and has more recently been the subject of attention by the Court of Appeal in *Roberts v. Gable.*[114] The nature of the defence was explained by Ward L.J. so that '[A] true case of reportage may give the journalist a complete defence of qualified privilege....'.[115] The judge went on to list matters which may be taken into account when considering whether there is a defence on the ground of reportage. These matters include whether the information is in the public interest, whether the journalist had adopted the report, made it his own or failed to report the story in a fair, disinterested and neutral way and the urgency of the publication.[116] In the same case, Eady J. at first instance had addressed the relationship between this defence and the *Reynolds* responsible journalism test and held that the qualified privilege defence may succeed in the reportage context despite failure to comply with some of the *Reynolds* checklist.

THE PUBLIC INTEREST DEFENCE: JAMEEL V. WALL STREET JOURNAL SPRL[117]

[5-33] The defence of *Reynolds* privilege based on responsible journalism was clearly a significant development in English defamation law and the protection of public interest speech. However, what proved just as significant was the application of *Reynolds*, which was itself anticipated by Lord Nicholls, when he pointed out that over time, a body of useful case law would build up. For the first time since *Reynolds*, the scope and operation of the defence came before the House of Lords in *Jameel.* On appeal, counsel for the *Wall Street Journal Europe Sprl* urged the House of Lords to replace the *Reynolds* test of 'responsible journalism' by a test of 'fair and non-negligent reportage' and in this respect to abandon the familiar duty/interest test and the ten factors. Having declined this

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former, particularly in the field of political discussion, is of a higher order, a constitutional right of vital importance to the proper functioning of a democratic society.'

[111] *Ibid.*, para. [35]. One commentator made the point '...that as an aspect of the *Reynolds* defence this followed from the rejection of a generic 'political reporting defence' in that case. See H. Johnson, 'Variation on the *Reynolds* Theme – The Reportage Defence: *Roberts v. Gable'* (2007) 12(5) *Comms. L.* 175.

[112] [2002] E.M.L.R. 38. The defence has been approved in subsequent decisions; see for example *Al Misnad v. Azzaman* [2003] E.W.H.C. 1783 (Q.B); [2003] All E.R. (D) 338, para. [47].

[113] Above, n. 5, see Lord Hoffmann, para. [62] and Baroness Hale, para. [149].

[114] [2007] E.W.C.A. Civ. 721.

[115] *Ibid.*, para. [59].

[116] Above, n.44, para. [61].

[117] Above, n. 5.

approach, the House of Lords nonetheless welcomed the opportunity to review the scope and application of *Reynolds* privilege.

Background

[5-34] The facts giving rise to the litigation may be briefly stated. The *Wall Street Journal Europe* published an article, the gist of which was that the Saudi Arabian Monetary Authority, at the request of United States law enforcement agencies, was monitoring bank accounts associated with some of the country's most prominent businessmen in an effort to prevent them from being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. In the second paragraph, a number of companies and individuals were named, among them Mr. Jameel's group of companies, who it was stated later in the article, "couldn't be reached for comment". The newspaper had obtained confirmation of the story in Washington through a confidential source within the US Treasury. At trial, the newspaper was however unable to prove the truth of its publication because officials in Saudi Arabia were unable to confirm, fearful as they were of reprisals from the Saudi authorities. Eady J.[118] and on appeal, the Court of Appeal, ruled against the successful application of *Reynolds* privilege, primarily on the ground that the defendant had failed to obtain the claimants' response to the inclusion of their names prior to publication.[119]

The Nature of *Reynolds* Privilege[120]

[5-35] The Law Lords were unable to agree on the unanswered question of whether *Reynolds* privilege introduced a new public interest defence or extended the traditional qualified privilege defence. According to Lord Bingham, *Reynolds* was '...built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues.'[121] In contrast, Lord Hoffmann held that *Reynolds* privilege does not stand for the traditional defence of qualified privilege and it is therefore

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[118] For discussion of Eady J.'s High Court judgment, see I. Cram, 'Reducing Uncertainty in Libel Law After *Reynolds v. Times Newspapers*? *Jameel* and the Unfolding Defence of Qualified Privilege' (2004) 15(5) *Ent. L. Rev.* 147.

[119] There was a second question on the law of libel before the House of Lords as to whether a trading corporation is entitled to receive financial compensation in libel without proving special damage. A majority held that it was not necessary to prove special damage. This aspect of the judgment is addressed briefly in Chapter 2.

[120] See N. Cox, *op. cit.*, n.74 and A. Scott, 'The Same River Twice? *Jameel v Wall Street Journal Europe*' *loc. cit.* n.72.

[121] Above, n.5, para. [28].

'...unnecessary and positively misleading to go back to the old law on classic privilege.'[122] He went on to differentiate *Reynolds* privilege from traditional privilege on two grounds. The first is that under *Reynolds* and unlike traditional privilege, it is the material and not the occasion which is privileged. Secondly, in contrast to the traditional defence, *Reynolds* privilege cannot be lost by proof of malice because the conduct of the defendant is measured by Lord Nicholls's factors in the determination of whether the material is privileged. Lord Hoffmann, joined by Baroness Hale,[123] endorsed the opinion of Lord Phillips in *Loutchansky v. Times Newspapers Ltd (Nos 2-5)*[124] to the effect that the *Reynolds* privilege is '...a different jurisprudential creature from the traditional form of privilege from which it sprang....'.[125] On this aspect of *Reynolds*, Lord Hoffmann concluded that '[I]t might more appropriately be called the *Reynolds* public interest defence rather than privilege.'[126] Unlike Lord Hoffmann and Baroness Hale, Lord Scott did not accept that *Reynolds* privilege is 'a different jurisprudential creature' [127] from traditional qualified privilege. Nonetheless, he appreciated that strict insistence on reciprocity between publisher and recipient does not appropriately recognise the role of the modern press in reporting on matters of public importance given that newspapers address their contents to the public at large.[128] As regards the duty limb of qualified privilege, Lord Scott described 'a professional duty'[129] under which newspapers exist to supply information to the public.

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[122] Above, n.5, para [57]. This helps to explain Lord Hoffmann's approach to the duty/interest limb of traditional qualified privilege. He held at para. [50] that: 'In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The *Reynolds* defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist.' It is worth noting the contrast with Lord Hope's approach to duty/interest at para. [107]where he explained that '[T]he duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed.'

[123] Above, n.5, para. [146].

[124] Above, n. 67.

[125] Above, n.5, paras. [35-36].

[126] Above, n.5, para. [46].

[127] Above, n.5, para. [135].

[128] Above, n.5, para. [129].

[129] Above, n.5, para. [138].

The Operation of *Reynolds* Privilege

[5-36] The manner in which *Reynolds* privilege operated had been variously described as 'haphazard'[130] as well as entailing a failure to emphasise 'the underlying rationale of the privilege'[131] and in which 'judges applied a dollop of hindsight.'[132] In *Jameel* itself, Lord Bingham criticised the narrow application of *Reynolds* by the Court of Appeal for a ruling which '...subverts the liberalising intention of the *Reynolds* decision.'[133] Similarly concerned by the operation of *Reynolds* privilege in the seven years pre-*Jameel*, Baroness Hale highlighted that '[W]e need more such serious journalism in this country and our defamation law should encourage rather than discourage it.'[134] In an attempt to address how *Reynolds* privilege should operate, the judgments will be discussed under the headings of (i) the ten Lord Nicholls's factors and (ii) the importance of editorial judgment.

(i)The Ten Factors and Overall Context

[5-37] The seven years of case law post-*Reynolds* and pre-*Jameel* revealed that an over-rigid application of Lord Nicholls's factors in each case could undermine their purpose, namely to encourage investigative reporting on matters of public importance. The Law Lords in *Jameel* acknowledged this reality and signalled that the focus must be on the article and the factors in a more holistic manner. Addressing the ten *Reynolds* factors of responsible journalism, Lord Bingham explained that 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.'[135] Therefore, according to Lord Hoffmann, '...this case suggests that *Reynolds* has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles.'[136]

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[130] A. J. Bonnington, 'Case Comment: *Reynolds* Rides Again' (2006) 11(5) *Comms. L.* 147,
[131] T. Gibbons, 'Responsible Journalism: *Charman v Orion Publishing Group Ltd*' (2006) 11(3) *Comms. L.* 97,
[132] D. Hooper, 'The Importance of the *Jameel* Case' (2007) 18(2) *Comms. L.* 62.
[133] Above, n.5, para. [35].
[134] Above, n.5, para. [150].
[135] Above, n.5, para [33]. Similarly, see Lord Hoffman, at para. [56],
[136] Above, n.5, para. [38].

(ii)Editorial Judgment

[5-38] In restating the *Reynolds* privilege and in order to give proper effect to the intention behind *Reynolds*, the importance of editorial judgment was emphasised by the Law Lords in *Jameel*.[137] Lord Hoffman explained that:

> 'A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as an editor.'[138]

[5-39] Lord Hoffman very clearly recognised the role of editorial judgment with the following *dicta*:

> 'If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting.'[139]

[5-40] In response to criticisms by Eady J. at trial, that the concept of responsible journalism was too vague, Lord Hoffmann responded that as a standard, it '...is as objective and no more vague than standards such as "reasonable care" which are regularly used in other branches of law.'[140] He argued that greater certainty could be attained by the building of a body of illustrative case law and the use of the Code of Practice ratified by the Press Complaints Commission as guidance.

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[137] Hooper observed that '[U]ntil the House of Lords decision, the way that the *Reynolds* case had been interpreted meant that it really was not likely to be successful except possibly where there was the pressure of the newsroom. It was unlikely to be available, for example, in relation to books, as there almost certainly would have been some further step that the author with greater time available could have taken to check the facts.' *Loc. cit.*, n. 132, p. 63.
[138] Above, n.5, para. [108]. Similarly, see Lord Hope, at para. [107].
[139] Above, n. 5, para. [51].
[140] Above, n. 5, para [55].

Application of *Reynolds* Privilege in *Jameel*

[5-41] As noted above, the newspaper had lost in the Court of Appeal for failure to delay publication of the respondents' names without including their side of the story. Applying the more holistic approach, the House of Lords held that this failure did not deny the defendant the protection of *Reynolds* privilege. Lord Bingham explained thus:

> 'The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. It is very unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored it was unlikely that they would know. It might be thought that this was the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect.'[141]

[5-42] Although uncertainty as to the operation of *Reynolds* privilege alongside the traditional defence of qualified privilege remained post-*Jameel*, the judgment in other respects was significant. It emphasised in strong terms the importance of respect for editorial judgment and that the application of the ten factors in this context is such that courts are not obliged to locate the public interest defence for each piece of information within the article. The Law Lords were clearly concerned that the application of *Reynolds* had not resulted in the anticipated liberalisation of protection of speech on public interest matters and appeared anxious to re-enforce the public interest speech element of the defence which appeared to have been somewhat eroded by the focus on journalistic ethics.

DAMAGES

[5-43] The operation of damages awards[142] in libel cases are just as significant for the media's ability to engage in public discussion as the substantive defences on offer. Indeed in *Gleaner Company Ltd & Anor v. Abrahams*[143] the Law Lords expressed desire that a

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[141] Above, n.5, para. [35]. Coad criticised the judgment for its failure to deal with the difficulty faced by the claimant in testing the sources relied on in the article. See J. Coad, 'Reynolds and Public Interest – What About Truth and Human Rights?' (2007) 18(3) *Ent. L. Rev.* 75, 83.

[142] The developments outlined over the following pages are based on caselaw. Despite the introduction in England of the Defamation Act 1996, these changes in the practice and procedure of libel trials failed to reach the statute book. This is because they were considered an issue of public policy and were thereby excluded from the Neill Committee's terms of reference upon which the Act was based; see C. Sandford and F. Boyle, *The Defamation Act 1996: the New Law*, (Northumbria Press, 1997).

[143] [2004] 1 A.C. 628.

large award by the Court of Appeal in the context of a Jamaican publication would in fact produce a chilling effect upon irresponsible journalistic conduct and foster more responsibility in the future. The English courts began more generally however to recognise the costs of the chill factor to the protection of public interest speech[144] and this in turn led to legislative and judicial changes in the practice and procedure in the operation of awards of libel damages. The recognition by the English courts of the link between high and unregulated damages awards and the potential for the chilling of discussion of matters of public interest against the backdrop of Article 10 obligations resulted in the constitutionalisation of this area of law.[145] These changes addressed the question of providing juries with guidelines in their assessment of the quantum of damages and the standard of appellate review of jury awards in defamation cases. The case law also necessarily discussed the role and scope of the different types of damages. As discussed in Chapter 3, the Irish judiciary has been largely unswayed by similar arguments of the need to modify the libel damages regime and it is instructive to consider the extent to which the English and Irish regimes now differ.

[5-44] The first step taken by the English courts to address concerns of ever-increasing damages awards in defamation actions occurred in *Sutcliffe v. Pressdram Ltd* [146] wherein a £600 000 libel award was set aside by the Court of Appeal with damages to be re-assessed by a fresh jury. The Court recognised the need to make the jury aware of the '...real value of large sums' such that an element of realism would be introduced in the awarding of damages. Little elucidation on how this could best be achieved was made other than to welcome the need for juries to be invited '....to consider what the result would be in terms of weekly, monthly or annual income if the money were invested in a building society deposit account without touching the capital sum awarded or, if they have in mind smaller sums, to consider what they could buy with it.'[147]

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[144] This process may be traced to *Derbyshire County Council v. Times Newspapers*, above, n.21.

[145] In *Rantzen v. Mirror Group Newspapers Ltd*, [1993] W.L.R. 953; [1993] 4 All E.R. 975, Neill L.J. considered jury discretion in the awards of damages against the Convention based test of what is 'necessary in a democratic society'.

[146] [1991] 1 Q.B. 153. Sonia Sutcliffe was the wife of the Yorkshire Ripper and the libel consisted of reports that she had been prepared to sell her story to the Daily Mail for £250,000.

[147] *Ibid.*, p. 284.

The dangers of high awards in defamation cases had been recognised by some judges as early as the 1960's with Holroyd Pearce L.J noting on the facts of the case in *Lewis v. Daily Telegraph Ltd* [1963] 1 QB 340, 375, that the awarding of damages in the case '...became somewhat divorced from reality.'

[5-45] As a result, judges were only permitted to lay down general guidelines to assist jury members, thus failing to steer the jury in the direction of a particular level of damages. The subsequent application of these guidelines in *Tolstoy Miloslavsky v. United Kingdom*[148] (hereafter *Tolstoy*) led to a jury award of £1,500,000 to Lord Aldington against the historian Nicolai Tolstoy for allegations in a pamphlet that he had been responsible for handing over Cossack prisoners to the Soviet authorities in 1945. It was this lack of proper judicial control of damages that led to a finding by the European Court of Human Rights (ECtHR) that this award was disproportionate and constituted a breach of the ECHR.

[5-46] The legislature stepped in a year later with the enactment of sections 8 (1) and (2) of the Courts and Legal Services Act 1990, respectively empowering the Court of Appeal to order a new trial where it considers a damages award 'excessive' and to substitute on appeal, a jury sum, as might appear to the Court to be proper.[149] *Rantzen v. Mirror Group Newspapers Ltd*[150] (hereafter *Rantzen*) afforded the Court of Appeal the opportunity to apply the legislation. Importantly, from the viewpoint of the potential scope of the legislation, the Court of Appeal believed itself bound to consider the application of the Act against a background of increased focus on the right to freedom of expression '....in the light of the guidance recently given by the House of Lords as to the relationship between the common law and article 10 of the Convention and also in the light of the guidance as to the proper scope of article 10 given by the European Court of Human Rights in Strasbourg.'[151]

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[148] (1995) 20 E.H.L.R.R. 442.

[149] As far back as 1965, the Joint Working Party of Justice and the British Committee of the International Press Institute recommended that the Court of Appeal should have the power to vary awards and that juries should be given specific guidance on quantum: Justice, *The Law and the Press*, (London, 1965).
Since the introduction of s.8 (2) of the 1990 Act, there have been a number of cases in which the Court of Appeal has had to examine awards of damages in the exercise of its legislative power afforded by the Act: *Gorman v. Mudd* [1992] CA Transcript 1076, *Rantzen v. Mirror Group Newspapers* Ltd [1993] W.L.R. 953, [1994] Q.B. 670, [1993] 4 All E.R. 975, *Houston v. Smith* [1993] CA Transcript 1544, *John v. Mirror Group Newspapers Ltd* [1997] Q.B. 586, [1996] 2 All E.R. 35, *Kiam v. Neil* (No.2) [1996] E.M.L.R. 493, *Jones v. Pollard* [1997] E.M.L.R. 233.
Under a summary procedure provided for in sections 8 to 10 of the Act, a judge without a jury, may provide an award of damages to a maximum of £10,000, if the defendant has no realistic prospect of successfully defending the action.

[150] Above, n.145. The case concerned the well-known television presenter Esther Rantzen whom the Sunday People accused of exposing children to sexual abuse by failing to inform a school of her knowledge that one of its teachers was a paedophile. See C. A. Hopkins, 'A Terrible (but Transient) Ordeal (1994) 53 *C.L.J.* 9.

[151] Above, n.145, p. 990.
The relevant House of Lords decision in this context is *AG v. Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, [1988] 3 All E.R. 545, in particular the judgment delivered by Lord Goff of Chieveley.

[5-47] These developments prompted the Court to subject large awards of damages to a more searching scrutiny than was customary in the past, namely; whenever the decision of the jury was such that '...no reasonable jury could have thought that the award was necessary to compensate the plaintiff and re-establish his reputation.'[152] This threshold for intervention was met, with the Court of Appeal cutting by more than half the jury award of £250,000. The Court continued by drawing a clear distinction between references to awards by juries in previous cases and awards substituted by the Court of Appeal in the exercise of its powers under section 8(2) of the Act of 1990; in light of the practice pertaining up to the case of *Sutcliffe v. Pressdam*[153] of giving juries only minimal guidance in carrying out their task of assessing damages, such previous awards are unreliable for reference purposes, unlike substituted awards by the Court of Appeal which were intended by the 1990 Act to provide over time a body of figures which could be relied upon in this regard.[154] The Court continued to rule out references to awards in personal injury cases.[155]

[5-48] Further changes in practice were introduced in *John v. Mirror Group Newspapers Ltd*[156] in which Sir Thomas Bingham criticised the current lack of guidance given to juries in defamation actions, noting that the result of the approach was that juries '...were in the position of sheep loosed on an unfenced common, with no shepherd.'[157] His criticisms were bolstered on account of a jury award of £75,000 compensatory damages and £275,000 exemplary damages for an allegation that the plaintiff was bulimic, despite the jury having been given the guidance suggested in *Sutcliffe v. Pressdram.*[158] In order to

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[152] [1993] W.L.R. 953, 972; [1993] 4 All E.R. 975, 994.
This represents a clear departure from earlier authorities such as *Bray v. Ford* [1896] A.C. 44 in which Lord Herschell expressed his belief that in actions for defamation '...damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide.' In *Youssoupoff v. Metro- Goldwyn-Mayer Pictures Ltd.*, (1934) T.L.R. 58, 585, (CA) the following rationale justified a lack of interference in the substitution of jury awards: 'The question is what amount the jury, as representing the public, the community, have fixed, and it is extremely rare to have that amount interfered with by the court.'

[153] Above, n. 146.

[154] Neill L.J. in giving the court's judgment reduced the amount awarded at trial by £140,000 resulting in a sum of £110,000 being awarded. This award has been criticised by I. Loveland, 'Reforming Libel Law: The Public Dimension' (1997) 46 *I.C.L.Q.* 561, 565 for failing to indicate '...which particular "objective standard of reasonable compensation" he was deploying, or indeed to which standards he was rejecting.'

[155] The presence of a vindicatory element attached to an award of damages in defamation actions is absent in personal injury actions and the Court of Appeal accordingly considered itself compelled to reject the proposal that libel juries should be referred to awards made in actions involving serious personal injuries.

[156] [1997] Q.B. 586; [1996] 2 All E.R. 35.

[157] [1997] Q.B. 586, 608, [1996] 2 All E.R. 35, 49.

[158] Above, n. 148. The Court of Appeal also appears to have been influenced by the ECtHR's ruling in *Tolstoy*, above, n. 148 and a decision of the Australian High Court in *Carson v. John Fairfax & Sons Ltd* (1993) 178 C.L.R. 44. In the Australian case, the majority concluded that from that point on, appeal courts,

rectify this situation, the solution proposed went much further than previous changes in practice and procedure; in assessing compensatory damages in a defamation case a jury in future was no longer only to be referred to previous libel awards made or approved by the Court of Appeal,[159] but also to conventional awards in personal injury cases,[160] and furthermore there was no reason to prevent counsel on either side or the judge in summing up from indicating to the jury the level of damages which they believed it appropriate to award.[161] It appeared that the only prohibited reference was to awards by juries in previous libel cases. However, there was an indication that this position might be changed if the guidelines advanced proved workable in the future.[162] Another element of the principles of law relating to jury awards of damages in defamation cases which the Court focused upon was exemplary damages. Although it was accepted that exemplary damages can be awarded,[163] the Court considered it necessary to provide the jury with additional guidance. Such guidance involved the jury being satisfied that the publisher must have had no genuine belief in the truth of what was published and must have acted in the hope or expectation of material gain. The Court also included as relevant the means of the defendant, his degree of fault and the amount of any profit he may be shown actually to have made from his unlawful conduct.

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trial judges and counsel should be permitted to refer to awards made in personal injuries cases in subsequent libel cases to ensure a rational nexus between the two sets of awards.

[159] Such references are to be made with discretion so as to avoid shifting the focus from the alleged defamatory statement at issue to the similarities and differences between the facts in the present case and those in previous cases.

[160] While there was no attempt to equiperate damages for personal injuries and damages for defamation, it was considered offensive on public policy grounds to allow the awarding of higher amounts for damage to reputation than serious physical injury. This was an approach advocated in the earlier case of *McCarey v. Associated Newspapers Ltd* [1965] 2 Q.B. 86, 109 by Diplock L.J. who stated as follows: 'It is, I think, legitimate as an aid to considering whether the award of damages by a jury is so large that no reasonable jury could have arrived at that figure if they had applied proper principles to bear in mind the kind of figures which are proper, and have been held to be proper, in cases of disabling physical injury.'
It is also worth noting that since the Court of Appeal's decision in *Heil v. Rankin* [2001] Q.B. 272, [2000] 3 All E.R. 138, the maximum general damages award available in personal injury actions has been raised from £150,000 to £200,000. As a result, Eady J. said in *Reed & Lille v. Newcastle Borough Council* [2002] EWHC 1600, that there is now a ceiling of £200,000 for compensatory damages in libel cases. This was affirmed in *Cleese v. Clark* [2004] E.M.L.R. 37.

[161] The Court was unconvinced, unlike earlier courts that such a move would result in the proceedings developing into an auction, (see *Ward v. James* [1965] 1 All E.R. 563, 576) but was of the belief that reference to figures by both judge and counsel would '...induce a mood of realism on both sides.'

[162] The Court of Appeal exercised its powers under s.8 (2) of the Courts and Legal Services Act 1990 and RSC Ord 59, r11 (4) to substitute the figures of £75,000 and £250,000 for compensatory and exemplary damages respectively for £25,000 and £50,000.

[163] It was established in *Rookes v. Barnard* [1964] A.C. 1129 in a non-defamation case that punitive damages can be awarded. This was confirmed in the defamation context in *Broome v. Cassell* [1972] A.C. 1027; [1972] 2 W.L.R. 645.

[5-49] The powers of the Court of Appeal under section 8(2) of the 1990 Act and the guidance to be given to juries both as to an appropriate bracket for the level of damages and the relevance of comparable awards were re-examined in *Kiam v. MGN Ltd.*[164] The Court recognised the expanse of its powers under section 8(2) of the 1990 Act in the sense that it urged caution in overruling a jury's award such that a '...court should not interfere with the jury's award unless it regards it as substantially exceeding the most that any jury could reasonably have thought appropriate.'[165] On this test, the Court appeared concerned not to further erode the role of the jury in defamation actions.

[5-50] In order to avoid a 'battle of comparables'[166] whereby time-consuming and complex arguments might develop by counsel in the presence of the jury, about the facts of other libel cases and the extent to which they were they were comparable to the case at hand, Simon L.J. reasoned that the only detailed guidance on figures directed towards the jury should come from the judge. He was however, prepared to countenance the input by counsel into suggested figures through the use of a revised procedure such that in the event of a judge deciding to suggest a bracket for damages, each side should have a proper opportunity to argue the matter after having exchanged authorities and made submissions indicating how they propose to argue it. If either side suggested that there is a close comparable in point, consideration should be given to handing the jury a note identifying the particular points which each side wished to emphasise. Otherwise, counsel should not generally refer to comparables and, if they do, the judge should be alert to explain to the jury how those are properly taken into account in his own bracket. The dissenting judgment of Sedley L.J. on the role of exemplary damages in defamation cases is worthy of note, wherein he explained that there was not necessarily any incompatibility between the moderation of compensatory awards for libel and the deterrent purpose served by exemplary damages. He accepted it was possible for damages to be assessed by judges under the present law, but that the underling tension between compensation and deterrence was something only Parliament could resolve.

[5-51] In the recent Privy Council decision in *Gleaner Company Ltd & Anor v. Abrahams (Jamaica)*[167] the plaintiff, Mr. Abrahams, a former Minister of Tourism for Jamaica had

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[164] [2002] 2 All E.R. 219; [2002] 3 W.L.R. 1036.
[165] *Ibid.*, p. 234.
[166] This phrase was used by Pill L..J in *Kiam v. Neil (No.2)*, above, n. 164.
[167] [2004] 1 A.C. 628. The Court usefully summarised the position in English law in respect of jury guidance in defamation cases.

been seriously libeled[168] and was awarded by the jury a sum of J$80.7 million, which at that time was the equivalent of £1.2 million. This was set aside by the Court of Appeal and substituted for J$35 million which equated to £533,000. A further appeal was lodged by the defendants on the ground that the substituted award was still excessive, that it curtailed the right to freedom of expression under s.22 of the Constitution of Jamaica, and that the Court of Appeal erred in law in ruling that juries should not be referred to awards of damages for pain and suffering and loss of amenity in personal injury cases. Giving the advice of the Privy Council, Lord Hoffman supported the reservations expressed by Forte P. for generally not allowing counsel to address the jury about first instance awards in other defamation cases.[169] In relation to reference to awards made by the Court of Appeal itself, their Lordships acknowledged that in Jamaica, unlike England, there did not exist a corpus of authority to refer the jury to and therefore accepted the formula 'multiple times any award ever granted in Jamaica in these type of cases' as sufficient. The trial judge failed to make any reference to personal injury awards, which the appellants submitted was an error of law. This argument was rejected on the basis that the question whether juries in assessing libel damages should be referred for purposes of comparison to awards of general damages in personal injury claims was one of policy. The Jamaican courts were therefore not incorrect in law in preventing this form of comparison.[170] In terms of the test for deciding whether an award is excessive, their Lordships supported Neill L.J.'s formulation in *Rantzen* ('Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation?') rather than that formulated in the present case ('Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and re-establish his reputation?'). Although their Lordships saw no actual difference in meaning between the two, for the sake of avoiding linguistic intricacies at a future date, they urged the Jamaican courts to adhere to Neill L.J.'s formulation.

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[168] In fact, in an interlocutory judgment in 1994 the Court of Appeal struck out the defences on the ground that the defendants were unable to plead any facts to support them. The only remaining issue was the amount of damages.

[169] Although this was the general rule, Forte P. had in fact allowed counsel for the defendants to refer to two other awards in Jamaica while commenting to the jury: 'Comparison with other awards is very difficult, because the circumstances of each libel case are almost bound to be different. You are not going to find two cases with the factors the same, and indeed this fact was borne out in Mr. George's [for the defendants] and Mr. Spaulding's [for the plaintiff] addresses to you.'

[170] However, the judgment makes it clear as to the preferred policy direction of their Lordships. Lord Hoffman appears to view awards in the two categories as performing different social functions and on this basis that one should be no guide for the other.

[5-52] By a combination of many factors including the serious financial loss or actual damage to health suffered by Mr. Abrahams, the sixteen years during which the defendant newspapers repeatedly resisted the attempts of the plaintiff to clear his name and the maintenance of the allegations far beyond the point at which it became obvious that they had no evidence to support them, it was decided that the Court of Appeal award was justified. Their Lordships were critical of the behaviour of the defendants and, as noted at the beginning of this section, hoped that such an award would in fact produce a chilling effect upon this type of irresponsible journalistic conduct and foster more responsibility in the future.

[5-53] The award of £533,000 was more than twice what was the prevailing ceiling set on English libel awards causing obvious concern to newspapers. The fact that the Law Lords did not view this as a case in which freedom to publish was in issue, on the basis that the publication was wrongful and fell outside the permissible limits of section 22, coupled with their approval of ignoring personal injury awards in the assessment of libel damages indicated a worrying potential direction. The case is also important for its extension of the deterrence argument from punitive to compensatory damages on the grounds that defamation is an intentional tort and the conduct of the defendant is capable of aggravating the damages. Accordingly, '[T]he monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence.'[171]

[5-54] Clearly, values come into play in the area of damages awards and there appears somewhat of a mixed position in this respect from the English judiciary. On the one hand, the English courts have emphasised that those defamed must be compensated to the extent of any damage caused to reputation. In the assessment of compensation, there was a clear acceptance of the need to assist the jury in this exercise. This points to the property concept of reputation (see further Chapter 2) so that compensation is determined based on reputational injury. However, more recently, the approach to the punitive element of compensatory damages in *Gleaner Company Ltd & Anor v. Abrahams*[172] points to honour and dignity concepts of reputation (see Chapter 2).

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[171] Above, n.167, para. [42].
[172] Above, n. 167.

CONCLUSION

[5-55] Despite the absence of a constitution in England, Convention protections for freedom of expression and reputation received increased significance under the Human Rights Act 1998 and provided opportunities for quasi-constitutionalisation of these rights. The *Reynolds* public interest defence represented an effort to accommodate both rights in a move away from the traditional strict liability position to one operated on fault. The introduction of the fault standard of liability recognised the chilling effect that the strict liability principle had produced on dissemination of material of public importance. However, this standard also acknowledged the instrumental value of the media so that they must act according to the tenets of responsible journalism to ensure the release of accurate and reliable information to the public. The English jurisprudence therefore offers a developing body of case law on journalistic ethics for Irish defamation law, which has recently endorsed the *Reynolds* public interest defence.[173]

[5-56] Interestingly in *Reynolds*, counsel for *the Times* in both the Court of Appeal and House of Lords had argued for expansion of the 'common convenience and welfare of society' limb of traditional qualified privilege to protect political expression. Lord Lester had obviously appreciated the potential for development of the duty to inform rationale of qualified privilege. This chapter has argued that although the House of Lords explained its development of the law on the basis that it liberalised the common law qualified privilege defence, the *Reynolds* defence is too far removed from the traditional position to support this and instead is a new stand-alone public interest defence. This interpretation of *Reynolds* has also been endorsed by a number of the Law Lords in *Jameel*. It will be argued on a number of grounds in the Introduction to Part III of the thesis that the establishment of the *Reynolds* defence is to be preferred over expansion of the traditional defence in the reform of Irish defamation law.

[5-57] The process of quasi-constitutionalisation actually commenced with reform of the procedure and law relating to awards of damages in defamation cases. The potential consequences of unregulated and disproportionate damages awards for both speech and reputation rights were explored in Chapter 3. That, unlike the English courts, the Irish judiciary has not accepted the chilling effect argument in respect of damages is returned to

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[173] *Hunter v. Duckworth and Co. Ltd & Anor*, above, n. 2 and *Leech v. Independent Newspapers (Ireland) Ltd*, above, n. 3.

for analysis in Chapter 9. The arguable imbalance in the protection of speech and reputation in the context of the potential for an award of exemplary damages represents a weakness in the English approach and this point is also explored further from the Irish constitutional perspective in Chapter 9.

CHAPTER 6

THE UNITED STATES AND THE BIRTH OF THE PUBLIC FIGURE DOCTRINE

INTRODUCTION

[6-01] The developed free speech jurisprudence of the United States courts and the extensive academic literature produced by this case law have addressed many important elements of defamation law. The courts have been presented on many occasions with clashes between freedom of expression and reputation and have been tasked with reconciling these rights. Unlike the constitutional guarantee of good name in Ireland, the United States constitution does not contain any express guarantee for the protection of reputation.[1] Although the case law recognises and protects reputation,[2] the value of reputation is both constitutionally and socially of a different value[3] than the Irish protection of good name. Given this significant distinction between the constitutions of the two jurisdictions, the standard of protection afforded to false defamatory statements by *New York Times v. Sullivan* [4] (hereafter *New York Times*) may not be constitutionally appropriate in this jurisdiction to reconcile the rights of free speech and reputation.[5]

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[1] The First Amendment provides, *inter alia*, that '[C]ongress shall make no law...abridging the freedom of speech, or of the press.' In *Siegert v. Gilley* (1991) 500 U.S. 226, Rehnquist J. pointed out that '[D]efamation itself is a tort actionable under the laws of most States, but not a constitutional deprivation.' This supported the Supreme Court's position in *Paul v. Davis* (1976) 424 U.S. 693.

[2] In *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 147 Harlan J. referred to reputation and the important social values which underlie the law of defamation as 'competing considerations' so that an accommodation between them and freedom of expression is necessary in all libel actions arising from a publication concerning public issues. In *Gertz v. Welch Inc.*, (1974) 418 U.S. 323, 341 the Supreme Court explained that '[T]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.'

[3] A leading First Amendment scholar has observed the following in respect of the protection of reputation in the United States: '[T]he American attitude towards reputation is unique. In Europe, where pre-capitalist concepts of honor, family, and privacy survive, reputation is a weighty matter not only for the remnants of the nobility who still fight duels to protect it, but for all the middle groups who flood the courts with petty slander litigations as we flood ours with automobile and other negligence actions. But where tradition is capitalistic rather than feudalistic, reputation is only an asset, "good will", not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.' (footnote omitted). See R.A. Smolla, 'Let the Author Beware: The Rejuvenation of the American Law of Libel' (1983) 132 *U. Pa. L. Rev.* 1, 17.

[4] (1964) 376 U.S. 254. The standard of liability is discussed thoughout the chapter.

[5] See for example the Law Reform Commission, *Report on the Civil Law of Defamation*, (LRC 38-1991), p. 83, E.O'Dell, 'Does Defamation Value Free Expression? The Possible Influence of *New York Times v. Sullivan* on Irish Law (1990) 12 *D.U.L.J.* 50, 69 and U. Ni Raifeartaigh, 'Fault Issues and Libel Law – A Comparision Between Irish, English and United States Law' (1991) 40 *I.C.L.Q.* 763, 774.

[6-02] It is submitted in this thesis that the constitutional guarantee of freedom of expression in Article 40.6.1°(i) has not been sufficiently developed and applied, resulting in an inappropriate balance between the rights to freedom of expression and reputation in defamation law. Until the early 1960s, United States defamation law, similar to the Irish position, was largely modeled on English common law principles. However, from this point in time onwards, the United States Supreme Court in a number of leading judgments moved away from the traditional position. It carried out this exercise through the employment of the First Amendment which was used to shape defamation law, and in the process effect a radical shift in the balance which had previously existed between rights of speech and reputation. As explained by one commentator[6], '[T]he lesson of the U.S. experience is that the common law has to be interpreted in the light of the constitution. It is simply an example of constitutional supremacy.'[7] Even if the *New York Times* standard of protection is rejected in this jurisdiction, the American case law remains valuable in providing a constitutional perspective on the development of defamation law.

[6-03] Although much of American defamation law has addressed the question of the public/private figure divide *per se*, drawing a distinction based on status has created jurisprudence on other elements of defamation law relevant to speech on matters of public interest. The relevant jurisprudence has addressed evidentiary standards, the allocation of the burden of proof and the types of and circumstances in which damages are awarded. The case law and academic commentary on these other aspects of defamation law serve to fulfill a valuable role when addressing the need for reform of Irish defamation law, in addition to the more confined question of whether a public/private figure divide is constitutionally acceptable to serve an appropriate reconciliation of the values underlying Articles 40.6.1°(i) and 40.3.2.°

THE PUBLIC FIGURE DOCTRINE AND THE CONSTITUTIONALISATION PROCESS

The Argument from Democracy

[6-04] Unlike the position in Ireland, as discussed in Chapters 3 and 8, the United States adopts a distinction in defamation law based on plaintiff categories so that in bringing a

[6] E.O'Dell, 'Reflections on a Revolution in Libel' (1991) *I.L.T.* 181.
[7] *Ibid.*, p. 183.

defamation action, a public official or figure faces a different standard than a private party. Adopting this position required the courts to engage in a process of defining plaintiff categories which produced many cases, but arguably no final definitional resolution. Given the general absence of examination of the values underlying the Irish constitutional free speech guarantee, it should not be surprising that it has escaped interpretative scrutiny as to whether it may support different standards of proof for public and private figure plaintiffs in defamation law. However, the recent acknowledgment of the democratic objectives which support Article 40.6.1°(i) as discussed in Chapter 1, alongside the recent domestic jurisprudence endorsing a public interest defence in Chapter 3, make it appropriate to consider the public figure doctrine in this modern democratic context. For even if the doctrine is not considered acceptable within the Irish constitutional framework, the reference in section 24(2)(a) of the Defamation Bill 2006 as to whether a statement refers to the performance of public functions will remain to be determined through case law, and the American case law remains valuable in providing a constitutional perspective of the development of defamation law in this respect. This point is returned to for further analysis from the Irish perspective in Chapters 8 and 9 on the public interest defence and damages respectively. This section addresses the relevant case law on the public figure doctrine.

[6-05] An appeal to the United States Supreme Court of a $500,000 jury award of damages[8] in an Alabama court and affirmed by the state supreme court,[9] provided the highest court in the land with the opportunity to review a state judgment in a civil libel action.[10] The Court used the occasion in *New York Times* to put in place new contours for constitutional defamation law.[11]

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[8] According to Loveland, '...neither the Alabama judiciary nor Alabama juries were likely to discharge their legal functions in a spirit of non-partisan objectivity towards critics of their state's racist political culture.' See I. Loveland, *Political libels: a comparative study*, (Hart, 2000), pp. 65-66.
The trial judge had not indicated the division of the award between general and/or punitive damages.

[9] (1962) 273 Ala. 656, 144 So. 2d 25.

[10] The first amendment speech and press clauses apply to the states by reason of the fourteenth amendment: *Gitlow v. New York*, (1925) 268 U.S. 652.

[11] For a general review of defamation law prior to this constitutional development, see, Developments in the Law – Defamation, (1956) 69 *Harv. L. Rev.* 875. According to Bertucci, the Court proceeded to sweep away the holding of thirty-six jurisdictions by finding that erroneous statements on debated public issues are inevitable, see D. Bertucci, 'Defamation of a Public Official: The *New York Times* Case in Perspective', (1965-66) 15 *DePaul L.Rev.* 376, 386. Loveland however highlights the expansive protection offered by some states to freedom of speech in the nineteenth and early twentieth centuries, *op. cit.*, n. 8, chpt 3. Indeed, for many years before *New York Times*, the fair comment privilege at common law had protected criticism of public officers and their official conduct. However, judicial division existed as to whether such criticism was limited to comment or extended to protect false statements of fact. The majority of courts limited the defence to comment. In *Post Publishing Co. v. Hallam*, (6th Cir. 1893), 59 Fed. 530, Judge Taft argued in favour of the more limited protection, fearing that 'good men' would be deterred from entering public office if it were otherwise. However, the minority view, lead by *Coleman v. McLennan*, (1908) 78 Kan. 711, 98 extended the privilege to encompass false statements of fact made in good faith; see generally, V. E. Schwartz, K. Kelly

[6-06] The publication in question arose from the ongoing racial conflict in the South.[12] The *New York Times* had carried an advertisement by civil rights activists alleging violation by the authorities in Montgomery, Alabama, of black civil rights. Although the plaintiff had not been specifically mentioned by name, he claimed to have been defamed by the word 'police' in the third paragraph given that he was the elected Montgomery Commissioner responsible for the supervision of the police department.[13] He also pointed to factual mistakes in the publication.[14]

[6-07] Delivering the Court's opinion, Brennan J. opted to hang the decision by analogy with seditious libel.[15] The Sedition Act of 1798, which had criminalised defamation of the President, Congress or the federal government was allowed to expire after two years in

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and D.F. Partlett, *Prosser, Wade and Schwartz's torts: Cases and Materials*, 10th Ed., (Foundation Press, 2000), Chpt XVII, p.873. See also D. W. Noel, ' Defamation of Public Officers and Candidates' (1949) 49 *Colum. L. Rev* 875 who argued for wider acceptance of the rule that a conditional privilege applies to make misstatements of fact.

[12] The advertisement had been carried at the height of civil and political unrest in Alabama and it may well be the case that the outcome was influenced by the environment of the day. As observed by a commentator, 'The source of many of the problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth. In consequence the decision has not stood the test of time well when applied to the more mundane cases of defamation arising with public figures and officials.' See R. E. Epstein, 'Was *New York Times v. Sullivan* Wrong?' (1986) *53 U. Chi. L. Rev.* 782, 787.

Similarly, it has been argued that the Court '...overreacted to what seemed a clear example of political persecution whereas in the normal situation the critic will not require its extraordinary safeguards because the jury will give him a fair trial on the issue of truth.'; see D. C. Kramer, 'The Right to Denounce Public Officials in England and the United States', (1968) 17 *J. Pub. L.* 78, 98.

See further A. Lewis in '*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment' (1983) 83 *Columbia L. Rev.* 603 and also the same author's analysis in *Make No Law: the Sullivan case and the First Amendment* (Vintage Books,1992) and *'Journalists and the First Amendment'* in D. Kingsford-Smith and D. Oliver, (eds) Economical with the Truth: The Law and the Media in a Democratic Society' (ESC Publishing, 1990), pp. 1-15. For a depiction of events in the Southern states precipitating this decision, see S.R. Pierce. Jr. 'Anatomy of an Historic Decision: *New York Times Co. v. Sullivan*' (1964-1965) 43 *N.C.L.Rev.* 315, pp. 316-323.

[13] There were ten paragraphs in the advertisement of which the third and sixth formed the basis of the action. The relevant paragraphs respectively read as follows:

'In Montgomery, Alabama, after students sang, 'My Country, Tis of Thee' on the State Capital steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.'

'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times – for 'speeding', 'loitering' and similar 'offences.' And now they have charged him with 'perjury' – a felony under which they could imprison him for ten years....'

[14] Dr. King had not been arrested seven times, rather four; the students on the Capitol steps sung the National Anthem and not "My Country, 'Tis of Thee" and the students dining hall had never been padlocked.

[15] This argument had been presented to the Court by counsel for the newspaper. As regards the analogy, BeVier writes that it is '...wholly apt, because few topics are as easily included within the political speech principle as the official conduct of a public official....' See L. BeVier, 'The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle', (1977-78) 30 *Stan. L. Rev.* 299, 348.

response to criticisms that it violated the First Amendment.[16] Justice Brennan accepted the logic of the argument that the Alabama law, which allowed for the presumption of falsity in relation to political commentary and other forms of public discourse,[17] placed the right to criticise government and its officials in danger.[18] Justice Brennan considered the Court bound to examine the case '...against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open....'.[19]

[6-08] There was no doubt in Justice Brennan's mind that the *Times* advertisement constituted '...an expression of grievance and protest on one of the major public issues ...' of the day.[20] The question was whether it forfeited constitutional protection by the falsity of some of its factual statements and by its alleged defamation of the defendant.[21] Alert to the danger that a fear of damages awards under defamation rules such as those invoked by the Alabama courts could produce self-censorship, which '...dampens the vigor and limits

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[16] According to Justice Brennan, it was nonetheless an important piece of legislation given that it '...first crystallized a national awareness of the central meaning of the First Amendment.' Above, n. 4, p.273 See generally L. Levy, Emergence of a Free Press (Oxford University Press, 1985), D. A. Anderson, 'The Origins of the Press Clause', (1983) 30 *UCLA L.Rev.* 455 and R. P. Bezanson, 'Institutional Speech' (1995) 80 *Iowa L. Rev.* 735. An influential opponent of the law of seditious libel was a Michigan judge called Thomas M. Cooley: '[T]he evil likely to spring from the violent discussion', he considered, 'will probably be less and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.' See T.M. Cooley, A Treatise on the Constitutional Limitations (Da Carpo, 1972), p.429.

[17] The prevailing common law in Alabama at the time of the publication was based on a strict liability system. If a publication subjected the plaintiff to public contempt or was such as to injure him in his public office, it was deemed libelous *per se*. The onus was on Sullivan to establish that the publication was of and concerning him and if this was done, even errors in detail would constitute libel. Following the establishment of the falsity of the publication, damages were presumed.

[18] 'Raising as it does the possibility that a good faith critic of government will be penalized, for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.' Above, n. 4, p. 292. This proposition required that truth as a defence would only succeed if proved in every particular. Brennan J. was alert to the danger this carried: 'It is often difficult to prove the truth of the alleged libel in all particulars. And the necessity of proving truth as a defence may well deter a critic from voicing criticism, even if it be true, because of doubt whether it can be proved or fear of the expense of having to do so.' Above, n. 4, p. 279.

[19]Earlier in *Thornhill v. Alabama* (1940) 310 U.S. 88, 102, the Supreme Court said: 'Freedom of discussion...must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'

[20] Above, n. 4, p. 271. Pedrick considered the carrying of such paid advertisements as concerning the 'common carrier' duty of the press to carry divergent views. See W.H. Pedrick, 'Freedom of the Press and the Law of Libel: The Modern Revised Translation' (1963-64) 49 *Cornell L.Q.* 581, 598.

[21] In *Chaplinksky v. New Hampshire* (1942) 315 U.S. 568, 572, the Supreme Court had expressly included libel within the class of utterances that '...are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Subsequently in *Beauharnais v. Illinois* 343 U.S. (1952) 250, 266 the Court considered that '[L]ibelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'

the variety of public debate...',[22] the Supreme Court formulated a new standard of liability specifically applicable to public officials:

> 'The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not.'[23]

[6-09] The above standard had to be met with 'convincing clarity.'[24] However, the Court held that on the presented evidence, a finding of negligence was the extent of liability that could be imposed upon the newspaper.[25] Such a finding reflected the fact that there had been several inaccuracies in the advertisement.[26]

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[22] Above, n.4, p.279.

[23] Above, n. 4, pp. 279-80. Justices Black, Goldberg and Douglas were prepared to go further and afford an absolute privilege for all comment on public affairs. It is not surprising that Justice Black espoused this position in *New York Times*, given that he commented as follows in a public interview two years prior to the decision: "I understand that it is rather old-fashioned and shows a slight naïveté to say that "no law" means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which almost convince me, that it is very foolish of me to think "no law" means no law. But what it says is "Congress shall make no law respecting an establishment of religion," and so on." See E.Cahn, 'Justice Black and First Amendment "Absolutes": A Public Interview', (1962) 37 *N.Y.U. L. Rev.* 549. In line with these Opinions, see D. Meiklejohn, 'Public Speech and Libel Litigation: Are they Compatible' (1985-1986) 14 *Hofstra L. Rev.* 547. See also R. Gilson and M. Leopold, 'Restoring the "Central Meaning of the First Amendment": Absolute Immunity for Political Libel', (1986) 90 *Dick. L. Rev.* 559, 572-75 who support absolute immunity from libel actions for political speech. See also P.A.Lebel, 'Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework' (1987) 66 *Neb. L.R.* 249, who argues that the only truly adequate protection for criticism of government is the ability to say whatever one wishes about government without the possibility of being called to account in any governmental forum.

[24] Above, n. 4, pp. 285-286. One author has described this standard as presumably falling '...somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt.' See L. H. Bloom, Jr., 'Proof of Fault in Media Defamation Litigation' (1985) 38 *Vand L. Rev.* 247, 255. According to Anderson, a requirement that certain facts be established with clear and convincing proof rather than by a preponderance of the evidence accomplishes two things. Firstly, it will result in juries resolving more cases in favour of speech than that they would under a preponderance standard and secondly, it gives judges additional powers to overrule juries as it is easier to hold that a verdict is not supported by clear and convincing proof than to hold that it is not supported by a preponderance of the evidence. See D.Anderson, 'W. Page Keeton Symposium on Tort Law: Torts, Speech and Contracts' (1997) 75 *Tex. L. Rev.* 1499, 1510-1511.
This standard was higher than the ordinary preponderance of the evidence test imposed on most other civil actions. Loveland has also argued that this enhanced burden of proof would assist federal courts to overturn state court decisions and substitute their own judgments rather than sending the case back to the state court for a new trial. *Op. cit.*, n. 8, p. 70.

[25] This finding illustrates the level of proof required to ground a finding of actual malice. Despite evidence that the newspaper had in its own files articles already published showing the falsity of some of the charges against the plaintiff, an admission by a secretary of the newspaper that he suspected one of the charges was false and a refusal to retract for the Respondent despite retraction on foot of a similar demand by the Governor of Alabama, the Court did not consider this amounted to proof of actual malice.

[26] This specific finding prevented the Alabama court from imposing any greater liability on the newspaper upon return of the case to it.

[6-10] A primary advantage of the high fault threshold of *New York Times* is the latitude it offers to media defendants to expose wrongdoing and corruption in public office. It seeks to ensure a vigorous and enterprising press that is free to scrutinise those in power. It also serves to encourage publication in circumstances where a journalist has a good faith belief in a story but is too fearful to publish lest a jury find the burden of proving truth has not been satisfied. Nonetheless, the decision raises questions as to its costs for libel plaintiffs, the citizenry and media defendants themselves. [27] These costs are considered throughout this chapter and applied in the Irish context in Chapters 8 and 9.

THE DEVELOPMENT OF THE PUBLIC/PRIVATE FIGURE DIVIDE

Public official and official conduct

[6-11] In the same year as the decision in *New York Times*, the Supreme Court in *Garrison v. Louisiana* [28] held that for statements to be covered by the *New York Times* protection, they must relate to the office of the public official and not merely the officer personally.[29]

Given the absence of definition of 'public office' in *New York Times*,[30] it was necessary for the Court to subsequently consider this concept. *Garrison* related to criticism at a press conference by a District Attorney directed towards local judges for what he alleged was a failure on their part to administer justice in an efficient and effective manner. The criticisms were held as protected statements under the *New York Times* standard. *New York Times* was also successfully applied to charges of illegal conduct concerning a candidate for the Democratic nomination for the United States Senate some forty years previously in

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[27] For an article predicting difficulties in surmising on the course of development of defamation law following *New York Times*, see H. Kalven Jr., 'The *New York Times* Case: A Note on the Central Meaning of the First Amendment' (1964) *S.Ct. Rev.* 191.

[28] (1964) 379 U.S. 64. The Court pointed out that the public's interest includes 'anything which might touch on an official's fitness for office...Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'

[29] In earlier case law, the prosecution in Crosswell had argued that '[T]o expose personal vices, defects and foibles to the public eye, corrupts the morals of the community, tends to drive useful men from office, and to render the press a vehicle to scatter firebrands, arrows and death.' See *Johns. Cas.* 307, 350 (N.Y. Sup. Ct. 1804).

[30] In *New York Times*, the Court had provided as follows: 'We have no occasion here to determine how far down into the ranks of government employees the "public official" designation would extend for the purpose of the rule, or otherwise to specify categories of person who would, or would not be included.' Above, n.4, p. 282, n. 23.

Monitor Patriot Company v. Roselle A Roy[31], in *Ocala Star-Banner Co. v. Damron*,[32] to perjury charges against a county tax assessor and in *Time, Inc. v. Pape*,[33] in respect of allegations of police brutality related to a city deputy chief of detective's official conduct.

[6-12] The definition of public official as distinct from public office took a further two years post *New York Times* to clarify. The Supreme Court in *Rosenblatt v. Baer* [34] provided the following definition:

> 'A person is a public official if the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees...the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.'[35]

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[31] (1971) 401 U.S. 265, 274. According to the Court, '[G]iven the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for office. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.' The Court also went on to explain that a '...principal activity of a candidate...' is that he puts before the electorate '...every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him.'
The freedom to discuss political candidates had previously been recognised at state level. Burch J. of the Kansas Supreme Court in *Coleman v. McClennan* (1908) Pac 281, 286 explained that '...it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantage derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputation of individuals must yield to the public welfare.' Similarly, in *Ogren v. Rockford Star* (1925) 237 Ill. App. 349 the Illinois Court of Appeal considered it to be '...through the medium of the public press that the people...become informed of the record of candidates for office, and of the principles for which they stand...If this right is abridged then those who are called upon to make a choice between candidates will be deprived of a means to become fully informed of the candidates and what they represent.' Indeed, the principle can also be traced back to an early 19th century case in which Judge Parsons wrote that '[A]nd when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualification for the office....And every man holding a public elective office may be considered as within this principle.' See *Commonwealth v. Clapp*, (1808) 4 Mass. 163, 169-70.

[32] (1971) 401 U.S. 295. In fact, the journalist had substituted the wrong name, for it was James Damron, Leonard Damron's brother, who had been charged with perjury not Leonard, the candidate running for election as a county tax assessor. Leonard Damron was defeated in the election.

[33] (1971) 401 U.S. 279.

[34] (1966) 383 U.S. 75.

[35] *Ibid.*, p.85. This implies two necessary conditions, the first of which is a pre-condition to the second: the holding of a requisite position and a controversy surrounding that position. It is unclear which level of office-holders are governed by this and what forms of charges are necessary before the term is applied. This lack of clarity can produce unsatisfactory results: see P.S. Cane, 'Defamation of Teachers: Behind the Times?' (1987-1988) 56 *Fordham L. Rev.* 1191, who highlighted the difficulties the lack of a uniform approach produced in relation to public school teachers as public officials at state level. He argues '[T]o conclude that Mr. Rosenblatt was a public official but that public school teachers are not is to assert that the public has a greater interest in the management of recreation areas than in the education of its children.'

According to the Court, this definition applied '...at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'[36]

From Public Official and Public Office to Public Figure

[6-13] Given the importance attached to free debate on public issues in *New York Times*[37] it was to be anticipated that the range of parties about whom defamatory statements could be made under the *New York Times* standard of liability would be widened. In *Curtis Publishing Co. v. Butts*[38] and its companion case, *Associated Press v. Walker*[39] the Supreme Court supported the extension of the *New York Times* rule to defamation actions by 'public figures.' In *Curtis*, an athletic coach of the University of Georgia instituted libel proceedings as a result of a *Saturday Evening Post* publication alleging he had 'fixed' a football game. The plaintiff in *Walker* was a retired General who objected to a news dispatch to the effect that he had lead and encouraged a violent crowd in opposition to the enrollment of a Negro student at the University of Mississippi. Both of these plaintiffs were deemed public figures.[40] According to the Court, a public figure included someone '...intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'[41]

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[36] Above, n. 34, p. 85. The Court held in the case that the appointed supervisor of a county recreation area might be a public official. Given that *New York Times* had not been decided at the time of the trial, the Court considered it necessary to return the case for retrial and for the trial judge to determine if the proofs showed that the respondent was a public official.

[37] In *New York Times v. Sullivan*, above, n. 4, p. 270, the Court specifically referred to the central meaning of the first amendment as being the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials...'

[38] Above, n.2.

[39] (1967) 388 U.S. 130.

[40] *Ibid.*, pp. 154-55 per Harlan J 'We note here that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of public interest at the time of the publications; both in our opinion would have been labeled "public figures" under ordinary tort rules...Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.' According to Eisenberg, in the light of this decision, any person who makes a significant comment about an issue of public concern, or invites such comment, may be held to have thrust himself into the public view and to have become a public figure. See L.D. Eisenberg, 'The Constitutional Law of Defamation and Privacy: *Butts* and *Walker*' (1967-1968) 53 *Cornell L. Rev.* 649.

In the *Walker* case, the Court concluded that there had been no reason on the part of *Associated Press* not to believe that its source was trustworthy and reliable. In *Curtis*, the Court determined that the Saturday *Evening Post* had failed the 'conduct test.' It had made no attempt to screen the films of the game to verify if the allegations made by the reporter were accurate and published the article on the basis of the reporter's affidavit alone supporting its accuracy despite being aware that the reporter responsible for the allegations had previously been placed on probation for bad check charges.

[41] Above, n.39, p. 164.

From Plaintiff Status to Speech Status

[6-14] In *Time, Inc. v. Hill*[42] the Supreme Court explained that '[T]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.'[43] Although *Time, Inc. v. Hill* was a privacy case,[44] one commentator observed that:

> '[I]t appears that the major impact of the *Hill* case, with its emphasis on the informing function of the first amendment, may be on the law of defamation. The formulation of the "public interest" test can be viewed as indicating the readiness of the Court to look away from the status of the individual being defamed and to focus instead upon the legitimacy of public interest in the subject discussed.'[45]

[6-15] The Court used the logic of *Hill* in *Rosenbloom v. Metromedia* [46] to further extend the reach of the First Amendment in defamation cases. A plurality of the Court approved

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[42] (1967) 385 U.S. 374. See generally M. B. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy', (1968) 56 *Cal. L.Rev.* 935 who suggested a number of reasons why the privacy definitional balance should give a lesser scope to the First Amendment privilege than is recognised under the Times definitional balance for defamation. His thesis was that there are greater speech values in a reputation-injuring statement that in a non-defamatory (or 'pure') privacy-invading statement.

[43] *Ibid.*, p. 388.

[44] The plaintiff and his family had been held hostage in their home by three escaped convicts but were released unharmed. The incident caused extensive involuntary notoriety and in an effort to avoid media attention, the family moved to Connecticut. Years later, *Life* magazine featured an article on a Broadway play which loosely re-enacted the incident that had taken place in the Hills' previous residence. The family brought a lawsuit against the magazine article under a New York statute providing a cause of action to a person whose name or picture is used by another without consent for the purpose of trade or advertising. The family argued that the magazine article had sensationalized the facts. The Court held that the constitutional protection for free expression precluded the application of New York's statute to redress false reports of newsworthy matters absent proof that the publisher knew of the falsity or acted in reckless disregard of the truth. The Court entertained no doubts that the subject matter of the *Life* article was a matter of public interest.

In dissent, Justice Harlan made the point that a private citizen is open to being injured more easily because '[T]he public is less likely to view with normal scepticism what is written about him...[The public] is not accustomed to seeing his name in the press and expects only a disinterested report.' See pp. 408-409.

[45] Comments, 'Privacy, Defamation, and the First Amendment: The Implications of *Time, Inc. v. Hill*' (1967) 67 *Colum. L. Rev.* 926, 951. Kalven predicted that '[N]ewsworthiness will almost certainly become a descriptive and not a normative term. In brief, the press will be the arbiters of it and the Court will be forced to yield to the argument that whatever the press prints is by virtue of the fact newsworthy.' See Kalven, H. Jr. 'The Reasonable Man and the First Amendment: *Hill*, *Butts* and *Walker*' (1967) *Sup. Ct. Rev.* 267, 284.

[46] (1971) 403 U.S. 29. The plaintiff was a pornography shop owner who had been described in a radio broadcast as, *inter alia*, a 'smut merchant.' Due to lack of evidence to support these allegations, the plaintiff instituted libel proceedings and ultimately lost on the ground that there was no proof that the broadcaster knew or should have known, that his comments were false.

the extension of the actual malice requirement[47] to cases involving speech on matters of public or general concern,[48] irrespective of the status of the plaintiff. Such movement [49] applied the *New York Times* standard to private plaintiffs who became involuntarily involved with some matter of general interest.[50] According to one commentator,[51] the test established in *Rosenbloom* was '...essentially self-defining. The fact that a story was chosen for coverage *ipso facto* made it a matter of public interest.'[52]

[6-16] Concerns for the protection of private reputation were voiced on the bench[53] and by academics.[54] The *Rosenbloom* 'public interest' test was abandoned in *Gertz v. Welch*[55] and replaced by a determination of liability on the basis of the plaintiff's public[56] or private figure status. According to the Court '[P]rivate individuals are not only more vulnerable to

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[47] The 'convincing clarity' standard of *New York Times* was replaced with an alternative formulation of 'clear and convincing proof.'

[48] The Court failed to define what constitutes a matter of public or general concern. A number of years later, in *Connick v. Myers* (1961) 461 U.S. 138,146, a definition was forthcoming such that a matter of public concern was one 'relating to any matter of political, social or other concern to the community.'

[49] Justice Douglas, although having concurred in the *New York Times* result, had argued that the question should focus on whether a public issue is involved rather than whether the plaintiff is or is not a public figure.

[50] It has been pointed out that '[I]n virtually all cases, the liability of a publisher or broadcaster of defamatory statements was to be based only upon a finding of actual knowledge of falsity or reckless disregard of truth since the "public interest" is implicit in nearly everything the media reports.' See H.C. Phillips, 'Washington and New York Respond to *Gertz*', (1978) 55 *Denv. L. J.* 136.

[51] G.G. Ashdown, 'Whither the Press: The Fourth Estate and the Journalism of Blame', (1994) 3 *Wm. & Mary Bill of Rts. J.* 681.

[52] *Ibid.*, p. 683.

[53] The judgment drew a strong dissent from Justice Marshall, joined by Justice Stewart. Justice Marshall reasoned that to fall within the privilege, the courts are obliged to determine whether an event is of 'legitimate public interest'. In his view, this 'conditional privilege approach' is likely to result in ad hoc balancing of speech and reputation values and in the process failing to adequately protect either. He also expressed concern about the diminution that a test premised on the public interest may have for private reputation given that all human events arguably lie within the area of public or general concern. See pp. 78-87.

[54] Eaton argued that '[B]y erecting a constitutional defense of ignorance for defamatory statements touching on some matter in the public interest, *Rosenbloom* had nearly destroyed the law of defamation.' See J.D. Eaton, 'The American Law of Defamation through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer' (1975) 61 *Va. L. Rev.* 1349, 1403.

[55] (1974) 418 U.S. 323, 339-340. The case also appeared to constitutionally protect statements of opinion. According to Justice Powell, '[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' For consideration of the development of the opinion privilege, see J.E. Thomas, 'Statements of Fact, Statements of Opinion, and the First Amendment' (1986) 74 *Cal. L. Rev.* 1001. For articles critical of the Supreme Court's failure to articulate the distinction between fact and opinion, see, R.N. Webner, 'The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright Line Rule' (1984) 72 *Geo. L.J.* 1817 and G.J. Berritt, 'The Fact-Opinion Distinction in Libel Law: The Second Circuit Adopts a More Comprehensive Approach' (1986-1987) 52 *Brook. L. Rev.* 879.

[56] The categories of public plaintiff to whom the actual malice standard applies are persons who, by reason of the notoriety of their achievements or the vigour and success with which they seek the public's attention and those who hold governmental office. Although the Court acknowledged that it might be possible for someone to become a public figure through no purposeful action of his own, the instances of truly involuntary public figures were considered to be exceedingly rare.

injury than public officials and public figures; they are also more deserving of recovery.'[57] It was therefore considered by Powell J. that:

> 'Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.' [58]

[6-17] The Court then adopted a balancing of interests test and concluded that there is a different state interest in compensating a private individual whose reputation is injured by defamatory falsehoods from a similar interest in the context of public persons.[59] This distinction in treatment was based on the following two factors; (i) public officials and public figures usually enjoy significantly greater access to the channels of effective

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[57] Above, n.55, p.345.

[58] Above, n.55, p. 352.

[59] There are some however who fear that such an approach may serve to discourage persons from entering public life or encourage those already in to opt out, see for example, W.L. Prosser, *Handbook of the Law of Torts*, (3rd ed., 1964), p. 814. As argued by Professor Barron, '[I]t is not possible to number those, however talented and public-spirited who choose not to withstand the pitiless, constant and often scurrilous scrutiny that is today the lot of those who participate in American public life. The transformation of American libel law in favor of the media defendant may not have depopulated public life of the wise, the virtuous, and alas, also the sensitive but...there is no assurance that it has not either.' See J.A.Barron, 'Punitive Damages in Libel Cases – First Amendment Equalizer', (1990) 47 *Wash. and Lee L. Rev.* 105, 110. Likewise another author makes the point in relation to *New York Times* that '[O]verlooked by the Court was the deterrent to public service, civic involvement and even to business leadership occasioned by an exposure to unmitigated, defamatory falsehoods.' See J. P. Cain, 'Protect us from a reckless press', (1985) 71 *A.B.A. Journal* 38. For a similar point of view, see V.V. Veeder, 'Freedom of Public Discussion' (1909-1910), 23 *Harv. L. Rev.* 413, 419 and Epstein, *loc. cit.*, n.12, pp. 799-780. However, in response to such arguments, one commentator has observed that many opponents of the *New York Times* rule have overlooked the fact that it has served to protect political figures exercising free speech rights. This is evident from cases such as *Garrison v. Louisiana*, (a district attorney who was charged with criminal libel after he defamed several judges, above n. 29, *St. Amant v. Thompson*, (a candidate for the U.S. Senate who criticised a deputy sheriff), (1968) 390 U.S. 727, *Bienvenu v. Angelle*, (a state representative who defamed a county welfare director), (1969) 254 La. 182, 223 So. 2d 140 and *Brown v. Kitterman*, (a mayor who questioned whether a public community center was being operated properly) 443 S.W. 2d 146 (Mo. 1969). In each of these cases, the figures making the statements escaped liability for defamation when the actual malice rule was applied. See G.E. Stevens, 'Defamation of Political Figures: Another Look at *The Times-Sullivan* Rule', (1974) 27 *Fed. Comm. B.J.* 99. The same author also countered the criticism that the Times rules discourages citizens from seeking public office. He believed there to be no substantive evidence to support the contention. For a similar conclusion, see T.I.Emerson, *The System of Freedom of Expression* (1970, Vintage Books), p. 538.
Under the rule in *Barr v. Matteo* (1959) 360 U.S. 564, 571 should a private citizen sue a public official for libel during the discharge of his public functions, the actual malice standard applies. Mr. Justice Harlan speaking for the majority, set out the reasoning for this rule: 'It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties – suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.'

communication and hence have more realistic opportunities to counteract false statements than private individuals[60] and (ii) these parties invite attention and comment by generally thrusting themselves to the forefront of particular public controversies to influence the resolution of the issues involved.[61] Applying this reasoning to the facts of the case, the Court reached the conclusion that an article implying that an attorney had a criminal record and which labeled him a 'Communist-frontier' was not protected under the actual malice standard as he could not be classified as a public official or figure. It explained that neither his past service on certain city committees nor his appearance as an attorney at the coroner's inquest into the death of the murder victim made him a public official and that his role in the particular legal case giving rise to the article did not make him a public figure.[62]

[6-18] The Court set out a new standard for private plaintiffs as a compromise between strict liability and the *New York Times* standard.[63] States were to be allowed to individually define the appropriate standard of liability in respect of compensatory damages so long as liability without fault is not imposed.[64] Although the Court failed to define 'fault', Smolla[65]

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[60] Cane referred to this as the 'self-help' theory, *loc. cit.*, n.35, 1191. However, the extent of access to the media remains open to question. In fact, in *Landmark Communications, Inc v. Virginia* (1978) 435 U.S. 829, 839, the Supreme Court in a non-libel case noted that judges 'by tradition will not respond to public commentary' but declined to give judges as individuals or the judiciary as an institution 'greater immunity from criticism' on said basis. Others question whether that access in fact exists. See, S. Trippi, 'Defamation of a Public Person: The Need to Provide a Forum for Reply' (1980) 26 *Loy. L. Rev.* 114, D. Marder, 'Libel Proof Plaintiffs – Rabble Without a Cause' (1987) 67 *B.U.L.Rev.* 993, 1012 and R. A. Smolla, *Jerry Falwell v. Larry Flynt, The First Amendment on Trial* (University of Illinois, 1988), p. 67.

[61] Elder describes this as the '...rationale of assumption of risk....' D. Elder, 'Defamation, Public Officialdom and the *Rosenblatt v. Baer* Criteria – A Proposal for Revivification: Two Decades After *New York Times Co. v. Sullivan* (1984) 33 *Buff. L. Rev.* 579, 609.

[62] Above, n.55, pp 351-352.

[63] It is to be noted that *Gertz* offered absolute protection for opinion as distinct from statements of fact which represented a departure from the common law qualifications to the fair comment defence. To benefit from the common law defence of fair comment, the statement must not imply the existence of undisclosed defamatory facts, the speaker must honestly hold the opinion and the opinion must not be given for the purpose of harming the plaintiff. One particular area where the *Gertz* ruling has impacted is in relation to letters to the editor. See K. H. Youm, 'Letters to the editor and US libel law' (1992) 13(3) *Tolley's Journal of Media Law and Practice* 220. The judgment however failed to specify clearly the elements which made a statement fact or opinion. For criticism of the Court on this point, see, G. J. Berritt, *loc. cit.*, n.55 and R. N. Webner, *loc. cit.*, n.55.

Judicial retreat of the protection afforded to opinions followed with *Milkovich v. Lorain Journal Co.* (1990) 110 U.S. 2695, 2705, when the Supreme Court made clear that *Gertz* was not intended 'to create a wholesale defamation exemption for anything that might be labelled "opinion"'.

[64] Although the Court had rejected the determination of liability on a case by case basis as proposed in *Rosenbloom*, above, n.46, its holding effectively welcomed the use by state courts of this very means of determination by allowing them to establish the correct standard of liability in actions taken by private plaintiffs.

This new test had previously been advocated in the dissenting opinion of Harlan J. in *Time, Inc. v. Hill* (1967) 385 U.S. 374 and the dissenting opinion of Marshall J. in *Rosenbloo*m, above, n.46.

Kovner points out that a potential difficulty of leaving states free to define the standard of liability may result from the tendency of plaintiffs to sue in forums with less protective press standards. See V.A. Kovner,

submitted that it probably had in mind the 'ordinary reasonable person' test used in tort law and if so, then the content and context of speech remains relevant, although repudiated in *Gertz v. Welch.*[66] This is because under common-law fault, there is an implicit assessment of the social utility of the speech involved.

[6-19] It was also unclear as to whether the holding in *Gertz v. Welch*[67] applied only to media defendants: its literal interpretation pointed in this direction,[68] requiring determination on a case-by-case basis as to who qualified for this elevated status, a balancing act incongruous with the criticism of this approach in *Rosenbloom v.Metromedia.*[69] Although the *New York Times* actual malice rule was not to apply to private individuals, the Court did provide that for private individuals to recover presumed and punitive damages, it would be necessary to show actual malice.

[6-20] By adopting a distinction between public and private parties, it necessarily followed that the explicit public interest test had been overruled.[70] A further distinction was drawn between general public figures and limited purpose public figures.[71] General public figures are those who achieve pervasive fame or notoriety that they become public figures for all purposes and in all contexts, where as limited purpose public figures attract this classification by having '...thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.'[72] Status becomes issue linked and is therefore limited to those public controversies in which persons become

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'Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion' (1975-1976) 3 *Hastings Cons. L.Q.* 363. For differing standards applied by some of the highest State courts, see, H.C. Phillips, *loc. cit.*, n. 50.

[65] *Loc. cit.*, n.3, p.81.

[66] Above, n. 55.

[67] Above, n.55.

[68] This conclusion has also been reached by a number of commentators. The American Law Institute acknowledge that '[t]he precise holding of the [Gertz] case ...does not extend beyond a statement published by a member of the communications media...' RESTATEMENT (SECOND) OF TORTS 402 A (1965), 580 B comment e.

[69] Above, n. 46.

[70] However, the Court later referred explicitly to this test and the various disadvantages associated with it. It was considered unacceptable that a private plaintiff should be placed in the same position as a public plaintiff such that a private individual whose reputation is injured by a defamatory falsehood that does not concern an issue of public or general interest is obliged to meet the *New York Times* standard of liability prior to succeeding. On the other hand, publishers and broadcasters may also lose out under the public interest test. Even if they took every reasonable precaution to ensure the accuracy of their assertions, they may remain liable if a court considers that the publication was unrelated to an issue of public or general concern.

[71] This process of articulation has been described as akin to 'trying to nail a jellyfish to a wall', see *Rosanavo v. Playboy Enterprises*, 411 F.Supp. 440 (S.D.Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978). See D. Dalton, 'Defining the Limited Purpose Public Figure' (1992) 70 *Univ. of Detroit Mercy Law Rev.* 47 and E. Walker, 'Defamation Law: Public Figures: Who Are They?' (1993) 45 *Baylor L. Rev.* 955.

[72] Above, n. 55, p.345.

engaged.[73] A judicial determination is required as to whether a 'public controversy'[74] exists and whether the plaintiff's behaviour during that controversy classifies him as a limited purpose public figure.[75]

The Refinement of the Public Figure Concept

[6-21] The *Gertz v. Welch* [76] 'limited purpose public figure' status was strictly applied in subsequent case law by maintaining the requirement that a plaintiff must have voluntarily thrust himself to the forefront of a public controversy in order to influence its outcome, leading to some criticism of a failure to adequately protect public interest commentary.[77] Applying this test, the Supreme Court rejected parties involved in a high-profile divorce case,[78] a scientist in receipt of public funds[79] and a person who had subjected himself to a citation for contempt for failure to appear before a grand jury investigating Soviet intelligence,[80] as limited purpose public figures. However, one commentator[81] has pointed out that '[U]nder the guise of deciding when a person is a public figure, it will be the final

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[73] According to Smolla, '[T]he "context public figure" concept is an attempt to extrapolate from the traditional common law privileges a notion that for most people speech concerning the neighbourhoods, the workplaces, and other institutions in which they operate daily is more immediately vital than the speech that appears in the CBS Evening News, the Washington Post or Harper's.' *Loc. cit.*, n.3, p.68.

[74] The Court failed to define the essential determinants of a public controversy.

[75] These subcategories have been criticised on the basis that '...rather than aiding in the classification of plaintiffs, have made life more bewildering for journalists and the attorneys who advise them, and have handed judges, a tool for gouging holes in the supposed safeguards of the actual malice shield'. See Dill, B., *'Libel Law Doesn't Work but Can It Be Fixed?'* in M. London and B. Dill, (eds) At What Price?: Libel Law and Freedom of the Press, (Twentieth Century Fund, 1993), pp.35-73.

[76] Above, n.

[77] See Smolla, *loc. cit.*, n.3, pp. 56-60.

[78] *Time Inc. v. Firestone* (1976) 424 U.S. 488.

[79] *Hutchinson v. Proxmire* (1979) 443 U.S. 111. Carman cited this case as another example of '...trigger, happy public figure analysis....', by means of which the Court focuses on the classification of the plaintiff and fails to consider the public interest value of the information. As an alternative, the author suggested that the defence of fair comment, neglected since *New York Times*, might be used to protect speech on matters of public interest. See C. Carman., *'Hutchinson v. Proxmire* and the Neglected Fair Comment Defense: An Alternative to "Actual Malice"'(1980-1981) 30 *DePaul L. Rev.* 1.

[80] *Wolston v. Readers Digest Association Inc.* (1979) 443 U.S. 157. The case also shows that a sixteen year time delay prevented the matter being one of public interest. On this point, see S.J. Davidson, 'Constitutional Law – Libel – New York Times Rule Extended to Statements Made about Maters of Public Concern' (1970) 1 *Loy. U. Chi. L.J.* 343.

However, it is worth noting that in *Rosenblatt v. Baer*, above, n. 34, p. 87, n. 14, it was considered that the privilege may sometimes remain to protect critics of a former official's conduct during the time he served in office. Smolla criticises the Court's decision for restricting the limited public-figure status to people involved in public disputes, as opposed to involvement in significant public events. He argues that treating only debate as a matter of First Amendment concern eliminates a plethora of issues and events such as crime and violence which are obviously subjects of profound concern and for which full First Amendment protection is vital. *Loc. cit.*, n. 3, pp. 56-57.

[81] G.C. Christie, 'Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches", (1976-1977) 75 *Mich. L. Rev.* 43, 55.

arbiter of what can be a matter of legitimate public interest.'[82] The public nature of the particular issue becomes secondary to the role played by the plaintiff in it,[83] thereby affording less protection to a defendant than would be received under traditional common law privileges which attach to occasions and do not depend upon the plaintiff's role in the controversy. Further, the lack of clear guidance from the Supreme Court as to when 'public' status attaches to a plaintiff resulted in confusion and conflicting approaches in lower courts.[84]

[6-22] Despite the emphasis on the participation of the plaintiff in the 'public controversy', such a test nonetheless demands that courts define this term.[85] The Supreme Court failed to clarify this concept in *Gertz v. Welch*.[86] Cases such as *Time, Inc. v. Firestone*,[87] *Hutchinson v. Proxmire*[88] and *Wolston v. Readers Digest Association Inc*[89] revealed a move-away from the media-defined public interest reasoning of *Time, Inc. v. Hill*[90] and *Rosenbloom v. Metromedia*[91] and illustrated that the Supreme Court considered that a public controversy is not defined as such simply on account of media coverage. [92]

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[82] *Ibid.*, p. 55. Kovner also pointed out that the differential treatment accorded to public and private figure plaintiffs under *New York Times* and *Gertz* respectively, means that '...the names of some private individuals will be stricken from newsworthy stories, leading the public figures and public officials as the only persons identified. Often these deletions will tend to distort the news or the role of the public persons named.' *Loc. cit.*, n. 64, p. 369.

[83] Nonetheless, as one commentator has observed '[I]n sum, *Firestone*, *Hutchinson*, and *Wolston* exhibit the Court's reluctance to hold that private individuals are public figures without a clear showing of voluntary action. Moreover, the Court also requires the public controversy at issue to be more than simply media attention resulting from a civil divorce, the defamation itself, or criminal conduct.' See C.R. Smith, 'Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine' (2004) 89 *Iowa. L. Rev.* 1419, 1432. As an Irish writer observed, in a point which will become clearer following the section on damages, '[I]f the "public interest concept" was rejected in relation to the test of liability in *Gertz*, its spectre has surely come back to haunt the issue of damages and the presumption of falsity, disturbing the relative clarity of the public/private divide in *Gertz*.' See U. Ni Raifeartaigh, above, n.5, 772.

[84] See further M. D. Walton, 'The Public Figure Doctrine: A Reexamination of *Gertz v. Robert Welch, Inc.* in Light of Lower Federal Court Public Figure Formulations (1995-1996) 16 *N. Ill. U.L.Rev.* 141.

[85] In *Time Inc. v. Firestone*, above, n. 78, p. 456, the Supreme Court simply said that the concept of 'public controversy' was narrower than the *Rosenbloom v. Metromedia*, above, n. 46, 'public or general interest' test. See generally C. Willner, 'Comment, Defining a Public Controversy in the Constitutional Law of Defamation' (1983) 69 *Va. L. Rev.* 931, 957, who argues that the failure to offer meaningful definitional guidance of the public controversy concept may serve to undermine First Amendment protection through legitimising restrictions on unpopular speech and creating a climate of self-censorship.

[86] Above, n.55.

[87] Above, n. 78.

[88] Above, n. 79.

[89] Above, n. 80.

[90] Above, n. 42.

[91] Above, n. 46.

[92] In *Hutchinson v. Proxmire*, above, n.79, p. 135, the Supreme Court stated that '...those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' In *Wolston v. Readers Digest Association Inc.*, above, n.89, pp. 167-168, the court insisted that the libel defendant must show more than mere newsworthiness.

However, as recently as 2001, a number of Justices conceded that the concept of 'public controversy' remains 'amorphous' and 'undefined'.[93]

A Return to the Public Interest Test

[6-23] Despite rejection of the *Rosenbloom v. Metromedia*[94] 'public interest' test in *Gertz v. Welch*,[95] it underwent a partial revival in *Dun & Bradstreet v. Greenmoss Builders.*[96] It may be recalled that post-*Gertz*, proof of actual malice was required prior to any award of punitive damages. This holding was diluted in *Dun & Bradstreet* by a ruling rendering the actual malice test redundant in the area of presumed and punitive damages where the speech does not concern matters of public concern.[97] The type of speech[98] therefore has a role to play in damages awards.[99] The Court determined that the report of a credit-reporting agency released to five of its subscribers wrongly indicating that the defendant had filed a voluntary petition for bankruptcy was not a matter of public concern because '...it was speech solely in the individual interest of the speaker and its specific business audience.'[100] In dissent, Justice Brennan, joined by three Justices, held that '[T]ime and again we have made clear that speech loses none of its constitutional protection 'even though it is carried in a form that is 'sold' for profit.' He continued '[I]t is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation

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[93] *Bartnicki v. Vopper* (2001) 532 U.S. 514, 542.
[94] Above, n. 46.
[95] Above, n. 55.
[96] (1985) 472 U.S. 749.
[97] 'In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the State interest adequately supports awards of presumed and punitive damages – even absent a showing of actual malice.' *Ibid.*, p. 761. The jury had awarded $50,000 compensatory damages and $300,000 punitive damages absent proof of actual malice.
[98] 'We have long recognized that not all speech is of equal First Amendment importance...speech on matters of purely private concern is of less First Amendment concern.' Above, n.46, pp. 758-759.
[99] According to some commentators, this limited focus on the type of speech has left speech on matters of private concern with no First Amendment protection: see, R. A. Smolla, '*Dun and Bradstreet, Hepps* and *Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation' (1987) 75 Geo. L. J. 1519, 1541, M. Greene, '*Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz*' (1986) 37 *Hastings L.J.* 1171, 1195.
[100] Above, n. 96, p. 762. The Supreme Court had previously written of the significance of speech on economic matters in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc* (1976) 425 U.S. 748. For an article which examines how lower courts have applied *Dun & Bradstreet*, see R. E. Drechsel, 'Defining "Public Concern" in Defamation Cases Since *Dun & Bradstreet v. Greenmoss Builders*' (1990-1991) 43 *Fed. Comm. L.J.* 1, 20. It may be noted that in respect of non-media defendants, Drechsel observed the following: 'Nonmedia defendants enjoy less predictability. Only if their expression directly and unambiguously pertains to government, political issues or other major public debate is it likely to be found to involve a matter of "public concern." Even then a "public concern" finding is less than certain because the courts appear to question the motives of nonmedia defendants more closely than those of media defendants.' However, the Supreme Court in *Branzburg v. Hayes* (1972) 408 U.S. 665, 704 (quoting *Lovell v. City of Griffin* (1938) 303 U.S. 444, 450) had held that '[F]reedom of the press is a "fundamental personal right" which is not confined to newspapers and periodicals.'

of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record.'[101]

[6-24] Langvardt[102] has submitted that '[I]mportant economic decisions having potentially far-reaching consequences are based on such information. Indeed, the interest in such information may be greater, for some recipients, than the interest in the day's pressing political issues.'[103] Affording heightened constitutional protection to speech that is relevant to public debate, according to some, only serves to potentially undermine First Amendment values, as it leaves judges to decide which speech qualifies, an approach inconsistent with a constitutional system based on democratic self-governance.[104] An alternative suggestion lies in placing limits on defamation suits regardless of the status of the plaintiff or the subject-matter of the communication, such as modifying the *Gertz v. Welch*[105] ruling so that there is a bar against punitive damages absent a showing of actual malice[106] and extending the *Hepps v. Philadelphia Newspapers*[107] ruling (considered later), so that the burden of proof lies on the plaintiff in all defamation actions and not simply where the subject matter is of public concern. These questions have been addressed in case law and are returned to later in this chapter.

THE PUBLIC/PRIVATE FIGURE DIVIDE AND THE ACTUAL MALICE STANDARD

[6-25] Criticisms of the strict liability principle in Irish defamation law were focused upon previously in Chapter 3. More recently, there has been some endorsement in High Court

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[101] Above, n. 96, p. 789.
[102] A.W. Langvardt, 'Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation' (1987) 21 *Val. U.L. Rev.* 241.
[103] *Ibid.*, p.256.
[104] See C.L. Estlund, 'Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category' (1990-1991) 59 *Geo. Wash. L. Rev.* 1, 30, 36. Estlund goes on to conclude as follows: 'But the newly privileged class of speech on matters of public concern, to which protections of libel defendants and public employees are limited, does seem to be confined chiefly to "political expression".'
[105] Above, n. 55.
[106] Justice White, concurring in *Dun & Bradstreet Inc. v. Greenmoss Builders*, above, n.96, p. 771, had argued that '[I]n *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, [the Court] could have achieved [its] goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in Rosenbloom...or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in Gertz. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered.'
[107] (1986) 475 U.S. 767.

domestic jurisprudence for a public interest defence which centres on negligence[108] and of course, section 24 of the Defamation Bill 2006 proposes a defence of fair and *reasonable* publication. However, the case law has not addressed in any depth the American actual malice standard. As with the public figure doctrine, the standard of liability for fault in Irish defamation law which is held as appropriate remains open to constitutional questioning if the exercise of considering alternatives has not been engaged in. It is suggested that when the Irish Supreme Court is offered the opportunity to determine the standard of liability upon which a public interest defence and possibly a consequent award of damages is made, that the elements of the actual malice test discussed below, must at the least be assessed.

[6-26] The *New York Times* holding obliged the plaintiff to focus on the conduct and state of mind of the defendant in the determination of liability.[109] Subsequently, in *Time, Inc. v. Hill*,[110] the Supreme Court re-affirmed the importance of retaining the actual malice standard in preference to a negligence standard on the basis that the latter '...would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.'[111]

[6-27] The actual malice test is concerned with the defendant's subjective state of mind at the time of publication. However, the actual malice definition proposed was different to that at common law, which related to spite or ill will and not knowledge of the falsity of statements made.[112] The result was confusion and misapplication of the term in state courts.[113] Plave[114] observed that '[I]n defamation cases, most jury verdicts in favor of libel

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[108] *Hunter v. Duckworth and Co. Ltd & Anor* [2003] I.E.H.C. 81 and *Leech v. Independent Newspapers (Ireland) Ltd* [2007] I.E.H.C. 223.

[109] Even if a plaintiff proves the falsity of the statement, he/she could still lose the case by failure to prove that the defendant acted with actual malice.

[110] Above, n. 42.

[111] Above, n. 42, p. 389.

[112] In *Garrison v. Louisiana*, above, n.28, pp. 78-79, the Supreme Court held that a defamatory statement made with '...hatred, ill will or enmity or a wanton desire to injure...' does not meet the *New York Times* 'actual malice' test. In the same case, at p. 64, the Court explained its rationale for not affording constitutional protection to calculated falsehoods made against public officials as follows: '[T]he use of the known lie as a tool is at once at odds with the orderly manner in which economic, social or political change is to be effected. Calculated falsehoods fall into that class of utterance which 'are of no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....'.

[113] For example, in *Greenbelt Pub. Association v. Bresler* (1970) 398 U.S. 6, 10, the trial court had defined malice in the context of a public figure libel suit as including spite, hostility or deliberate intention to harm in an elected official libel case and the jury had been instructed in *Beckley Newspapers v. Hanks* (1967) 389

plaintiffs are overturned on appeal...The most common rationale for reversal is that the jury improperly applied the 'actual malice' rule established in *New York Times v. Sullivan*.'[115]

[6-28] In *Garrison v. Louisiana*,[116] the reckless disregard for the truth standard was identified with a 'high degree of awareness of probable falsity.'[117] In *St. Amant v. Thompson*[118] the Supreme Court focused on the fact that the defendant had '...entertained serious doubts as to the truth of his publication.'[119] The problem with this standard is that it potentially renders a reporter who engages in pre-publication checks more open to liability than if this process was not engaged in, given that inquiry could lead to awareness of probable falsity. According to Shapiro, the reckless disregard standard creates perverse incentives to the regulated industry to perform as badly as possible.[120] Potential liability for engaging in pre-publication editorial discussions is heightened given the Supreme Court ruling in *Herbert v. Lando*[121] which sanctioned expansive discovery into the 'state of mind' of journalists accused of libel and thereby '...allowed discovery proceedings to invade the usually sacrosanct domain of editorial decisions when necessary for a public figure to establish "actual malice".'[122] The result, according to one commentator, was to

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U.S. 81, 82, that liability can follow from personal spite, ill will, a desire to injure the plaintiff, or a bad or corrupt motive.
In criticising the actual malice test formulated in *New York Times*, Smolla argued that '...it is a good lesson in the perils of using a word whose legal sense clashes with the meaning that the word is commonly understood to have in everyday speech'. R. A. Smolla, *Suing the Press*, (Oxford University Press, 1986), p. 50. In fact, such subsequent confusion led Justice Brennan to suggest that trial courts avoid the use of the phrase actual malice when framing jury instructions in *Rosenbloom v. Metromedia*, above, n. 46, p.52, n.18. The actual malice standard also came to be used in more and more cases given the wide definition adopted by lower courts to public official and public figure.

[114] E.F. Plave, '*Tavoulareas v. Piro*; An Extensive Exercise of Independent Judgment' (1987-1988) 56 *Geo. Wash. L. Rev.* 854. To avoid this recurring problem, Smolla advocates the unification of constitutional and common law standards. Such a move would require a plaintiff to prove that the defendant acted with knowing or reckless disregard before a conditional common law privilege is defeated. He argues that in addition to re-introducing much needed simplicity to this area of the law, the introduction of a unified definition would give proper protection to certain types of speech traditionally recognised at common law. *Loc. cit.* n. 3, pp.79-81.

[115] *Ibid.*, p. 854.

[116] Above, n. 28.

[117] Above, n. 28, p. 74.

[118] Above, n.59.

[119] Above, n.59, p. 731.

[120] M.M. Shapiro, 'Libel Regulatory Analysis', (1986) 74 *Cal. L. Rev.* 883.

[121] (1979) 441 U.S. 153.

[122] C.H. Carmen, '*Hutchinson v. Proxmire* and the Neglected Fair Comment Defense: An Alternative to "Actual Malice"' (1980-1981) 30 *DePaul L. Rev.* 1. According to another writer, '[W]hen the Supreme Court lent its imprimatur to unrestrained discovery in libel cases, it undid much of what had been accomplished in New York Times because the rigor of the "actual malice" standard permits more extensive discovery than in pre-New York Times cases.' See G.A. Ashdown, "Whither the Press: The Fourth Estate and the Journalism of Blame" (1994) 3 *Wm. & Mary Bill of Rts. Journal*, 68. Another commentator criticised the Supreme Court for its refusal to confront the growing problem of abuses in pre-trial discovery and thereby leaving the door

'...discourage the verbal testing, probing and discussion of hypotheses and alternatives engaged in by responsible journalists. Further, such an inhibition on candid editorial decision making may lead to a less accurate press. This result – a "chilling effect" on editorial decision making and a less accurate press – is exactly what the *New York Times* standard was designed to prevent.'[123]

[6-29] Given that the Supreme Court rejected as the standard of liability a test of reasonable care, it may protect the most reckless and irresponsible of journalists who fail to establish whether a story is false before publication or act with reckless disregard as to whether it is true or not.[124] In order to protect 'high value speech' produced through careful and responsible journalism, the Court considered it needed to establish a high barrier and that consequentially 'lower value speech' which would, under a lesser judicial standard, fail to mount this barrier, will reach it under the *New York Times* rule. This reasoning was subsequently endorsed in *Gertz v. Welch*[125] by Powell J. who explained that '[T]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'[126]

[6-30] A major omission from the *New York Times* analysis is the consideration of the potential for the injection of falsehoods to damage public discourse and undermine the very values that encouraged the Court to protect them.[127] The knowledge that the actual malice rule shields some false speech means that the public becomes unsure as to which

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open to risks of 'tactics of attrition' and 'in terrorem' discovery: see M.M. Mayo, 'Constitutional Law – *Herbert v. Lando*: Advancing the *New York Times Co. v. Sullivan* Standard Through State of Mind Discovery in The Editorial Process' (1980) 3 *Geo. Mason U.L.Rev.* 189, 190. Shapiro considers that '[T]he reckless disregard standard serves as the foundation for dragnet-style discovery demands.' *Loc. cit.*, n. 120, p. 886.

[123] Casenotes, 21 *B.C.L.Rev.* 1237, 1238 (1979-1980). See also R.L.Weaver and G. Bennett, 'Defamation and Editorial Decisionmaking' (1993) 14 *Journal of Media Law and Practice* 2.
According to Smolla, it was this decision '...that truly opened the door to the sort of inquiry into outtakes...reporter's notes, the veracity of sources, discussions among editors, and inquiries into the mental state of reporters that is the centerpoint of modern libel litigation in suits such as William Westmoreland's or Ariel Sharon's.' Smolla, *op. cit.*, n. 113, p. 68.

[124] According to one author, the *New York Times* standard allows '...an evil person using bullets made of false and defamatory statements of fact to deliberately shoot them at a public official and destroy them, without incurring criminal or tort liability.' See L. H. Eldredge, *The Law of Defamation* (The Bobbs-Merrill Company, Inc, 1978), p. 245.

[125] Above, n. 55.

[126] Above, n.55, p. 341.

[127] Epstein writes: '[I]f it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press.' *Loc. cit.*, n.12, p. 813.

information can be relied upon.[128] *New York Times* has created a situation whereby, despite lengthy and complex law suits, the determination of whether the publication was truthful or not may never be determined with the result that a plaintiff's reputation may not be vindicated.[129] A jury is free to decide that a defendant acted with reckless disregard in the absence of determining whether the publication was truthful or extent of reputational harm suffered by the plaintiff. The error potentially remains in the public domain. Of course, the same criticism can be leveled against a system based on negligence,[130] which although lowering the threshold that plaintiffs have to cross, similarly fails to make provision as to a ruling on the issue of truth or falsity.[131] Equally, however it must also be accepted that this lack of truth checking may benefit some plaintiffs who would not wish the truth of the statement to be confirmed.[132]

[6-31] The evidence is also to the effect that the actual malice rule lengthens the time and expense involved in a libel suit.[133] In *Herbert v. Lando*[134] the defendant's deposition took a year to complete and rose to over 3,000 pages of transcript, while in *Westmoreland v. CBS*[135], over 300,000 documents were examined collectively by counsel for both sides.[136]

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[128] L.C. Bollinger, 'The End of *New York Times v. Sullivan*: Reflections on *Masson v. New Yorker Magazine*' (1991) *Sup. Ct. Rev.* 1,6.

[129] It was the view of the Court that '...factual error affords no warrant for repressing speech that would otherwise be free.' Above, n. 4, p.272. For argument in favour of the need to offer increased protection for reputation, see D. A. Anderson, 'Is Libel Law Worth Reforming' (1991) 140 *Univ. Pa. L. R.* 487. For an opposite view, see D.M Gillmor, *Power, Publicity and the Abuse of Libel Law* (Oxford University Press, 1992), p.5, who refers to libel suits by public officials or figures asking for astronomical sums of money to compensate for allegedly reputational damage as sedition in civil guise.

[130] In fact, this criticism has been made against the *Gertz v. Welch* fault requirement; see P.N. Leval, 'The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place' (1987-1988) 101 *Harv. L. Rev.* 1287, 1290.

[131] Some plaintiffs desire an admission of falsehood in lieu of damages; see R.P. Bezanson, 'The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get' (1986) 74 *Cal. L. Rev.* 789, 792.

[132] See R.P. Bezanson, 'Libel Law and the Realities of Litigation', (1985-1986) 71 *Iowa L. Rev.* 226.

[133] See D. Anderson, 'Libel and Press-Censorship' (1975) 53 *Tex. L. Rev.* 422. The state of mind formulation at the centre of the actual malice standard also serves to hinder the use of the summary judgment procedure. This procedure has been summarised as a procedural solution '...designed to intercept all factually deficient claims and, in theory, could be used to test the plaintiff's ability to establish a *prima facie* case of actual malice prior to trial. See M. B. Louis, 'Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases' (1984) 57 *S. Cal. L. Rev.* 707,708. See further R. Ligansky, 'Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs', (1981-1982) 3 *Cardozo L. Rev.* 105, 106. In *Hutchinson v. Proxmire*, above, n.79, the Supreme Court stated that proof of actual malice 'does not readily lend itself to summary disposition.' It is however to be noted that caution of the use of the procedure is not limited to libel litigation. In *Poller v. Columbia Broadcasting System* (1962) 368 U.S. 464, 473, the Supreme Court had urged that 'summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.' A different approach was taken in *Anderson v. Liberty Lobby, Inc.,* (1986) 477 U.S. 242 in which a plurality of the Court held that a motion for summary judgment should be permitted in libel litigation on the basis that 'whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.'

[134] (1979) 441 U.S. 153.

[135] 596 F. Supp. 1170 (S.D.N.Y. 1984).

The Supreme Court has emphasised the potential of the actual malice formulation to result in very expensive litigation.[137] Put simply, the actual malice test formulated in *New York Times* to assist the press soon became the very same tool for creating far more extensive discovery than in the pre- *New York Times* period and undermined press freedom.

[6-32] Another danger posed to media defendants by the actual malice test is such that if public faith is eroded in the media by a perception that the industry is selling a less than merchantable product, the end product in the courtroom may be unsympathetic jurors. The legal significance of terms such as reckless disregard, knowingly and actual malice may be replaced by a more general public bias against media outlets.[138] This appears to underlie the warning offered by the authors of a libel litigation book to defense counsel not to over-rely on the first amendment dimension to a case. They explained that '[J]udges and juries are not necessarily sympathetic to claims of the media that they have a special privilege to run roughshod over their fellow citizens.'[139]

[6-33] Media defendants were offered some relief from this danger by the Supreme Court judgment in *Bose v. Consumers Union*,[140] in which the Court endorsed the role of appellate courts to review the entire record so as to '...exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.'[141] This expansion of the role of appellate courts could be criticised for its potential intrusion into the domain of the trier of fact and the limited ability of an appellate court to conduct a proper review of

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[136] Smolla, *op. cit.*, n. 13, p.71.

[137] This recognition led a plurality of the Court in *Rosenbloom v. Metromedia*, above, n. 46, pp. 52-53, to highlight the need for summary procedures. The Court explained '[I]t is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protected process, is threat enough....'

[138] Smolla has made similar observations to the effect that '[A]n individual who is scrutinized by the Washington Post or 60 Minutes is likely to feel helpless before the whim of the powerful media. It is quite possible that juries (and perhaps judges) moved by this perception of imbalance, are unconscionably applying strict liability standards against the media, imposing damages for defamation even though the media acted carefully, while all the time, adhering 'in principle' to the negligence standard.' Smolla, *loc. cit.*, n. 3, p.28.

[139] Schwab and Barton, *Trial of a Libel Case*, in R. Winfield (ed) Libel Litigation, (Practising Law Institute, 1986), p.293.

[140] (1984) 460 U.S. 485.

[141] The Court also explained in this case that the plaintiff must '...demonstrate with clear and convincing evidence that the defendant realised that his statement was false or that he subjectively entertained serious doubts as to the truth of the statement. *Ibid.*, p.511, n.30. For further discussion of the 'clear and convincing evidence' test, see L.H. Bloom, Jr., 'Proof of Fault in Media Defamation Litigation' (1985) 38 *Vand. L. Rev.* 247.

In *New York Times*, Justice Brennan had provided that: 'This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied....[Courts] must "make an independent examination of the whole record"...so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression.' Above, n.4, p. 285.

the evidence when actual malice rests on the subjective state of mind of a publisher which is often determined on the evaluation of witnesses' testimony.[142] However, given the uncertainty at state court level as to the interpretation and application of the actual malice standard,[143] perhaps it is necessary that *de novo* reviews are conducted to correct any errors made.[144] Put simply, in concluding on the actual malice element of *New York Times*, one commentator observed that '[W]hether the ultimate modification takes the form of a negligence standard in defamation actions or the availability of a declaratory judgment action, the actual malice standard deserves reconsideration.'[145]

THE BURDEN OF PROOF

[6-34] The common law strict liability system did not require a plaintiff to prove the falsity of a challenged defamatory statement. The statement was presumed false and truth had to be raised by the defendant by way of an affirmative defense. However, the constitutionalisation of common law principles amended this so that, unlike the Irish position which carries a presumption of falsity in all cases, public figures[146] and officials[147] are required to prove falsity.[148] In *Hepps v. Philadelphia Newspapers*[149] the requirement to prove falsity was extended to private plaintiffs suing a media defendant in relation to

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[142] See S. M. Matheson Jr., 'Procedure in Public Person Defamation Cases: The Impact of the First Amendment', *Texas L. Rev.* (1987) 66, 215, 275. See generally, G.A. Paranzino, Note, 'The Future of Libel Law and Independent Appellate Review: Making Sense of *Bose Corp. v. Consumers Union of United States, Inc.*,' (1986) 71 *Cornell L. Rev.* 477.

[143] In *Rosenbloom v. Metromedia*, above, n. 46, Justice Brennan even suggested that trial courts avoid the use of the phrase 'actual malice' altogether when instructing a jury.

[144] J.L Cohen, 'Actual Malice and the Connecticut Supreme Court: *Brown v. K.N.D. Corp.*' (1988-1989) 21 *Conn. L. Rev.* 518, 522. In fact, Goldberg J. in *New York Times* had observed the necessity of supervision by appellate courts because the actual malice standard is likely to generate errors. Other authors similarly argue '[I]ndependent review of a finding of actual malice provides a measure of assurance that the substantive promise of New York Times will not be undermined.' See T.C. Dienes and L. Levine, 'Implied Libel, Defamatory Meaning and State of Mind: The Promise of *New York Times v. Sullivan'*, (1992-1993) 78 *Iowa L. Rev.* 237, 262.

As to whether the *Bose Corp. v. Consumers Union of United States, Inc*, above, n. , opinion applied to so-called 'historical facts' or only to 'mixed questions of law and fact', see M.E. Sorini, 'Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases', (1993) 82 *Geo. L.J.* 563.

[145] J. P. Cain, 'Protect us from a reckless press' (1995) 71 *A.B.A. Journal* 38.

[146] The Supreme Court in *Hepps v. Philadelphia Newspapers* (1986) 475 U.S. 767, 775 held that '...as one might expect given the language of the Court in *New York Times*...a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.'

[147] In *Garrison v. Louisiana*, above, n.28, p.74, the Supreme Court provided that '[W]e held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or not.'

[148] See generally, M.A. Franklin and D.J. Bussel, 'The Plaintiff's Burden in Defamation: Awareness and Falsity' (1983-1984) 25 *Wm. & Mary. L. Rev.* 825.

[149] Above, n. 146.

public speech.[150] In *Hepps*, O' Connor J. justified this reversal of the burden of proof on two grounds. Firstly, he considered that the common law presumption of falsity might deter the publication of true speech on matters of public concern.[151] Secondly, he reasoned that the reversal would entail little practical difference given that '...evidence offered by the plaintiffs on the publisher's fault in investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted.'[152] Some commentators pushed this second ground further and argued that falsity is an element of the plaintiff's claim which forms part of the relief sought and like the elements of any claim, must be proven by the plaintiff.[153] These points are returned to in respect of the operation of the Irish public interest defence in Chapter 8.

DAMAGES

[6-35] In *New York Times*,[154] the Supreme Court chose to approach the chilling effect of restrictions on freedom of speech with a focus on plaintiff categories linked with the state of mind of the defendant rather than through the regulation of damages awards.[155] While perhaps unsurprisingly, the focus of much discussion of United States defamation law relates to this categorical plaintiff distinction, the Supreme Court has addressed the role and scope of damages in a number of judgments. The case law in this section is relevant to different aspects of damages addressed further in this thesis in Chapter 9.

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[150] The majority judgment drew a strong dissent from Stevens J., joined by three other Justices. He argued that the holding attached no weight to the State's interest in protecting good name and was unconvinced by the deterrence argument posed to free speech given that publishers were protected by the requirement that the plaintiff had of proving fault. Above, n. 146, pp. 781, 790. According to Benaroya, it may violate the due process clause to predicate constitutional protection on the status of the defendant as it fails to provide some parties with notice of whether and to what extent they will receive protection. See A. Benayora, '*Philadelphia Newspapers v. Hepps* Revisited: A Critical Approach to Different Standards of Protection for Media and Non-Media Defendants in Private Plaintiff Defamation Cases' (1990) 58 *Geo. Wash. L. Rev.* 1268, 1299.

[151] Above, n. 146, pp. 776-777.

[152] Above, n. 146, p. 778. This logic has been endorsed by a number of commentators, see *inter alia*, W.P. Keeton, 'Freedom of the Press' (1975-196) 54 *Tex. L. Rev.* 1221 and J. Plunkett, 'Constitutional Law of Defamation: Are All Speakers Protected Equally?' (1983) 44 *Ohio. St. L. J.* 149, 161.

[153] See Keeton, *ibid.*, pp. 1235-1236, R.D. Nelon, 'Media Defamation in Oklahoma: A Modest Proposal and New Perspectives – Part I' (1981) 34 *Okla. L. Rev.* 478, 490, P.N. Leval, 'The No-Money, No Fault Libel Suit: Keeping Sullivan in its Proper Place' (1987-1988) 101 *Harv. L. Rev.* 1287, 1292 and R.A. Smolla, *loc. cit.*, n. 99.

[154] Above., n. 4.

[155] D. A. Barrett, 'Symposium: New Perspectives in the Law of Defamation: Declaratory Judgments for Libel: A Better Alternative, (1986) 74 *Cal. L. Rev.* 847, 854. For a judicial viewpoint that the abolition of punitive damages might have served as an alternative to the *New York Times* actual malice standard, the judgment of Justice White in *Dun & Bradstreet v. Greenmoss Builders*, above, n.96, p. 771 is to be noted where he reasoned as follows: '[I]n *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden.'

[6-36] In *Gertz v. Welch*[156] Powell J. criticised the common law rule that allows for recovery of compensatory damages without evidence of actual loss.[157] The fact that damages may be awarded in the absence of loss coupled with the invitation which the presumed damages rule creates for juries to punish unpopular opinion rather than compensation for injury '...compounds the potential system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.'[158] Compensatory damages may be awarded to private plaintiffs who can prove actual injury to reputation as a result of publication on a matter of public concern but have not been able to prove knowledge of falsity or reckless disregard for the truth. The Court explained that actual injury is not limited to out-of-pocket loss for '...the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'[159] It emphasised the importance of guiding juries with appropriate instructions and required all awards to be supported with competent evidence concerning the injury. It is clear that American jurisprudence supports Post's property concept of reputation as discussed in Chapter 2.

[6-37] As regards punitive damages, Powell J. provided that '[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.'[160] The judge explained the rationale of this by describing punitive damages '...as wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead they are private fines levied by civil

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[156] Above, n. 55.

[157] Anderson proposed that the doctrine of presumed injury be abolished, but that once a plaintiff demonstrates proof of reputational injury, damages for emotional injury may be awarded, just as when a physical injury has been proved. See D. A. Anderson, 'Reputation, Compensation and Proof, Defamation and the First Amendment: New Perspectives' (1083-1984) 25 *Wm. & Mary L. Rev.* 747, 758. In response to this proposal, Le Bel argued that if a plaintiff overcomes the *New York Times* actual malice test, it is unrealistic to expect that the defendant should then escape liability because he has been unable to establish any actual harm to reputation. See P. Le Bel, 'Defamation and the First Amendment: The End of the Affair' (1983-1984) 25 *Wm. & Mary L. Rev.* 779, 789.

[158] *Ibid.*, p. 349.

[159] Above, n. 55.

[160] Judicial concern on the role of punitive damages was evident pre-*Gertz*. In *Rosenbloom v. Metromedia*, above, n. 46, Justice Marshall joined by Justice Stewart argued at p.84 that '[T]he threat to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proved, actual injuries.' He went on to hold, at p. 86 that '[I] believe that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses.' Whether the *Gertz v. Welch* limitation of presumed and punitive damages in the manner set out above prevents the chilling effect on press freedom was strongly questioned by R. A. Smolla, *loc. cit.*, n.3, p. 92.

juries to punish reprehensible conduct and to deter its future occurrence.'[161] This judgment appeared to provide that irrespective of the plaintiff's status[162] or the public or private nature of the speech, once actual malice is proved, it gives rise to an award of punitive damages.[163] Subsequently, in *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*[164] the *Gertz* holding was limited to public concern cases and the Court held that a private plaintiff need not show actual malice to recover presumed and punitive damages if the publication involves a matter of private concern.[165]A three Justice plurality[166] explained that '[I]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages, even absent a showing of "actual malice".'[167] It remains unclear whether punitive damages are available in public figure and public speech cases.[168]

[6-38] It is clear that punitive damages continue to play a role in United States defamation law but the dangers of lack of jury regulation in respect of this category of damages was discussed, (albeit outside the context of defamation law), in some detail in *BMW of North America v. Gore.*[169] Justice Breyer emphasised the need to have a damages system which significantly constrains a court's and in turn a jury's discretion in making an award of punitive damages. To do otherwise permits juries '...to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related

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[161] Above, n. 55.

[162] For the argument that punitive damages should be eliminated in public plaintiff libels, see N.B. Casarez, 'Punitive Damages in Defamation Actions: An Area of Law Worth Reforming' (1994) 32 *Duquesne L. Rev.* 667. See 'Punitive Damages for Libel' (1985) 98 *Harv. L. Rev.* 847 for the argument that the actual malice test, standing alone, is too lenient to govern the award of punitive damages in libel actions brought by public figures and proposes that public figures bringing libel actions are required to prove common law malice as well as actual malice before they can recover punitive damages.

[163] For arguments in support of the abolition of punitive damages, see *inter alia*, J.A. Barron, 'Punitive Damages in Libel Cases – First Amendment Equalizer?' (1990) 47 *Wash. And Lee. L. Rev.* 105, 119 and A. Lewis, '*New York Times v. Sullivan* Reconsidered: Time to Return to the "Central Meaning" of the First Amendment' (1983) 83 *Colum. L. Rev.* 605,617. See also the dissent of Justice Marshall in *Rosenbloom v. Metromedia*, above, n. 46.

[164] (1985) 472 U.S. 749.

[165] For further discussion, see W.J. Curry, '*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*: Moving in the Wrong Direction in the Award of Punitive Damages in Libel Law' (1986) 50 *Albany L. Rev.* 845, 869-876.

[166] Justice Powell was jointed by Rehnquist and O'Connor JJ.

[167] In dissent, Brennan J. joined by Marshall, Blackmun and Stevens JJ. held as follows, p. 794, in addressing the holding in *Gertz v. Welch*: '[R]ather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted. The plurality opinion today recognises, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. What was "irrelevant" in *Gertz* must still be irrelevant, and the requirement that the regulatory means be no broader than necessary is no less applicable even if the speech is simply the equivalent of commercial speech. Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of the First Amendment guarantees.'

[168] C. Rothfeld, 'The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures' (2000) 19 *Yale L. and Policy Rev.* 165.

[169] (1996) 517 U.S. 559. See also *State Farm Mut. Auto Ins. Co v. Campbell* (2003) 538 U.S. 408.

objective outside the confines of the particular case.'[170] The judge also pointed to the need for clear legal principles and in the absence of such argued that the lack of constraining standards warrants an appeal court to engage in detailed examination of the award which includes assessment of the proportionality of the award and the legitimate punitive damages objectives.[171]

CONCLUSION

[6-39] At the conclusion of this chapter, there are two very evident observations. The first is that the focus of much of the jurisprudence has been on the right to freedom of expression rather than the right to reputation. Of course, in contrast to the Irish position, the right of reputation is not a constitutionally prescribed right in the United States constitution, and textually, the protection for speech under the First Amendment is very different to the protection for freedom of expression in Article 40.6.1°(i). The second point is that despite the efforts made to further democratic dialogue, the development and application of the public figure doctrine appears to have undermined in some respects First Amendment protection for media defendants writing on matters of public interest, most particularly the operation of the actual malice standard in terms of cost and delay should a case proceed to trial. However, the American approach accepts both the democratic rationale of free speech and the property concept of reputation, which as submitted previously in Chapters 1 and 2 respectively, are the values supporting expression and good name under the Irish constitution. One of the questions to be addressed therefore in Part III is whether the express protection for both rights in the Irish constitution affects the application of these same values.

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[170] *Ibid.*, p. 596.

[171] Supporting this position, Rothfeld, *loc. cit.*, n. 168, p. 181, writes: '[A]fter all, it is the fundamental assumption of New York Times that the prospect even of compensatory damages will curtail expression. But punitive awards, for which availability is not constrained by meaningful jury instructions and which may be limitless in amount, compounds this danger exponentially.'

CHAPTER 7

FREEDOM OF SPEECH IN AUSTRALIA: THE CONSTITUTION AND THE COMMON LAW OF DEFAMATION

INTRODUCTION

[7-01] The Australian constitution lacks any explicit guarantee of free speech[1] and among common law countries, '...probably stands alone in having neither a constitutional nor statutory 'bill of rights'....'[2] This constitutional omission has not however prevented the development of Australian free speech jurisprudence and in particular defamation law. With a maturing democracy and the development of a more liberal political landscape,[3] calls increased for the re-balancing[4] of rights of freedom of expression and reputation in the context of defamation law.[5] The High Court[6] was repeatedly asked to reconsider where the appropriate line should be drawn in this respect. This chapter focuses on the establishment and development of the relationship between the constitution and the

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[1] Australia has however ratified a number of international treaties which provide for the protection of free speech; see Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and Article 5d(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD).

[2] L. Zines, *'Freedom of Speech and Representative Government'* in J. Beatson and Y. Cripps, (eds) Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams (Oxford University Press, 2000), p. 41.

[3] Chesterman has written that the Australian defamation defences '...originated and were developed against very different political, social and constitutional backgrounds to that of present-day Australia.' See M. Chesterman, *Freedom of Speech in Australian law: A Delicate Plant* (Aldershot, 2000), p.81.

[4] Freedom of expression in Australia has been described as a 'residual liberty' so that it is such which remains 'after legislation, and the creeping amendments of the common law, have taken effect.' See R.S. Magnusson, 'Freedom of Speech in Australian Defamation Law: Ridicule, satire and other challenges (2001) *T.L.J. Lexis* 9.

[5] Tobin referred to '...a presumption in favour of reputation.' See J. Tobin, 'The United States Public Figure Test: Should It Be Introduced Into Australia?' (1994) 17 *U.N.S.W.L.J.* 383, 399.

[6] The High Court is the highest Australian court. It generally hears cases of federal importance including challenges to the constitutionality of laws. It has appellate jurisdiction. Other cases that come to the High Court for final determination include appeals against decisions of the Supreme Courts of the States and Territories, of the Federal Court of Australia and the Family Court of Australia. Decisions of the High Court on appeal are binding and the decision is binding on all other courts throughout Australia. Parliament has also conferred non-exclusive original jurisdiction on the High Court to determine "all matters arising under the Constitution or involving its interpretation." The basis for this lies in the Australian Constitution and Judiciary Act 1903 30(a) (Austl.). See generally, L. Zines, *The High Court and the Constitution*, (Butterworths, 1997). Further information on the history and role of the Court can be obtained at http://www.hcourt.gov.au/.

common law of defamation in respect of the defence of qualified privilege and damages. It considers the impact this produced on the balancing of the rights of speech and reputation in these two areas of defamation law.

[7-02] The method of constitutional interpretation employed by the Australian High Court[7] was not uncontroversial.[8] Whether one agrees or not with the location of the implied right,[9] it would appear difficult to disagree with the observations of one commentator such that '...an outsider's mild surprise at the laying bare, after 90 years, of an unexpressed fundamental right in the Constitution, cannot temper his admiration for the ingeniously reasoned process of discovery.'[10] It was pointed out in Chapter 1 that for many years the Irish constitutional free speech guarantee remained undeveloped in contrast to the more activist judicial approach taken in the protection of other rights. However, some recent case law has adopted a more purposive approach to the development of Article 40.6.1°(i)'s democratic values and has recognised in this respect, '...the public activities of the citizen in a democratic society.'[11] In so far as the Irish constitutional guarantee of free speech was a late developer and has been linked with the Article 5 guarantee of democratic governance in some recent case law,[12] it does not stand so far removed from the location and development of the implied freedom in Australian jurisprudence. It is therefore comparatively significant to trace development of the implied freedom in Australian defamation law and assess whether there is scope for cross-fertilisation in Irish law in the two areas addressed in this thesis.

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[7] As noted by Loveland, in some free speech cases , the High Court '...clearly rejected textual literalism as an interpretive device....' See I. Loveland, '*Sullivan v The New York Times* Goes Down Under', (1996) *P.L.* 126, 129.

[8] See Symposium: 'Constitutional Rights for Australia?' (1994) 16 *Sydney L. Rev.* 141. For a more general discussion beyond the Australian context of the manner in which constitutional guarantees for freedom of speech have affected the civil law of defamation, see Fleming, J.,*'Libel and Constitutional Free Speech'* in P. Cane and J. Stapleton (eds), Essays for Patrick Atiyah, (Clarendon Press,1991), pp.333-349.

[9] Kennett feared that it would prove too difficult to draw any clear boundary around the rights that can be implied from the concept of representative government. See G. Kennett, 'Individual Rights, the High Court and the Constitution', (1994) 19 *Melb. Univ. L.R.* 581. There were others who did not consider the development as startling. See, *inter alia*, H.P.Lee, 'The Australian High Court and Implied Fundamental Guarantees', [1993] *P.L.* 606 and G. Williams, *Human Rights under the Australian Constitution*, (Oxford University Press, 2002), p. 170.

[10] S. Kentridge, 'Freedom of Speech: Is it the Primary Right?' (1996) 45 *I.C.L.Q.* 253, 255. Similarly, see M. Coper, 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur? (1994) 16 *Syd. L. Rev.* 185, 187 who referred to the 'persuasiveness of the Court's reasons...'.

[11] *Murphy v. IRTC* [1999] 1 I.R. 12, 24; [1998] 2 I.L.R.M. 360, 372.

[12] See *Irish Times v. Ireland* [1998] 1 I.R. 359; [1998] 2 I.L.R.M. 161 and *Cogley v. RTE* [2005] 4 I.R. 79; [2005] 2 I.L.R.M. 529.

THE LOCATION OF AN IMPLIED FREEDOM OF POLITICAL DISCOURSE

[7-03] The traditional level of protection for freedom of speech in Australian law may be explained with the following observation: '[O]ften, though not invariably, the fact that concern for freedom of speech underlies a legal rule is far from explicit in the way in which it is formulated.'[13] In 1992, in the 'foundational decisions'[14] of *Nationwide News v. Wills*[15] and *Australian Capital Television v. Commonwealth*,[16] the High Court created an implied constitutional guarantee for political communication.[17] In the former case, the High Court relied on this guarantee to invalidate a legislative provision prohibiting criticism of the Australian Industrial Relations Commission by bringing it or any member thereof into disrepute. Deane and Toohy JJ. discerned from the doctrine of representative government[18] which the Constitution incorporates, an implication of freedom of communication of information and opinions concerning matters of government.[19] They defined the doctrine of representative government as comprising the two electoral

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[13] M. Chesterman, *op. cit.*, n.3, p. 7.

[14] A. Stone and G. Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World', (2000) 26 *Monash Univ. L. Rev.* 362, 365, n.14.

[15] (1992) 177 C.L.R. 1.

[16] (1992) 177 C.L.R. 106.

[17] For examples of earlier case law in which this development had been suggested by Murphy J., see *Ansett Transport Industries (Operations) Pty Ltd v. Commonwealth* (1977) 139 C.L.R. 54, 88 ('Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections....From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution....'. See also *Miller v. TCN* (1986) 161 C.L.R. 556, 581-2 ('The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the Territories but in and between every part of the Commonwealth.').
For further discussion of the implied freedom and *Nationwide News v. Wills*, above, n. 15 and *Australian Capital Television*, above, n.16, see, *inter alia*, H.P. Lee,*'The Implied Freedom of Political Communication'* in H.P. Lee and G. Winterton, (eds) Australian Constitutional Landmarks (Cambridge University Press, 2003), chapter 16, R.L. Weaver and K. Boehringer, 'Implied Rights and the Australian Constitution: A Modified *New York Times, Inc. v. Sullivan* Goes Down Under' (1998) 8 *Seton Hall Const. L. J.* 459 and T. Jones, 'Freedom of Political Communication in Australia' (1996) 45 *I.C.L.Q.* 392.

[18] For a discussion of three models of representative democracy, see G. Patmore, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia', (1998) 7 *Griffith L. Rev.* 97. The author concludes that the participatory model is more likely to gain acceptance than the protective or elite models and should therefore be adopted by the Court. Cass has made the point that '...without expecting members of the judiciary to solve major philosophical questions, the decision would be stronger if there had been some acknowledgment of the difficulties associated with defining democracy.' See D. Z. Cass *'Through the Looking Glass: The High Court of Australia and the Right to Political Speech'* in T. Campbell and W. Sadurski, (eds) Freedom of Communication (Aldershot: Dartmouth, 1994), p.188. The cases highlight the lack of an underlying free speech theory in Australian law.

[19] In the same year, the Court also recognised Aboriginal land rights in *Mabo v. State of Queensland* (1992) 107 A.L.R. 1.

processes of electing the members of the Parliament (ss. 7 and 24)[20] and amending the Constitution (s.128).[21] In order to perform these democratic duties responsibly, the electorate requires the ability to both communicate and receive political information. Therefore, they reached the conclusion that the Constitution protects an implied right of freedom of information and opinions relating to the government of the Commonwealth at two levels, firstly between the represented and their representatives and secondly between the people of the Commonwealth.[22]

[7-04] The same implied freedom was used in *Australian Capital Television v. Commonwealth*[23] to invalidate federal legislation which prohibited political advertising during election periods.[24] Mason C.J. explained that:

> '[T]he efficacy of representative government depends...on free communication on [public affairs] between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process.'[25]

[7-05] Four of the Justices[26] considered the legislation to be invalid on the basis that, although the implied freedom of communication in relation to political matters inherent in

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[20] Section 7 provides, *inter alia*, that the Senate shall be composed of senators for each state, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. Section 24 provides, *inter alia*, that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth.

[21] Section 128 sets out the procedural steps to be followed when altering the Constitution.

[22] While in the early part of their judgments, Deane and Toohy JJ had explicitly stated that the freedom of communication of information and opinions related to matters concerning the Government of the Commonwealth, thereby leaving open the question of whether the freedom extended to State and local levels of government, the fact that the communication was seen to operate at a level of communication between the people of the Commonwealth raised a strong possibility that the freedom applied at State and local level also. This conclusion was bolstered by the express provision contained in section 92 of the Constitution, which guarantees the freedom of inter-state intercourse.

[23] Above, n. 16. For a case study of the decision, see D. Z. Cass, *loc. cit.*, n. 18.

[24] For an article on the relationship between democracy, paid political advertisements on television and constitutional rights to free speech, see G.N. Rosenberg and J.M. Williams, 'Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia' (1997) *Sup. Ct. Rev.* 439.

[25] Above, n. 16, pp. 138-139. Chesterman maintained that these dicta '...linked support for speaker autonomy with a concept of participatory democracy.' *Op. cit.*, n. 3, p.32.

[26] Mason C.J., Deane, Toohey and Gaudron JJ.

the Constitution was not absolute, the restrictions went beyond a justifiable restriction on the implied freedom.

DEVELOPMENT OF THE IMPLIED FREEDOM

[7-06] The location of the implied freedom of political communication discussed in the previous section had been applied in two non-defamation cases and its application to public interest speech by the media in the defamation context occurred two years later in *Theophanous v. Herald & Weekly Times*[27] (hereafter *Theophanous*) and *Stephens v. Western Australian Newspapers* (hereafter *Stephens*).[28] Although the democratic values underlying freedom of political expression had been revealed pre-*Theophanous* and *Stephens*, how these values were to be correctly balanced with the right of reputation remained unaddressed. This section briefly looks at the traditional defence of qualified privilege in Australian defamation law before moving on to consider the judgments in *Theophanous* and *Stephens*.

The Traditional Defence of Qualified Privilege[29]

[7-07] Until recently, Australia did not have a uniform defamation law.[30] Instead a patchwork regime existed with each of the eight states and territories having their own defamation law, combining common law and statutory law.[31] Defamation law in Australia has since been reformed with the introduction of almost uniform legislation across the

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[27] (1994) 182 C.L.R. 104.

[28] (1994) 182 C.L.R. 211.

[29] For discussion of Australian defamation law, see R.L.Weaver, A.T. Kenyon, D.R. Partlett and C.R. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006), pp. 78-80, P. Mitchell, 'The Foundations of Australian Defamation Law' (2006) 28 *Syd. L. Rev.* 477, D. Butler and S. Rodrick, *Australian Media Law*, (2nd ed., Law-Book Co., 2004), S.F. Fischer, 'Rethinking Sullivan: New Approaches in Australia, New Zealand and England' (2002) 34 *Geo. Wash. Int'l L. Rev.* 101, 120-123 and M.Chesterman, *op. cit.*, n. 3, pp. 83-95.

[30] There had however been numerous calls for harmonization. See, for example, the Australian Law Reform Commission Report No.11, *Unfair Publication: Defamation and Privacy*, 1979 (ALRC Report No.11) and the Australian Press Council, *Submission of the Australian Press Council to the NSW Attorney General on possible reforms to the NSW Defamation Law*, 10th October 2001, p.2 and more recently, Western Australian Defamation Law Reform Committee, *Committee Report on Reform to the Law of Defamation in Western Australia*, (Perth, 2003). Dent and Kenyon have expressed concern that this uncertainty in itself may be considered to create a 'chilling effect'. See A. Kenyon and C. Dent, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers', (2004) 9(2) *Media and Arts Law Review* 89, 93, n.20.

[31] For a general overview, see, *inter alia*, J.F. Fleming, *The Law of Torts*, (9th ed., LBC Information Services, Sydney, 1998), chapter 25, F. Trindade and P. Cane, *The Law of Torts in Australia* (Oxford University Press, 1999) and S. Walker, *Media Law: Commentary and Materials* (LBC, 2000) pp.101-102.

states and territories.[32] Given that the scope of the legislation has yet to be properly established through judicial interpretation,[33] the modifications are not addressed in depth throughout the chapter other than where strictly relevant. Of stronger current relevance for this thesis has been the influence of the English common law on Australian defamation law throughout most of the states and territories.[34] Mirroring the English position therefore, the traditional defence was limited to situations where there existed a relationship of reciprocity between the maker of the statement and the recipient of it.[35] The privilege could be defeated by malice. The duty/interest test was not met by the relationship between a newspaper and its readers.[36] The categories of qualified privilege are not exhaustive and have been developed over time. However, until recently, there was no common law or statutory generic category of protection governing media publications[37] even where the issue was one of public interest.[38]

Theophanous v. Herald & Weekly Times

[7-08] At the time of the publication, the plaintiff was a member of the Commonwealth Parliament, the Chairperson of the Joint Parliamentary Standing Committee on Migration Regulations and the Chairperson of the Australian Labor Party's Federal Caucus Immigration Committee. The first defendant, The Herald & Weekly Times Ltd., published in its newspaper, *The Sunday Herald Sun*, a letter to the editor written by the President of the Victorian branch of the Returned Services League entitled *'Give Theophanous the shove'*. The letter urged the public not to return the plaintiff to power in the next election, which at the time of the publication was likely to be called within the next month, on the basis that he showed a bias towards Greeks as migrants, stood for most things that Australians were against and generally acted idiotically. Defamation proceedings were taken and the newspaper defended the letter based on the implied freedom of

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[32] See S. Rares, 'Defamation and Media Law Update 2006: Uniform National Laws and the Federal Court of Australia' (2006) 28 *Australian Bar Rev.* 21.

[33] Each State passed its Defamation Act in 2005 with effect from 1st January 2006. The Civil Law (Wrongs) Amendment Act 2006 (Australian Capital Territory) was effective from 23rd February 2006 and the Defamation Act 2006 (Northern Territory) from 26th April 2006.

[34] The common law defence of qualified privilege did not apply in Queensland and Tasmania. These jurisdictions had a statutory defense known as qualified protection with no requirement of reciprocal duty and interest.

[35] *John Fairfax & Sons Ltd. v. Hook* (1983) 72 F.L.R. 190.

[36] *Morosi v. Mirror Newspapers Ltd.* [1977] 2 N.S.W.L.R.

[37] *Brown v. Croome* (1817) 2 Stark 297, *Duncombe v. Daniel* (1837) 3 Car & P 223, *Telegraph Newspaper Co. v. Bedford* (1934) 50 C.L.R. 632.

[38] *Lang v. Wills* (1934) 52 C.L.R. 637 (election speeches delivered to large audiences were not necessarily privileged even if they covered issues of interest to the elector) and *Loveday v. Sun Newspapers Ltd.* (1938) 59 C.L.R. 503 (publication to the world at large sometimes protected).

communication and further, that the publication had occurred on an occasion of qualified privilege.[39]

[7-09] The High Court considered it to be '...incontrovertible that an implication of freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous criminal and civil liability if the implication is to be effective in achieving its purpose.'[40] The Court had clearly accepted the application of the implied protection in the context of political discussion. The question was how to balance the protection of political discussion alongside the competing right of reputation. Mason CJ, Toohey and Gaudron JJ. held that in the event of a conflict between the Constitution and common law doctrine, the former prevails. They approached their task of reconciling defamation law and the implied constitutional freedom of communication by asking whether the nature of defamation law is such that it infringed on the implied freedom. The conclusion reached in this respect was that existing defamation law tilted the balance too far in favour of a politician's individual reputation, particularly in relation to the views, conduct and suitability for office of an elected representative of the Australian Parliament, at the expense of the implied freedom of communication.[41] Following this finding,[42] it became necessary to refashion defamation law to make it constitutionally compliant.

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[39] Counsel for the newspaper had cautioned that the requirement that a defendant establish the truth of a publication or fall within one of the other recognised defences, under threat of a substantial damages award, produces a chilling effect on free discussion of political and government matters, contrary to the objects of the constitutional guarantee of free speech in relation to government and political matters. Counsel therefore urged the Court to adopt one of two alternatives (i) statements regarding political and government matters were actionable only if the plaintiff could establish malice in the sense of deliberate falsity or reckless disregard of the truth or (ii) if the publication was unreasonable in all the circumstances.

[40] Above, n.27, p. 130.

[41] The majority explained that '[T]he decisions which establish the common law principles have not been concerned to assess the inhibiting impact of the law of defamation and threats of action for defamation on the exercise of that freedom'. Above, n.27, p.132. The Court considered that the need to prove truth when it arises clearly inhibits freedom to publish critical matter and the defences of fair comment and qualified privilege are not always available, which means that the need to prove truth can often arise in practice.

[42] Brennan J. strongly disagreed in the following terms: '[T]he question is not whether the absolute freedom to discuss government, governmental institutions and political matters is chilled by the law of defamation but whether the law of defamation, by chilling the publication of certain defamatory matter, is inconsistent with a constitutional implication. Whether one approaches that question by characterizing the implication as a limitation on power or by perceiving that the restrictions imposed by the defamation laws achieve the legitimate purpose of protecting reputations, the answer is the same: the common law of defamation is not inconsistent with any implication drawn from the text or structure of the Constitution.' Above, n. 27, p.155. He subsequently declared that '[I]t is not open to this Court to hold that the workings of the law of defamation show that the capacity of the people of the Commonwealth to form and to exercise political judgments have been damaged by those laws.' Above, n.27, p.160.

[7-10] The starting point for the majority was an examination of *New York Times v. Sullivan*[43] and its progeny. As discussed in Chapter 6, the *New York Times* standard requires a public official to prove that a publication was made with knowledge that it is false or with reckless disregard of its truth or falsity. The High Court rejected the incorporation of the *New York Times* standard into Australian defamation law on a number of grounds including the extension of the defence beyond candidates for public office.[44] Nonetheless, the Australian High Court believed that even in the absence of extensions to the defence, the *New York Times* test failed to strike the appropriate balance between freedom of expression and the right of a public official to his reputation. It pointed to a number of problems[45] with the public figure test including intrusive discovery procedures by the plaintiff in his attempt to prove malice, the danger posed to the protection of journalists' sources, the increased likelihood of protracted litigation and the subsequent inflation of legal costs. According to Brennan J., where as the purpose of *New York Times* '...is to define the conditions in which the constitutional privilege is forfeited....', the purpose of Australian defamation law '...is to protect personal reputation to an extent appropriate in a society which also values free speech.'[46]

[7-11] In rejection of the *New York Times* standard and its focus on the status of the plaintiff and not the public interest value of the material,[47] the High Court used the implied freedom to publish material discussing government and political matters, to create a constitutional defence[48] such that a publication will not be actionable under defamation law

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[43] (1964) 376 U.S. 254.

[44] 'We should indicate our preliminary view that these extensions [of the public figure test under *New York Times*] other than the extension to cover candidates for public office, should not form part of our law.' : *per* Mason CJ, Toohey and Gaudron JJ., above, n. 27, p. 134. According to *Zines*, '[T]he statement does not sit well with the comment that 'political discussion' includes the political views and conduct of trade union and Aboriginal leaders and political commentators....' *Loc. cit.*, n.2 , p. 385. Similarly, see F. A. Trindade, 'Political Discussion and the Law of Defamation' (1995) 111 *L.Q.R.* 199.

[45] These problems had been identified previously by the New South Wales Law Reform Commission, *Discussion Paper No. 32*, Defamation, (August 1993). The *New York Times* test had also been rejected by other Australian bodies; see *inter alia*, Australian Law Reform Commission *Report No.11*, *op. cit.,* n.30 and the New South Wales Legislative Assembly Committee, *Report of the Legislation Committee on the Defamation Bill*, 1992.

[46] Above, n. 27, p. 161. Although Brennan J. dissented from the majority, all the judges sought to balance the competing rights of expression and reputation.

[47] See further V. Mullen, *'Defamation of Public Officials and Public Figures: Special Rules and Free Speech in the United States and Australia'*, NSW Parliamentary Library Research Service, Occasional Paper No.2, August 1995. The *New York Times v. Sullivan* standard was rejected by a leading Australian defamation commentator as 'ineffective'. See M. Chesterman, 'The Money or the Truth: Defamation Reform in Australia and the USA' (1995) 18 *U. New South Wales L.J.* 300, 303.

[48] This constitutional defence applied to all the Australian jurisdictions and it could not be restricted by federal, Territory or State legislation.

if the defendant satisfies three requirements.[49] These are: (i) it was unaware of the falsity of the material published (ii) it did not publish the material recklessly, without caring about truth or falsity and[50] (iii) the publication was reasonable in the circumstances.[51] In respect of the *Theophanous* constitutional defence, '[I]t thus differed from the traditional rule of qualified privilege which places the burden of proving malice on the plaintiff.'[52] The Court explained that '...once it is accepted that it is necessary to show that the publication was reasonable...there is no occasion to include malice according to its common law understanding as an element in the test to be applied'.[53] The underlying objective of the newly formulated defence is to remove the obligation on a publisher to prove the truth of his statements, rather he is requested to satisfy the jury that he passes the three-pronged test set out above.[54] Ultimately what is reasonable will depend on what the jury considers reasonable in light of the facts in the particular case.

[7-12] The Court also expanded the traditional common law qualified privilege defence to cover government or political matters. This standard was perceived as necessary to protect the implied constitutional protection for political communication, which the existing common law of defamation failed to do, and has since been described as a '.... constitutionalised variant of qualified privilege.'[55] This phrase relates to the interaction of the implied freedom of political communication at constitutional level and the subsequently amended defence of common law qualified privilege, such that on account of the former, it was necessary to extend the defence to provide that the 'public at large' satisfy the interest element of the defence of qualified privilege. Accordingly, '[I]t follows that the discussion of political matters is an occasion of qualified privilege.'[56] Protection

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[49] Hence, the defendant must establish that the publication falls within the constitutional protection.

[50] The combined effect of these requirements according to Allen J. in *Hartley v. Nationwide News Pty Ltd* (1995) 119 F.L.R. 124, 125 is to deny the constitutional protection to a publisher '...who does not prove that the publication is the product of an honest endeavour to be accurate in what is stated.'

[51] The Court went on to explain this third requirement in more depth as follows: '[W]hether the defendant has acted reasonably will involve consideration of any inquiry made by the defendant before publishing; that is a matter peculiarly within the knowledge of the defendant'. It continued: '[W] hether a publisher has acted reasonably must be a question of fact in every case. It will depend upon the standards and expectations of the community as to whether the allegations needed to be investigated'. Above, n. 27, p.138.

[52] Fleming, *op. cit.*, n.31. p 641.

[53] Above, n.27, p.137.

[54] See R. Baker, 'Extending common law qualified privilege to the media: a comparison of the English and Australian approaches (2002) 7 *Media and Arts Law Review*, 87, 97 who refers to the courts' '...disciplinary role as regulators of journalistic conduct....'

[55] Loveland, *Political Libels: a Comparative Study* (Hart, 2000), p.140. The same author has opined that the majority decision '...impressed a far more radical stamp upon the relationship between Australia's legislators and their electorates.' See I. Loveland, 'Reforming Libel Law: The Public Law Dimension', (1997) 46 *I.C.L.Q.* 561, 583.

[56] Above, n.27, p.140.

will be lost only if the plaintiff can establish that the publication was motivated by malice. The *Theophanous* requirements did not apply in respect of this newly extended qualified privilege defence.[57]

[7-13] Acknowledging that '...not all speech can claim the protection of the constitutional implication of freedom we have identified...' it was held that '...in order to ensure the efficacious working of representative democracy and government',[58] political discussion was to be defined as including '.... discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators.'[59] The majority did not believe the concept exhausted '....by political publications and addresses which are calculated to influence choices. Barendt states that... " 'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'" [60] The definition delineates a distinction drawn by the court between different classes of public figures. Accordingly, public figures in the narrow sense of elected representatives or those seeking political election may have their '..conduct, policies or fitness for office' freely discussed, which appears to cover both their public and private lives so far as they relate to public positions. In contrast, those persons who '..are engaged in activities that have become the subject of political debate....'[61] will not undergo scrutiny in respect of their private lives, as political discussion of such persons only extends to their political views and public conduct.

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[57] This led Walker to observe the following: 'The High Court failed to recognise that, in many cases, the expanded form of qualified privilege could better provide protection to publishers than that accorded to them by the *Theophanous* defence.' *Op. cit.*, n.31, p. 215.

[58] Above, n. 27, p.125.

[59] Above, n.27, p.124.

[60] Above, n. 27, p.152. (quoting E. Barendt, *Freedom of Speech*, (Oxford University Press, 1985). In similar terms, *Post* had argued that '[The people] have the power to determine the content of public issues simply by the direction of their interests. This means that every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern. The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate.' See R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine and Falwell*', (1990) 103 *Harv. L.* Rev. 601, 670. In the Australian context, Baker makes the point that distinguishing the political from the non-political is far from a '...virtuously neutral exercise.' See R. Baker, *loc.cit.*, n.54, p.94.

[61] Above, n.27, p.124.

[7-14] The implied freedom, which had been located in the Commonwealth constitution, was found in *Stephens* to apply to state statutory defamation laws by the same bench, which had given the *Theophanous* ruling earlier the same day. The six plaintiffs who commenced proceedings for defamation were members of the Legislative Council of Western Australia[62] and of its Standing Committee on Government Agencies who claimed that three articles by the defendant, the publisher of the *West Australian* newspaper defamed them in their professional capacity. The articles reported assertions made by another member of the Council in relation to an interstate and overseas trip of twenty-two days undertaken by the plaintiffs as members of the Committee to the effect that the trip was a 'junket of mammoth proportions' undertaken in the absence of Parliamentary approval for it. The newspaper argued that the publications had been published pursuant to a constitutional freedom in so far as they related to elected members of Parliament and the performance by such persons of their functions and duties and that the articles were published on occasions of qualified privilege. By reason of the system of representative democracy, which operates in Western Australia, the freedom of communication implied in the Commonwealth Constitution with its direct linkage to a similar democratic system thus '...has its counterpart in the Constitution of Western Australia.'[63] Therefore, the majority reasoned that the freedom of communication implied in the Commonwealth Constitution extended to public discussion of the performance, conduct and fitness for office of members of a State legislature. The majority in a short judgment followed its reasoning in *Theophanous*,[64] whereby the implied freedom affords a defence in respect of defamatory political communications in circumstances where the defendant was unaware of the falsity of the material published, did not publish the material recklessly, and the publication was reasonable in the circumstances.[65] In following *Theophanous*, the same majority held, in respect of common law qualified privilege, that it was unnecessary to allege a duty on the part of the defendant to publish the matter complained of to its readers.

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[62] This is the upper house of the State Parliament.

[63] Above, n. 28, p. 232. This implied freedom was *distilled* from s.73 (2) of the Constitution Act of Western Australia. This requires the Legislative Council and the Legislative Assembly to be composed of members chosen directly by the people.

[64] Dawson and McHugh JJ. stated their belief that the incorrect defence had been relied on by the defendants, in that fair comment rather than qualified privilege was the correct defence given the facts. The material complained of by the plaintiffs was regarded by the two judges as being comment with little basis. As the public was receiving '...essentially bare defamatory comment unaccompanied by explanatory statements of fact', they resultantly were considered to have no duty or interest in its publication. However, they did not conclude their analysis fully, providing no answer as to whether they considered such a defence would be satisfied by the defendants in each case.

[65] For a review of decisions on the constitutional defence and qualified privilege following the *Theophanous* and *Stephens* cases, see A.E. Cassimatis, 'Comment: *Theophanous* – a review of recent defamation decisions', (1997) *TLJ Lexis* 23.

[7-15] Some concern was expressed subsequently that the judgments in *Theophanous* and *Stephens* defined the concept of political speech too narrowly and should have extended it beyond governmental and public sector operations.[66] Others welcomed the broad definition offered by the High Court. Commenting on both the constitutional and common law developments in the cases, leading defamation commentators opined that the '... expansive view of "political" took it close to a concept of "public affairs."' The same observers went on to argue that this broad definition, alongside a qualified privilege defense that could only be defeated by malice, '...suggested a reasonably broad area of public interest matters would be protected to a much greater degree than previously.'[67] What is of significance from an Irish constitutional perspective in addition to the definition of political discussion is the constitutional methodology employed. The High Court arrived at its conclusion by the constitutionalisation of defamation law both in terms of the creation of a constitutional defence and the use of constitutional norms to reform traditional qualified privilege. The recognition by the Australian High Court of the links between the constitutional freedom, political discussion and defamation law reveals similar potential in the Irish context.

LANGE V. AUSTRALIAN BROADCASTING CORPORATION [68]

[7-16] Deane J. had joined the majority judgment in *Theophanous*.[69] However, he had acknowledged some legitimacy in defamation rules which treated politicians and government officials differently from ordinary citizens on the basis that '...holders of high office in a representative government must be subordinated to the need for open and effective scrutiny and discussion of their official conduct and suitability.'[70] It was this

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[66] See M. Chesterman, *op. cit.*, n.3, p. 48 and A. Kenyon, 'Defamation and Critique: Political Speech and *New York Times v. Sullivan* in Australia and England' (2001) 25 *Melbourne Univ. L. Rev.* 522.

[67] R. L. Weaver and D.F. Partlett, 'Defamation, the Media and Free Speech: Australia's Experiment with Expanded Qualified Privilege', (2004) 36 *Geo. Wash. Int'l L. Rev.* 377, 386. See also Jones for the argument that the decisions make clear that criticism of the performance, ability and suitability for office of elected politicians lies at the heart of freedom of political expression; T.H. Jones, 'Freedom of Political Communication in Australia' (1996) 45 *I.C.L.Q.* 392.

[68] (1997) 189 C.L.R. 520. For a case note, see R. Tobin, 'Case Notes: Political discussion, freedom of expression and qualified privilege: *Lange v. Atkinson'*, (1999) 7 *T.L.J. Lexis* 4. See also, Leigh, L., *'Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia'* in I. Loveland (ed.), Importing the First Amendment: Freedom of Expression in American, English and European Law, (Hart, 1998), pp. 51-68.

[69] Deane J. believed that '...the appropriate course for me to follow is to lend my support for the answers which their Honours give to the questions reserved by the stated case.' Above, n.27, p.188.

[70] He explained, above, n. 27, p. 183: '[T]here are, of course, weighty reasons which support the common law's protection of personal reputation by the imposition of liability to pay damages for defamation. Strong though they remain, however, those reasons are less powerful in the case of those who undertake the exercise of the powers of government in high public office in that the holders of such office, particularly

divergence from the other majority judges that subsequently '...provided the High Court with impunity to disregard the constitutional aspects of *Theophanous* and *Stephens* without actually overruling either case.'[71] *Lange* represented a retreat from *Theophanous* in respect of the constitutional defence but it expanded the traditional defence of qualified privilege. This section divides discussion of *Lange* into the following (i) the *Theophanous* constitutional defence (ii) expansion of traditional qualified privilege and (iii) conditions for the application of the expanded qualified privilege defence. Prior to commencing with these sub-sections, the facts may be briefly noted. The case arose out of a defamation action brought in the Supreme Court of New South Wales by Mr. David Lange, a former Prime Minister of New Zealand against the Australian Broadcasting Corporation. He instituted defamation proceedings under the defamation laws of New South Wales claiming that the programme meant he was unfit to hold public office. The defendants pleaded the *Theophanous* constitutional defence and common law qualified privilege. The plaintiff sought to strike out both defences as bad in law and argued that *Theophanous* and *Stephens* had been wrongly decided.

The Theophanous Constitutional Defence

[7-17] According to the High Court in *Lange*, it was arguable that neither *Theophanous* nor *Stephens* established a '...binding statement of constitutional principle.'[72] Although the Court continued the constitutional protection for representative government,[73] it limited

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parliamentarians entitled to be heard in the public and privileged forum of parliamentary proceedings, are likely to have greater access by reason of their office, to the means of communication to refute or answer an untrue or unfair statement of fact or comment'. He held that '...the effect of the constitutional implication is to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office. I would also hold that the constitutional implication's protection of the freedom of the citizen to be informed by, and to participate in, public and vigorous discussion and criticism of the official conduct of those entrusted with the exercise of the powers of government also precludes completely the application of such laws to impose liability in respect of such statements or comments upon those responsible for the conduct of the press and other media outlets through which such public discussion and criticism must, in our society, largely take place'. His position echoes the position advocated by Justices Black and Douglas in *New York Times v. Sullivan,* above, n. .

[71] R. Potter, 'The Development of Freedom of Speech Defences to Defamation in Australia and other Common Law Jurisdictions' (1998) 3 *Media and Arts Law Review* 82, 85. According to Loveland, '[I]t is something of an exercise in sophistry to claim that because Deane J went far beyond the point reached by the plurality he cannot be assumed to have approved their destination.' See I. Loveland, *Political Libels: a Comparative Study*, *op. cit.*, n.55, p.148.

[72] Above, n. 68, p. 554.

[73] According to one observer, the High Court carried on the '...consistent attempt to source or ground such rights and freedoms in institutions. Initially, the favoured institution is representative democracy. *Lange* augments this notion, with responsible government.' See H. Patapan, *Judging Democracy: The New Politics of the High Court in Australia* (Cambridge University Press, 2000), pp. 59-60.

this to the constitutional text[74] so that the freedom of communication which the Constitution protects '...is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[75] Accordingly, '...legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.'[76]

[7-18] The Court did not however support the existence of a separate constitutional defence for political discussion. Accordingly, '...the implied freedom could not create any private constitutional defenses like the *Theophanous* constitutional defense.'[77] The Court then explained that any law must satisfy a two-part test so as not to suffer from invalidation for violation of the implied freedom.[78] In the first place, the object of the law must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and secondly, the law must be reasonably appropriate and adapted to achieving that legitimate object or end.[79] It was accepted that the system of representative government does not require an unqualified freedom to publish defamatory matter which causes damage to the reputations of individuals involved in government and politics. Nonetheless, the Court held that the common law of reciprocity of interest which operated in Australian defamation law in common law qualified privilege and was reflective of the traditional English position, had to be seen '...as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which the "common convenience and welfare of society" now requires.' [80] Although the implied constitutional

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[74] Zines has pointed to the Court's increased '...emphasis on representative government as *prescribed by the Constitution* rather than as an abstract political concept.' *Loc.cit.*, n.3, p.144. Both Brennan and McHugh JJ had earlier warned in *Theophanous* that the scope of the freedom to discuss government matters must be ascertained from the text or structure of the Constitution. See also in this respect *McGinty v. Western Australia* (1996) 186 C.L.R. 140.

[75] Above, n. 68, p.561.

[76] Above, n.68, p.560. See R. Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Fed. L. Rev.* 41 for the argument that in terms of freedom of communication, the ability to obtain information is just as important for the proper functioning of a democratic society as the ability to discuss that information.

[77] Fischer, *loc. cit.*, n.29, p.145. On the issue of personal rights under the Constitution, see A. Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Fed. L. Rev.* 219 and by same author, 'Right, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melb. Univ. L. Rev.* 374.

[78] See more generally M. Tilbury, 'Uniformity, the Constitution and Australian Defamation Law at the Turn of the Century', in N.J. Mullany and A.M. Linden (eds.) Torts Tomorrow, A Tribute to John Fleming, (North Ryde, N.S.W., LBC Information Services, 1998) pp.244-270, 263-267.

[79] See further A. Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melb. Univ. L. Rev.* 668.

[80] Above, n. 68, p.570.

freedom was held not to confer personal rights,[81] it clearly remained an instrument to shape the contours of those rights.[82] As the Court explained:

> 'Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.'[83]

[7-19] In light of the above, whether there is therefore any significant difference between the *Theophanous* and *Lange* constitutional approaches has been questioned:[84]

> 'It is sometimes suggested that the approaches in *Theophanous* and *Lange* are, in this respect, very different. The argument is that *Lange* denied that the constitutional implication operated directly to alter the private rights of individuals *inter se* and that *Theophanous* was therefore, in effect, overruled. As, however, it was held that the common law must conform to constitutional requirements there is no difference in result....In each case it can sensibly be said that the defendant was guaranteed a defence by virtue of the *Constitution*.' [85]

Expansion of traditional qualified privilege

[7-20] In light of the Court's findings that the traditional defence of common law qualified privilege failed to meet the tests required for conformity with the implied constitutional

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[81] See further A. Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 Melb. Univ. L. Rev. 374, 390-400, who argued that even though the freedom of political communication serves an institutional rationale, questions about more 'personal' values remain.

[82] The Court made this point further when it explained that '[T]he Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'...Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.' Above, n.68, p.564, citing *McArthur v. Williams* (1936) 55 C.L.R. 324, 347, *per* Starke J. For a similar approach in Canadian jurisprudence on the relationship between the constitution and the common law, see *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573.

[83] Above, n. 68, p.566.

[84] L. Zines, *'The Common Law in Australia: Its Nature and Constitutional Significance'*, Law and Policy Paper, No. 13, Centre for International and Public Law, Australian National University, 1999).

[85] *Ibid.*, p. 24. Similarly, see G. Hill and A. Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adel. L. Rev.* 67.

freedom of political communication, the High Court prescribed the broadening of the defence. The Court moved away from the explicit *Theophanous* constitutional defence in favour of the liberalization of public interest speech by extension of the common law qualified privilege defence.' [86] However, as noted above, there remained a relationship between the implied freedom and the defamation laws so that the latter '...are to be developed independently of the freedom but with due regard to its requirements.'[87] In this respect therefore, the Court relied on the system of representative government in the context of the duty/interest limb of traditional qualified privilege to expand it to protect '...a wider freedom for members of the public to give and to receive information concerning government and political matters...'[88] It was considered vital to develop the common law defence of qualified privilege to take account of the 'varying conditions of society'.[89] It was acknowledged that the traditional balance struck by the common law in the balancing of freedom of communication about government and political matters and the protection of personal reputation had to be developed to meet subsequent changes.[90] A different balance was required by factors such as the expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern developments in mass communications especially the electronic media.[91] The Court went on to declare that '...each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.'[92] It was further explained that this may include, for example, discussion of matters concerning the United Nations, other countries, or discussion of government or politics at state, territory or local government level. By extending the ambit of the defence in this manner, it was acknowledged that the result might produce anomalies between the common law of defamation and the freedom of communication required by the

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[86] As has been pointed out, '[A]lthough the Australian High Court has interpreted the Constitution as containing an implied right of free speech for government and political matters, and has even flirted with providing constitutional protections for defamation, the High Court ultimately chose the common law qualified privilege route.' See D. Partlett, R.L.Weaver and A. Kenyon, 'Defamation Law and Free Speech: *Reynolds v. Times Newspapers* and the English Media' (2004) 37 *Vand. Transnat'l L.* 1255, 1260.

[87] M. Chesterman, 'Privileges and Freedoms for Defamatory Political Speech' (1997) 19 *Adel. L. Rev.* 155, 157.

[88] Above, n. 68, p.570.

[89] This concept was borrowed from the English decision of *Wason v. Walter* (1868) L.R. 4 Q.B. 73, 93, *per* Cockburn C.J.

[90] Similar views had previously been expressed by Mason C.J. in *Theophanous*, above, n. p. such that'[T]he implied freedom is one that shapes and controls the common law. At the very least, development in the common law must accord with its content. And, though it may not have been appropriate in 1901...if the content of the freedoms required, the common law must be taken to have adapted to it in 1901.'

[91] Many of these developments had previously been highlighted by Deane J. in *Theophanous*. Above, n. , pp. 173, 174.

[92] Above, n. 68, p.571.

Commonwealth Constitution[93] such that '....discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.'[94] The Court had justified such a move earlier in its reasoning by holding that '...the common law may be developed to confer a head or heads of privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower.'[95]

[7-21] The extension of the categories of qualified privilege in *Lange* was generally regarded as reflective of an establishment[96] or institutional[97] concept of political communication. It has been observed that '[T]his perspective is understandable, given that the freedom in Australia is no more than a consequence of the system of representative government established by its Constitution.'[98] However, there was concern that the judicial limitation of constitutional protection to the overly political[99] would result in limited protection for speech on matters of public interest more generally.[100]

Conditions for the Expansion of the Qualified Privilege Defence

[7-22] Although the discussion of government and political matters to a wide audience was recognised as an occasion of qualified privilege, the traditional defence of common law qualified privilege was expanded to incorporate an extra requirement of reasonableness rather than mere honesty on the part of the maker of the statement. The

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[93] According to Twomey, '[T]he most that could be argued is that the alleged scandal involving the New Zealand and Labour Party might taint by association the Australian Labor Party, which was in Government at the Commonwealth level at the time.' See A. Twomey, 'Before the High Court, Dead Ducks and Endangered Political Communication – *Levy v State of Victoria* and *Lange v Australian Broadcasting Corporation*, (1997) 19 *Sydney L. Rev.* 76.

[94] Above, n.68, p 571.

[95] Above, n. 68, p.566.

[96] E. Handsley and G. Davis, 'Case Notes: Defamation and Satire: *Hanson v. Australian Broadcasting Corporation*', (2000) 9 *TLJ Lexis* 12, 39.

[97] Chesterman maintains that the case follows an overall trend since 1992 '...away from some initial adherence to participatory democracy as the underlying model and towards an apparent, but by no means complete, acceptance of an 'institutional' version.' *Op. cit.*, n.3, p. 31.

[98] E. Barendt, Freedom of Speech, 2nd ed.(Oxford University Press, 2005), p. 162. See also D. Meagher, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melb. U. L. Rev.* 438, 459 for the view that '[T]he rationale of the implied freedom is a minimalist model of judicially-protected popular sovereignty.'

[99] For writing in support of this approach in the United States context, see R.H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana L. J.* 19.

[100] See *inter alia*, A. T. Kenyon, 'Defamation and Critique: Political Speech and *New York Times v. Sullivan* in England and Australia' (2001) 25 *Melb. Univ. L. Rev.* 522, 528.

Court found this standard of care to be reasonably appropriate and adapted to the protection of reputation when balanced alongside the need to protect political communication. It explained:

> 'The protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good. The constitutionally prescribed system of government does not require – to the contrary, it would be adversely affected by – an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics.'[101]

[7-23] In order to avail of the reformulated common law defence of qualified privilege, the defendant must have had:

> '...reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.'[102]

[7-24] The incorporation of the reasonableness test is due to the fear that '...the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients.'[103] Therefore, it is to be noted that the requirement of reasonableness of conduct '...is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience.'[104] Arguably therefore, it has reduced the protection afforded to publications on governmental or political matters published to a wide audience as the reasonableness requirement must always be met, whereas the same requirement does not apply in respect of situations privileged pre-*Lange*.

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[101] Above, n.68, p. 568.
[102] The requirement of giving the person defamed the opportunity to respond had previously been suggested by Brennan J. in his dissenting judgment in *Stephens*, above, n.28, pp. 252, 253. The criteria listed in *Lange* are not an exhaustive list.
[103] Above, n.68, p.572.
[104] Above, n. 68, p. 573.

This approach has been criticised on the basis that it focuses on the identity of the defendant or the size of the audience at the expense of consideration of whether the communication is a matter of legitimate interest to the public.[105] The fear of reputational damage by publication to a wide audience points to *Lange* as a media defence despite the reference to citizens and electors throughout the judgment.[106]

[7-25] The element of malice is retained [107] but in a somewhat varied form such that a plaintiff must not only prove the existence of ill will or other improper motive to defeat the privilege but also prove that the publication of the defamatory matter was actuated by that ill will or improper motive.[108] By way of illustration it was explained that in the political context, the '...motive of causing political damage to a plaintiff or his party cannot be regarded as improper',[109] establishing a high threshold to meet the requirement. According to leading defamation commentators,[110] '[A]lthough *Lange* qualified privilege can be defeated by malice, there will be little room for malice to operate in most instances. The focus will be on whether the defendant can establish reasonableness.'[111]

[7-26] *Lange* endorsed the democratic discourse theory of freedom of expression but defined public speech narrowly in perceived constitutional application of this theory. Its limitation of public speech to governmental activity to enable citizens to have access to relevant information for the exercise of civic duties marked a narrower definition of political speech than *Theophanous*. It located the right to this information in an expanded duty/interest form of qualified privilege, yet arguably failed to explain why this basis for access to political information as distinct from the constitutional defence required a narrowing of the *Theophanous* definition. From a comparative Irish defamation perspective, it is significant that the High Court in *Lange* recognised that the traditional

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[105] See the Paper by the Combined Media Defamation Reform Group, *Submission in Response to 'Outline of Possible National Defamation Law' Attorney-General's Discussion Paper*, March 2004, p.50.

[106] Chesterman correctly pointed out however that *Lange* promoted free discussion so that '...all citizens, so long as they act "reasonably", may participate on equal terms, rather than with some enjoying the status of "privileged publishers". *Op. cit.* n. 3, p.109.

[107] For discussion, see H. Chisholm, 'The Stuff of Which Political Debate is Made: *Roberts v. Bass*' (2003) 31 *Fed. L. Rev.* 225.

[108] Fischer highlights that the case '...appears to diverge from the traditional common law rule that malice can be established by proof that a defendant lacked belief in the truth of his publication. Lack of belief is irrelevant for the extended privilege; only an improper motive would suffice to counter the extended privilege.' *Loc. cit.*, n. 29, p.148, (footnote omitted).

[109] Above, n. 68, p.574. Some observers contend that publication exceeding what is necessary in manner or extent may be evidence of improper purpose. See D. Butler and S. Rodrick, *Australian Media Law*, (LBC, 2003), p. 82.

[110] R. L. Weaver and D.F. Partlett, 'Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege' (2004) 36 *Geo. Wash. Int'l L. Rev.* 377.

[111] *Ibid.*, p. 387.

qualified privilege defence, similarly influenced by the English common law as the Irish defence, offered insufficient protection to public speech. The Australian experience is returned to in Chapter 8 as regards the possible constitutional development of the Irish common law qualified privilege defence. What is also important in the discussion of Irish defamation law is the introduction in *Lange* of a reasonable publication element in the operation of the qualified privilege defence. Unlike *Reynolds v. Times Newspapers*,[112] the High Court did not set out a detailed list of factors and part of the following section traces the application of this more general form of a reasonableness test, which is comparatively important for Irish defamation law.

THE AFTERMATH OF LANGE

The Scope of Political Communication

[7-27] Prior to *Lange*, in *Lewandowski v. Lovell*,[113] Master Adams of the Supreme Court of Western Australia had declared the concept of political discussion to extend '...to comment on the legislative, executive or judicial processes.'[114] Since *Lange*, the concept of governmental and political matters has been interpreted and applied on a case-by-case basis, although the following general summary can be made using the categories established in *Lewandowski*.

[7-28] In respect of the legislative process, protection has been afforded to commentary on 'third wave' industrial legislation,[115] State legislation governing political donations by industrial organisations[116] and the exercise of public functions and powers vested in officials charged with the responsibility of administering income tax laws.[117] However, statements which form part of the background to a campaign for legislative change do not under the *Lange* defence give '...carte blanche to defame another.'[118] Discussion of the

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[112] [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010 (HL).
[113] (1995) 123 F.L.R. 450.
[114] *Ibid.*, p. 451.
[115] *Communications, Electrical, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Commissioner Laing of the Australian Industrial Relations Commission* (1998) 159 ALR 73.
[116] *Registrar of the Western Australian Industrial Relations Commission v Communications, Electrical, Electronic, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch* [1999] WASCA 170.
[117] *Archer v. Channel Seven Perth Pty Ltd* [2002] WASC 160 (21st June 2002).
[118] *Orion Pet Products Ltd v. Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860. In this case, remarks were made during the course of a campaign to reform the laws in Victoria regarding the

operation of the executive has been offered qualified privilege protection including discussion of the suitability of members of a political party as candidates for election to councils,[119] the public functions and powers of a Minister,[120] the behaviour of a practicing politician,[121] the operation of State planning laws,[122] the shelving by Cabinet of an enquiry into a major public utility which is alleged to have been involved in a sweetheart deal with a Union[123] and animal welfare.[124] Nonetheless, there have been some categories of information which have not been afforded protection as part of the executive process such as commentary on an appointment by the executive to a body with advisory functions exercising no political office,[125] immigration policy but which was not directed at the holder of the public office for this matter,[126] criticism by the City and its Mayor of the conduct of one of its tenants and ratepayers,[127] discussion by elected councillors of property development in respect of '..what they perceived to be the flouting by the plaintiff of the terms of the development consent'[128] and the candidature for appointment to a corporate board of a former politician.[129] Criticism of judicial officers may also be excluded from the implied protection.[130] It has also been held that '...the mere fact that part of published material relates to "government or political matters", does not extend qualified privilege to communications relating to individuals which do not relate to the discussion of "government or political matters" simply because they are included in material which does not have that character....'.[131]

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use of electronic training devices for animals. However, the article included only one sentence relevant to government and political matters, and so the qualified privilege defence was held not to have been made out.

[119] *Brander v. Ryan* (2000) 78 SASR 234.

[120] *Bristile Ltd v. The Buddhist Society of Western Australia Inc & Anor* [1999] WASC 259 (16th December 1999).

[121] *Shave v. West Australian Newspapers Ltd* [2003] WASC 83 (5th May 2003).

[122] *Chapman v. Conservation Council* (SA) (2002) 82 SASR 449.

[123] *Moriarty & Wortley v. Advertiser Newspapers Ltd* [1998] SADC (9th July 1998).

[124] *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* (2001) 208 C.L.R. 199. Speech on animal welfare is protected under the executive heading for the reason that public debate and political pressure from special interest groups can lead to advance in the protection of animal rights.

[125] *Amalgamated Television Services Pty Ltd v. Marsden* [2002] NSWCA 419 (24th December 2002).

[126] *Baltinos v. Australian Consolidated Press Ltd* (Unreported, Sully J., Supreme Court of New South Wales, 21 July 1995).

[127] *Heytesbury Holdings Pty Ltd and Ors v. City of Subiaco & Ors* [1998] WASC 183, (12th June 1998).

[128] *West v. Nationwide News t/a Cumberland Newspaper Group* [2003] NSWSC 505, para. [135].

[129] *NRMA v. John Fairfax Publications Pty Ltd.* [2002] NSWSC 563.

[130] *Herald & Weekly Times v. Popovic* [2003] VSCA 161 (21 November 2003).

[131] *McMullin v. TCN Channel Nine Pty Ltd* [2000] NSWSC 925, para. [57]. See also *Nationwide News Pty Ltd v. International Financing & Investment Pty Ltd* [1999] WASC 95, para. [27].

[7-29] Following these cases, it has been argued that *Lange* '...is in no way a public interest defence.'[132] One commentator[133] has called upon the Australian courts to '...acknowledge the amorphous nature of the concept, the possibility that a broad range of matters may count as political communication and its own limited institutional capacity to determine a question of this kind.'[134] Another observer has warned that a strict division of political and non-political speech may undermine the promotion of an active citizenry and pointed to the elasticity of the *Reynolds v. Times Newspapers* [135] approach with its focus on public interest rather than '...reliance on the construct of the 'political'....'[136] It is submitted that any such criticism needs to be addressed to the *Lange* definition of political speech rather than its subsequent application by the courts. To this end, as noted by one observer,[137]'[A]lthough the courts appear cautious to apply Barendt's expansive definition of political speech, they are nonetheless creatively applying its conceptual thread within the constitutional confines.'[138]

The Interpretation of Reasonableness

[7-30] The requirement of reasonableness must be met as one element in a successful *Lange* defence. This imposes an additional burden of proof on the defendant, which had not existed post-*Theophanous* and *Stephens*. The High Court did not take the opportunity in *Lange* to set out a detailed list of factors indicative of reasonable behaviour. Although the Court considered that section 22 of the Defamation Act 1974 (NSW) was compatible with the implied constitutional freedom of political communication, it did not specifically endorse the case law applying section 22. The lack of explicit endorsement was welcomed as it was argued that to interpret common law qualified privilege reasonableness in the

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[132] A. Kenyon, *'Lange and Reynolds: Lessons for Ireland?'*, Symposium on Freedom of Expression, Trinity College, Dublin, 5th and 6th December 2003. See also A. Kenyon, Defamation: Comparative Law and Practice (UCL Press, 2006), pp. 214-217.

[133] D. Meagher, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication', (2004) 28 *Melbourne U.L.R.* 438.

[134] *Ibid.*, p. 466. He assists the courts by formulating the 'likely audience' test that provides that for the purpose of the implied freedom, a communication is to be categorised as political if the subject matter of the communication is such that it may reasonably be relevant to the federal voting choices of its likely audience.

[135] Above, n. 112.

[136] Baker, *loc. cit.*, n. 54, pp. 93, 95.

[137] E. O' Dwyer, 'Qualified Privilege and Public Leaders in Political Debate: Diverging Defamation Law After *Lange*, *Reynolds* and *Atkinson*' (2003) 8 *Media and Arts Law Rev.* 91.

[138] *Ibid.*, p.110. According to some it does however remain '...unclear how far beyond the electoral sphere the protection will run.' See R. L. Weaver and D.F. Partlett, 'Defamation, Free Speech and Democratic Governance' (2005-2006) 50 *N.Y.L Sch. L. Rev.* 57, 75.

same way as courts had interpreted the section 22 reasonableness requirement would severely restrict the scope of *Lange* protection.[139]

[7-31] Although the case law under section 22 was not explicitly embraced in *Lange*, some case law on the *Lange* requirements appeared similarly restrictive for publishers. A publisher's conduct was considered unreasonable in *Herald & Weekly Times Ltd v. Popovic*,[140] following his failure to publish in full the exchange between the magistrate who was defamed and the public prosecutor. Failure to contact the persons defamed particularly when there was no immediate urgency to publish the matter defeated the defence in *Moriarty & Wortley v. Advertiser Newspapers Ltd.*[141] The selective use of comment sought was not acceptable in *McMullen v.TCN Channel Nine Pty Ltd*[142], especially where the plaintiff was not given any indication of the thrust of the program. The High Court warned newspapers in *Roberts v. Bass*[143] against seeking to rely too heavily on legitimate commercial interests in defending publication decisions. Rather, those defendants who defend an article on the basis of the circumstances in which daily newspapers are published need to use greater particularity when attempting to convince a court that their conduct has been reasonable. However, there is some more recent indication that the courts may be more prepared to consider the circumstances of news publication when it was explained in *Rogers v. Nationwide News*[144] that:

> 'In the respondent's written submissions, reference was made, without elaboration, to the 'circumstances in which daily newspapers are published'. It may be enlightening if...courts were given more evidence as to those circumstances....Where, as here, serious errors are made, and attributed to 'the circumstances in which daily newspapers are published', a court would be in a better position to judge the reasonableness of the publisher's conduct if it were told

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[139] *S.Walker, op. cit.*, n. 31, p.219. In fact, the New South Wales Law Reform Commission gives by way of a notable example of a defence, which had little chance of succeeding yet is often pleaded, that of s.22 statutory qualified privilege. *Op. cit*, n.45, para [4.13].
The restrictive reading of section 22 can be seen in cases such as *Austin v. Mirror Newspapers* (1985) 63 A.L.R. 149, 155 and *Barbaro v. Amalgamated Television Services Pty Ltd* (1985) 1 N.S.W.L.R. 30, 44-45. For further discussion of the *Austin* decision, see A. Henskens, Defamation and Investigative Journalism in New South Wales: The Evolution of Statutory Qualified Privilege' (1990) 6(3) *Australian B. Rev.* 267, 268 for the view that it '...seemed to amount to the proposition that if any errors of fact are made within a publication then the defence of statutory qualified privilege will usually not be available.'
[140] [2003] VSCA 161.
[141] [1998] SADC 3843.
[142] [2000] NSWSC 925.
[143] (2002) 194 A.L.R. 161.
[144] (2003) 216 C.L.R. 327.

exactly what those circumstances were, why they prevailed, and how they contributed to the error.'[145]

[7-32] Although Gillard AJA explained in *Herald and Weekly Times Ltd v. Popovic*[146] that the *Lange* requirements were not essential elements in successfully establishing the newly extended common law qualified privilege defence, he emphasised their role by explaining that the failure on the part of a publisher to prove any one of them would prove fatal in most cases. Failure to make adequate inquiries and the imposition of conditions when giving a defendant an opportunity to respond defeated the *Lange* form of privilege in *Amalgamated Television Services Pty Ltd v. Marsden.*[147] It was established in *Brander v. Ryan and Messenger Press Pty Ltd*[148] that a defendant's conduct is not to be measured simply by reference to a plaintiff's conduct. Easily discoverable errors will work to defeat the defence as confirmed in *Heytesbury Holdings Pty Ltd v. City of Subiaco.*[149] Some commentators have expressed concern that media defendants may also be required to reveal sources in order to persuade a court that there existed reasonable grounds for believing that a publication was true.[150] Finally, the concept of malice has played a role in some cases in defeating *Lange* privilege.[151]

[7-33] Added to *Lange* privilege has been the recent introduction of new uniform defamation legislation in Australia which provides for a defence of qualified privilege and incorporates in this defence a list of factors which go to reasonableness of publication. Section 30(3) of the New South Wales Defamation Act 2005 for example includes within assessment of whether a defendant's conduct is reasonable the extent to which the matter published is of public interest, the extent to which the matter published relates to the performance of the public functions or activities of the person, the nature of the business environment in which the defendant operates, the sources of the information, whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response

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[145] *Ibid.*, para. [31].
[146] Above, n. 130.
[147] [2002] NSWCA 419.
[148] [2000] SASC 446.
[149] (1998) 19 WAR 440.
[150] *Op. cit.*, n. 109, p.82.
[151] See *McMullen v. TCN Channel Nine Pty Ltd*, above, n. 142, para. [70] and *Chapman & Ors v. Conservation Council of SA and Ors* [2002] SASC 4, (21st January 2002).

from the person.[152] Having conducted empirical research on the operation of Australia defamation law and practice, Kenyon[153] has welcomed these developments for two reasons in particular:

> 'They are not limited to matters of political communication – as *Lange* privilege is – and they would allow significant recourse to English decisions under *Reynolds*. The first aspect – changing the scope of protection – would be a marked alteration in the Australian law and could lead to many more cases in which the privilege defence would be argued. The second aspect – recourse to *Reynolds* – is open under existing law, but may be promoted by the statutory lists.' [154]

DAMAGES [155]

[7-34] It was acknowledged in *Lange* that '...in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning [government or political matters relating to the Commonwealth]...it effectively burdens the freedom of communication...'.[156] Of course, it has also been accepted that reputation is a competing right and that damages serve to offer consolation for personal hurt and distress, reparation for reputational harm and vindication of same.[157] The trend in Australia has been a move away from the use of juries in civil litigation generally, thereby affecting the practice of defamation proceedings.[158] For example, in South Australia, civil juries were abolished[159] and in other states, with the introduction of uniform defamation legislation, when jury trials take place,[160] the judge assesses damages. Given however that in contrast to the present Australian position, the jury is retained in Irish defamation law, there remain three relevant aspects of Australian legislation jurisprudence on defamation damages for consideration. These are (i) references to awards in personal injury cases (ii) appellate review standard for libel damages and (iii) exemplary damages.

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[152] Many of these factors are not dissimilar from those listed in section 22(2A) which amended section 22 of the Defamation Act 1974 (NSW) which had been the statutory defence relied upon in *Lange*.
[153] Kenyon, *op. cit*, n.132.
[154] *Ibid*., p. 379.
[155] See generally, M. Gillooly, *The Law of Defamation in Australia and New Zealand*, (1998) Sydney: Federation Press, A. Kenyon, 'Problems with Defamation Damages?' (1998) 24 *Monash Univ. L. Rev*, 70.
[156] Above, n. 68.
[157] *Carson v. John Fairfax & Sons Ltd* (1993) 178 C.L.R. 44.
[158] See D. Rolph,'Perverse jury verdicts in New South Wales defamation trials'(2003) 11 *TLJ LEXIS*,4.
[159] Section 5 of the Juries Act 1927 (SA).
[160] Defamation cases are tried with a jury unless otherwise ordered under the new legislation.

References to Awards in Personal Injury Cases

[7-35] As pointed out in the above section, with the introduction of the uniform defamation legislation, the role of assessing damages lies with the judge which presumably explains the absence of reference to personal injury awards in the legislation. The legislation does however impose a cap for non-economic loss at $250,000 which was intended as a lesser amount than awarded in cases of severe personal injuries.[161] It remains the judicial approach prior to this legislation, when the jury played a role in assessing damages, that is relevant from an Irish defamation perspective. Initial judicial reluctance in *Coyne v. Citizen Finance*[162] to giving the jury information on awards in previous personal injury cases when assessing libel damages[163] was replaced by an acknowledgment in *Carson v. John Fairfax & Sons Ltd.*[164] that there must exist '...a rational relationship between the scale of values applied in the two classes of case.' [165] In his dissent in *Coyne*, Mason CJ had previously pointed to the public speech dimensions of damages awards when he explained that

> '...it is a common perception that the stop writ and the effect of extravagant verdicts have combined to constitute an increasing threat to adequate and informed public discussion of matters of legitimate concern...and where the absence of any apparent correlation between the quantum of the amounts awarded as damages for defamation and the injury actually sustained has even led to the suggestion that the extraction of money by a public figure by way of settlement of a defamation action could constitute a sophisticated form of corruption...'.[166]

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[161] Western Australia, Parliamentary Debates, Legislative Assembly, 15th September 2005, 5483, The Attorney General, J.A. McGinty: '[T]here is no doubt that false and defamatory statements are harmful. However, reputations can be restored and adverse personal feelings will pass. Pain and suffering from injuries that result in, say, quadriplegia are likely to continue for life. For those reasons the bill proposes an index cap of $250,000 for general damages....'.

[162] (1991) 172 C.L.R. 211.

[163] While the majority supported the use by the trial judge of inviting the jury to consider the investment or buying power of any sum it may award or to indicate the range of damages he or she thinks appropriate it expressly ruled out reference to personal injury awards.

[164] (1993) 178 C.L.R. 44, 64.

[165] Above, n., p. 58. Statutory effect was given to this proposition in New South Wales by section 46(A) of the Defamation Act 1974 (NSW). Section 46A provided that:

(1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.

(2) In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages).

[166] Above, n.162, pp. 218-219.

[7-36] While the policy underlying such reasoning is generally accepted, it should be noted that there were a number of subsequent decisions questioning the practicalities of such comparisons. In fact, at re-trial in the *Carson* decision itself, the appeal judge choose not to refer the jury to personal injury awards on the basis that it had not been determined which cases should be referred to, who should refer to them, the level of background information required to place the awards in context and whether time limits should apply.[167] Very recently, the difficulties that comparisons to both previous defamation and personal injury awards can yield has been discussed and acknowledged in *Rogers v. Nationwide News Pty Limited.*[168] Nonetheless, in relation to earlier defamation awards, the High Court accepted the reality that judges will necessarily be mindful of what was done in other cases and in so far as references to personal injury awards are concerned, drawing attention to them invites attention to the nature of the injury subsequent upon a defamatory publication in line with the consequences of physical injury. In this manner, defamation awards take their proper place in the administration of justice. The Court explained that '[B]ecause reputation is not bought and sold, it is only in the courts that money values are assigned to the consequences of infliction of harm to reputation.'[169] On the facts of the case,[170] an award of $250 000 was not held to be manifestly excessive.

Appellate Review Standard for Libel Damages

[7-37] On account of the fact that the assessor of damages may be a judge or jury in different territories, Australian case law sets different appellate review tests depending on who carries out the function. Where a judge has assessed damages, an appeal body will be slow to interfere with that finding as the holding in *Humphries v. TT* [171] demonstrates:

> 'Where it is not shown that the trial judge acted upon a wrong principle of law or misapprehended the facts, the court will infer that the judge's discretion miscarried

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[167] See also *Kendell v. North Queensland Newspaper Co. Ltd.* (1994) Australian Torts Reports, 81-272.
[168] (2003) 216 C.L.R. 327.
[169] *Ibid.*, para. [68].
[170] The publication implied that the appellant, a prominent eye surgeon, had performed eye surgery on a patient without reasonable care.
[171] (1993) 120 A.L.R. 693. The Court applied the dicta of Dixon J. in *Smith's Newspapers v. Becker* (1932) 47 C.L.R. 279, 300. The test has recently been re-approved in *Random Hose Australia Pty. Ltd. v. Abbott and Anor*; *Random House Australia Pty Ltd. v. Costello and Anor*, (1999) 167 A.L.R. 224.

only where it is satisfied that the amount is so high or so low as to be a wholly erroneous estimate of the damages to which the party is entitled.'[172]

[7-38] As discussed in Chapter 6 on defamation damages in English law, the Court of Appeal in *Rantzen v. Mirror Group Newspapers Ltd*,[173] subjected a jury award on appeal to scrutiny based on a test of whether, '...no reasonable jury could have thought that the award was necessary to compensate the plaintiff and re-establish his reputation.'[174] In contrast, Australian case law illustrates that no precise formula of words is used in the review of jury awards. In *Coyne v. Citizen Finance,*[175] the majority accorded a libel jury special status, deliberating that their assessment '...is not invulnerable but which nevertheless an appellate court should be slow to disturb.'[176] An appeal court is to start from the assumption that the jury took a view of the evidence most consistent with the verdict it returned and then proceed to ask whether, in the light of that evidence, the award is sustainable. If the members of an appellate court can say no more than that the damages are considerably higher than they themselves would have awarded there is no justification for interfering with the jury's verdict. However, the later case of *Carson v. John Fairfax and Sons Ltd.*[177] distinguished *Coyne* in this respect, in its place establishing a lower threshold of intervention at appellate level, by directing that if an appellate court is convinced, not that in its own view the amount is too high or too low, but that the amount awarded is so high or so low that it is outside the range of what could reasonably be regarded as appropriate to the circumstances of the case, the proper performance of its functions will require it to intervene to prevent a miscarriage of justice.

Exemplary Damages [178]

[7-39] Under the new legislation, a plaintiff cannot be awarded exemplary or punitive damages for defamation.[179] The rationale is that if punitive measures are imposed, then the

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[172] *Ibid.*, p.700. More recently in *Rogers v. Nationwide News Qty Limited* above, n.168, the court established that '...the question for the appellate court is whether the result at which the trial judge arrived bespeaks error. What must be identified is manifest excess, not just excess.'
[173] [1993] W.L.R. 953; [1993] 4 All E.R. 975.
[174] [1993] W.L.R. 953, 972; [1993] 4 All E.R. 975, 994.
[175] Above, n. 162.
[176] *Ibid.* p.228, *per* Toohey J.
[177] Above, n.164.
[178] See M. Tilbury and H. Luntz, 'Punitive Damages in Australian Law' (1995) 17 *Loy. L.A. Int'L & Comp. L. Journal* 769.

safeguards afforded under criminal law should be equally available in this type of award of defamation damages.[180] Nonetheless, it has been judicially accepted that punishment retains a role in defamation damages. As explained in *Carson v. John Fairfax & Sons Ltd:*[181]

> 'To say that no element of punishment enters into the assessment of (aggravated) compensatory damages and that the effect of such an award is merely to compensate the plaintiff for the increased harm which that person suffers is to resort to fiction in many cases....However much judges and jurists may seek to rationalize the right of the jury to increase damages by reason of the conduct of the defendant as being purely compensatory, compensation to the plaintiff is only achieved in many cases of awards of aggravated damages by punishing or deterring the defendant. Eminent judges have accepted that this is so...That being so, the abolition of exemplary damages does not automatically preclude a New South Wales jury from increasing the damages to punish or make an example of the defendant nor does it automatically preclude a jury from increasing the damages because of its anger or indignation at the defendant's conduct towards the plaintiff or from taking into account what the defendant should pay as well as what the plaintiff should receive. It does, however, preclude the jury from further punishing the defendant by awarding greater damages than can be justified as a fair solatium to the plaintiff for the wrong done to him or her. [182]

CONCLUSION

[7-40] Despite the judicial acknowledgment over thirty years prior to *Lange* in *Australian Consolidated Press v. Uren*,[183] to the effect that those who enter political life must expect to suffer hard words, whether in practice they will undergo such criticism is uncertain. A recent report on a comparative content analysis of more than 1,400 Australian and United States newspaper articles concluded that the Australian media is chilled in comparison to

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[179] See s.37 of the Defamation Act 2005 in Victoria, New South Wales, Western Australia, Tasmania, Queensland, s. 35 of the Act in South Australia, s. 139F in the Australian Capital Territory and s.34 in the Northern Territory.

[180] Western Australia, Parliamentary Debates, Legislative Assembly, 15th September 2005, 5516, (Mr. J.A. McGinty, Attorney General).

[181] Above, n. 164.

[182] Above, n. 164, p. 106. Similarly, see *Rogers v. Nationwide Pty News Ltd*, above, n.168, para. [141].

[183] (1966) 117 C.L.R. 185, 210.

the US.[184] Despite *Lange's* introduction of a '...new concept of constitutionally driven common law....'[185] whereby traditional common law principles are retained in principle but developed through constitutionalising the defamation action, the judgment represented a retreat from *Theophanous* in respect of the scope of definitional protection for public speech. Furthermore, empirical research[186] conducted on Australian defamation litigation after *Lange* concluded that '...most reporters, editors, producers and defamation lawyers agree that the decision has not "come up to expectations."'[187] This is primarily due to the reasonableness element of the defence for '...few are confident that judges or juries will find that the media acted reasonably if, in fact, the media got it wrong.'[188] The evidence suggests that the application of the reasonableness defence has therefore '...not produced a major change in media psychology.'[189] The media has remained focused on ensuring that it has legally admissible evidence to support allegations and prove the truth of such. It is submitted at this point and returned to for analysis in Chapter 8 that both the interpretation of public speech and the *Lange* requirements need to be linked more strongly to the constitutional protection for freedom of expression. This position is more likely to ensure that broader developments are not undermined by excessive focus on elements of definitional resolution and the test of reasonableness.

[7-41] As discussed in Chapter 3, the Irish courts have been unreceptive to comparison between defamation and personal injury wards. The position in *Carson v. John Fairfax & Sons Ltd*[190] supports the dicta of Denham J. in *De Rossa v. Independent Newspapers*[191] to the effect that there should be uniformity and rationality in the wider scheme of damages. As regards the appellate review standard for libel damages, the test of whether a jury award is so high or so low that it is outside the range of what could reasonably be regarded as appropriate in the circumstances is similar to the Irish test discussed in Chapter 3 and is returned to in Chapter 9. Finally, the abolition of exemplary damages in Australian defamation law and the acceptance that this position meets an acceptable balance between

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[184] C. Dent and A. Kenyon, *loc. cit.*, n.30.
[185] A. Stone, 'Case Note: *Lange*, *Levy* and the Direction of the Freedom of Political Communication under the Australian Constitution', (1998) 21 *U.N.S.W.L.J.* 117, 133.
[186] *Loc. cit.*, n.67. The authors conducted interviews with the Australian media from 1994 to 2003. The Article based upon the interviews examines how the Australian media has responded to the *Lange* decision.
[187] *Ibid.*, p. 430.
[188] *Loc. cit.*, n.67, p. 430
[189] R. L. Weaver, A.T. Kenyon, D.R. Partlett and C.R. Walker, *op. cit.*, n.29, p. 213.
[190] Above, n. 164.
[191] [1999] 4 I.R. 432.

speech and reputation given that aggravated damages are retained is analysed in the Irish context in Chapter 9.

Part II

Conclusion

To different extents, the European Court of Human Rights and courts in the United Kingdom, United States and Australia have engaged with constitutional arguments on the resolution of conflicts between speech and reputation rights. Various constitutional methodologies have emerged from the comparative jurisprudence discussed in Chapters 4-7. The thesis does not prescribe wholesale importation of the constitutional balancing results from any one jurisdiction. What is recognised however is the value of comparative constitutional perspectives in shaping future reform of Irish defamation law.

The comparative exercise undertaken in Part II is particularly significant given the general absence of scrutiny of foreign jurisprudence in much domestic defamation case law. Brief reference has been made to developments in other jurisdictions but generally with sparse analysis of its potential within Irish defamation law by reference to domestic constitutional values. Although this thesis proposes the introduction of some English developments, it is important that the traditional easy reliance on English precedent is avoided by the judiciary.

In addition to the lessons from the comparative materials on the wide question of constitutional balancing, are the more specific answers to particular elements of defamation law. These include the meaning of public interest speech, the operation of the test of negligence and the method of awarding damages.

While Ireland is not obliged to have regard to these foreign developments, other than of course the jurisprudence of the European Court of Human Rights, the particular jurisdictions analysed in Part II were selected for the interesting constitutional principles which have emerged, some of which are firmly established (United States), and others of more recent origin (Australia). The connections drawn in these jurisdictions between constitutional norms and freedom of political and public interest discussion is considered from the Irish perspective in Part III to which the thesis now turns.

PART III

THE CASE FOR REFORM

INTRODUCTION

Recent developments in the manner in which Article 40.6.1°(i) is judicially interpreted particularly in respect of the recognition of the role of the media in the communication of public interest material was explored in Chapter 1. It has been argued throughout the thesis that under-protection of the right of freedom of expression impacted upon the scope and operation of traditional defamation defences and damages awards. However, the role of Article 40.6.1°(i) has been addressed recently in legal areas such as confidentiality,[1] privacy[2] and of course, defamation,[3] and the common thread throughout these judgments[4] has been the democratic features of the freedom of expression right. Central to this development of the constitutional right of freedom of expression is the role of the media and its promotion of the Article 5 guarantee of democratic governance.[5] The liberal democratic strands running throughout the Irish constitution[6] and the recognition of these in some recent free speech jurisprudence support a reading of Article 40.6.1°(i) which most closely aligns with citizens' rights to know and be informed. The value of any speech must therefore necessarily be assessed by reference to a democratically based public interest test.

One of the principal arguments advanced in Part I of this thesis was that the constitutional values underpinning freedom of expression were traditionally not recognised, while there was arguably an overprotection of the right to good name. The recent jurisprudence

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[1] *Mahon v. Post Publications Ltd* [2007] I.E.S.C. 15 and *Mahon v. Keena* [2007] I.E.H.C. 348.
[2] *Cogley v. RTE* [2005] 4 I.R. 79; [2005] I.L.R.M. 529.
[3] *Hunter v. Duckworth and Co. Ltd & Anor* [2003] I.E.H.C. 81 and *Leech v. Independent Newspapers* [2007] I.E.H.C. 223.
[4] See also *Murphy v. IRTC* [1999] 1 I.R. 12; [1998] 2 I.L.R.M. 360 and *Irish Times v. Ireland* [1998] I I.R. 359; [1998] 2 I.L.R.M. 161.
[5] Article 5 provides: 'Ireland is a sovereign, independent, democratic state.'
[6] In addition to the Article 5 guarantee of democratic governance, Article 1 provides, *inter alia*, for the right to self-determination. In addition, Article 6.1 reads: '[A]ll powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State, and in final appeal, to decide all questions of national policy, according to the requirements of the common good.'

referred to in the preceding paragraph points to increased recognition of the democratic theory of free speech. This thesis proposes that in order for the process of constitutionalisation to work in promoting the free speech theory, two principal areas of domestic defamation law must be reformed. These are firstly the creation of an *effective* public interest defence and secondly, the creation of an *effective* system of damages awards. These areas have been selected as representing the strongest sources of constitutional imbalance in the level of protection afforded to the competing rights of expression and good name in the light of the values underlying these rights, discussed in Chapters 1 and 2.

A further point worth mentioning here is that the traditional reluctance of the Irish courts to constitutionalise[7] the tort of defamation was evidence of a more general trepidation to supplement tort or common law with constitutional provisions.[8] Using Professor Binchy's tort ineffectiveness test,[9] it was argued in Chapter 3 that the resolution of clashes of speech and reputation rights cannot be limited to tort law but require engagement in constitutional balancing. Indeed, that this balancing exercise must occur within a constitutional framework has necessarily been conceded by the very fact that the source of protection for good name in Article 40.3.2° has been interpreted as the basis for the common law of defamation.[10] This thesis argues for the constitutionalisation of Irish defamation law in respect of the public interest defence and damages, in order to properly reflect the relevant values. [11]

Part III of the thesis is divided into two chapters. The purpose of the chapters is twofold; to apply the constitutional values of expression and good name discussed in Chapters 1 and 2 and the comparative materials which formed Chapters 4-7, in order to suggest the appropriate balance between the two rights in respect of (a) publications which may be

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[7] For general discussion of the relationship between tort law and infringement of constitutional rights, see B. McMahon and W. Binchy, *Irish Law of Torts*, 3rd., (Butterworths, 2000), pp. 7-25.

[8] For example, in *W v. Ireland (No.2)* [1999] 2 I.R. 141, Costello J. held: '[T]here is therefore no need to construe the constitution as conferring a new and discrete cause of action for damages in those cases in which the acts or omissions which constitute the alleged infringement also constitute an actionable wrong at law for which damages are recoverable.' See more generally, paras. [3-04] to [3-07] of Chapter 3.

[9] W. Binchy, *'Constitutional Remedies and the Law of Torts'*, in J. O'Reilly (ed) Human Rights and Constitutional Law (Round Hall Press, 1992), pp. 201-205.

[10] See Chapter 2, n. 2.

[11] Similarly in the defamation context, McDonald has observed that '[T]he common law rules, posited on balances struck in earlier times by judges and legislators, are therefore vulnerable to constitutional action, and the judiciary is clearly entitled, should it see fit, to move those balances to accord better with constitutional requirements.' See M. McDonald, *Irish Law of Defamation*, (Round Hall, 1989) p. 4.

regarded as being in the public interest and (b) the system whereby damages awards are awarded in Irish defamation law.

The Public Interest Defence

The jurisdictions considered in Part II revealed different approaches in the protection of public interest speech. In the United States, the focus is upon the public or private figure status of the allegedly libelled party, whereas in contrast, the content of speech is the basis for the operation of the public interest concept in the United Kingdom and Australia. These different approaches are considered from an Irish constitutional perspective in Chapter 8. It will be argued that the public figure doctrine is not appropriate either in protecting the rights of speech and reputation or in their reconciliation with one another. Instead, the creation of a public interest defence is suggested. The meaning of public interest speech and the standard of liability which applies form part of the analysis of this defence.

Of course, a potential alternative to the creation of a new public interest defence is the expansion of the traditional defence of qualified privilege. This position was suggested by counsel for the Attorney General in *Hunter v. Duckworth and Co. Ltd and Anor.*[12] It was also adopted by the Australian judiciary in the reform of traditional defamation law in *Lange v. Australian Broadcasting Corporation.*[13] Although it is arguable that the duty to inform the public rationale of traditional qualified privilege could be extended to give stronger recognition to the democratic basis for free speech, the creation of a public interest defence *per se* is preferred in this thesis for a number of reasons. One of the criticisms made of Australian developments (see Chapter 7), is that the focus remains on the identity of the defendant or the size of the audience at the expense of consideration of whether the communication is a matter of legitimate interest to the public.[14] This could be explained on the basis that the concept of the public interest has never been central to the operation of traditional qualified privilege, a position which also exists in Irish defamation law (see Chapter 3).[15] The duty/interest framework of traditional qualified privilege rests

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[12] See further Chapter 3.
[13] (1997) 145 A.L.R. 96.
[14] See the Paper by the Combined Media Defamation Reform Group, *Submission in Response to 'Outline of Possible National Defamation Law' Attorney-General's Discussion Paper*, March 2004, p.50.
[15] Una Ni Raifeartaigh 'Defences in Irish Defamation Law' (1991) 13 *D.U.L.J.* 76, 100, 'Nevertheless, such new defences are usually described as a species of qualified privilege, and when they are confined to the media are usually given the name "Media Qualified Privilege". It is suggested that to place such defences within the range of qualified privilege would unduly complicate the concept, to which, it will be recalled, the notion of public interest is not central. If such defences are introduced, they should be seen as a new category.' It is also worth noting the comments of Loveland on the public interest term in traditional

on whether there is an occasion of publication sufficient to protect the publication in the event that it defames a party. However, it is arguable that to require the media to prove occasion does not sufficiently protect the democratic rationale of free speech. It carries the danger that occasion is focused upon at the expense of whether the communication is on a matter of public interest. To present the point in wider terms, Loveland has argued the following in respect of both the qualified privilege and fair comment defences: '[R]ecasting existing defences would reinforce the presumption that political libels raise an issue of private rather than public law.' [16] It seems strongly arguable therefore that '...the exceptional, relationship-based nature of traditional qualified privilege....'[17] does not adequately meet the constitutional obligation to ensure that the organs of public opinion engage in the exercise of educating public opinion. However, the democratic theory of free speech carries responsibilities for the media and so for this further reason, this thesis supports the move from occasion to manner of publication, as occurred in *Reynolds v. Times Newspapers Ltd,*[18] as an appropriate method of reconciling expression and good name. It is argued by some (see Chapter 6 for further detail) that the *Reynolds* defence merely liberalises the traditional defence of qualified privilege. However, this thesis takes the position that the move away from occasion to manner of publication, the increased focus on the public interest value of the speech and introduction of reasonableness of conduct suggest that *Reynolds* created a new defence. In any event, any preference for liberalisation of traditional qualified privilege over a new public interest defence may be academic. In two recent High Court cases,[19] the *Reynolds* public interest defence has been endorsed and section 24 of the Defamation Bill 2006 suggests a new defence of fair and reasonable publication on a matter of public interest.[20]

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qualified privilege: '[T]he notion of 'the common convenience and welfare of society' which has informed interpretation of this defence since 1834 is an obviously elastic idea. In respect of political information, one would expect its meaning to have undergone rather substantial alteration in the past 160 years.' I Loveland, *'Privacy and Political Speech: An Agenda for the Constitutionalisation of the Law of Libel'* in Birks, P (ed), Privacy and Loyalty in the Law of Obligations, (Clarendon Press, 1997), pp. 51-92, 91 (footnote omitted).

[16] *Ibid.*, p.91.

[17] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), p. 1047.

[18] [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010.

[19] *Hunter v. Duckworth & Co Ltd and Anor*, above, n. 3 and *Leech v. Independent Newspapers (Ireland) Ltd*, above, n. 3.

[20] This new defence does not replace traditional qualified privilege which operates as a defence under section 16 of the Bill.

Damages

The implications of the constitutional rationale of free speech advanced in this thesis for damages awards in defamation cases is the subject of Chapter 9. Missing from much judicial discussion in the Irish jurisprudence on defamation damages are the values underlying the rights of speech and reputation. It appears that the Irish courts have generally failed to recognise the constitutional link between protection of public interest speech and the chilling effect produced by high damages awards.[21] The potential consequences of disproportionate and unregulated damages were set out in Chapter 3. It appears therefore that constitutionally based re-balancing of rights of speech and reputation in the context of damages awards has not occurred and continues the traditional balance between the competing rights, which is now unreflective of the democratic demands of the constitutional free speech guarantee.

To different degrees, the jurisdictions addressed in Chapters 4-7 have accepted the constitutional link between damages awards and restraints on the publication of public interest material. These developments now place the lack of constitutionalisation of the Irish position in stark contrast. The inhibition which compensatory damages, in the absence of evidence of actual loss and presumed damages, cause to the exercise of First Amendment freedoms was highlighted as far back as the early 1970s in the United States by Powell J. in *Gertz v. Welch.* [22] Of the various jurisdictions addressed in Part II, it is the United States which most clearly considered punitive damages from a constitutional perspective. Based on the heightened constitutional value of public interest speech as contrasted with speech involving no matters of public concern, punitive damages may be awarded in cases in the latter category without proof of actual malice[23] where as it appears unclear whether punitive damages are available at all in public figure and public speech cases.[24] As discussed in Chapter 4, the language of chilling effect in the context of freedom of expression has been a feature of the jurisprudence of the ECtHR[25] and the dangers of high and unregulated damages awards to the exercise of Article 10 rights have been

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[21] By way of notable exception, see *Dawson v. Irish Brokers Association*, Unreported, Supreme Court, 27th February 1997.
[22] (1974) 418 U.S. 323, 341.
[23] *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749.
[24] C. Rothfeld, 'The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures' (2000) 19 *Yale L. and Policy Rev.* 165.
[25] *Cumpana and another v. Romania*, (2005) 41 E.H.R.R. 14, paras. [113] and [114] and *Nikula v. Finland* (2004) 38 E.H.R.R. 45, para. [54].

accepted. By way of example of this approach, in *Independent Newspapers v. Ireland*,[26] the ECtHR explained that '...it is not necessary to rule on whether the present damages' award had, as a matter of fact, a chilling effect on the press: as a matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny...'.[27] However, it was questioned in Chapter 4 as to whether the ECtHR had in fact sufficiently applied this approach in the case before it. In England, in *Rantzen v. Mirror Group Newspapers Ltd*,[28] the Court of Appeal addressed legislation[29] on damages in light of the relationship between the common law and Article 10 of the Convention. More recently, in *Nail v. News Group Newspapers Ltd*,[30] it was accepted by the Court of Appeal '...that the level of damages should not be so disproportionately high that the freedom of expression is unduly curtailed.' Finally, in Australia, the regulatory impact that high damages awards can cause to informed public discussion of matters of legitimate concern was accepted by Mason C.J. in dissent in *Coyne v. Citizen Finance Ltd.*[31] and subsequently acknowledged by the High Court in *Lange v. Australian Broadcasting Corporation*[32] as effectively burdening the freedom of communication. As mistaken as the lack of constitutionalisation is in the Irish context as regards failure to provide guidelines for juries on the quantum of damages or to address the appropriate standard of appellate scrutiny of jury awards of damages, it is particularly erroneous when it involves exemplary damages.

The two areas of defamation law identified above represent the most obvious and problematic examples of situations in which the under constitutionalisation of the tort of defamation has had practical consequences that impinge negatively on the freedom of the media and hence on the operation of intelligent self-governing society. The hypothesis advanced throughout this thesis is that such under-constitutionalisation must be remedied and reform of these two issues must necessarily therefore be the first point of practical reform.

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[26] (2006) 42 E.H.R.R. 46.
[27] *Ibid.*, para. [114].
[28] [1993] W.L.R. 953; [1994] Q.B. 670; [1993] 4 All E.R. 975.
[29] Courts and Legal Service Act, 1990.
[30] [2005] 1 All E.R. 1040.
[31] (1991) 172 C.L.R. 211.
[32] (1997) 189 C.L.R. 520.

CHAPTER 8

THE PUBLIC INTEREST DEFENCE

INTRODUCTION

[8-01] The strict liability principle in Irish defamation law was explored in Chapter 3. This principle alongside ineffective defamation defences served to produce a chilling effect on the dissemination of material of public importance to citizens. On the constitutional level, this position stifled the media in its Article 40.6.1°(i) task to educate public opinion. Some recent domestic legislative and judicial developments have recognised the need to engage in the re-balancing of rights of speech and reputation in the context of public interest discussion. The comparative part of the thesis (Chapters 4-7) revealed different approaches to balancing these rights. This is the first of two chapters to explore the re-balancing of speech and reputation rights within a value based Irish constitutional framework. This chapter discusses the implications of the democratic rationale for free speech in respect of the public interest defence. The starting point in this chapter is balancing based on plaintiff status, before moving on to consider the alternative method of protecting speech based on its content. It will be argued that Article 40.6.1°(i) supports a general protection for public interest speech in preference to a generic privilege for political speech, and the chapter therefore explores the meaning of public interest speech. Finally, given that recent domestic developments point away from the strict liability position, this chapter explores the appropriate standard of defamation liability to properly balance freedom of expression and the right of good name. The negligence standard is preferred over that of actual malice and this position is supported with reference to constitutional values, before turning to discuss the operation of the negligence standard.

THE PUBLIC/PRIVATE FIGURE DOCTRINE

[8-02] The adoption of the public/private figure distinction as a method of balancing speech and reputation rights has never been considered in any real sense by the Irish

courts.[1] Counsel for the Attorney General in the High Court case of *Hunter v. Duckworth and Co. Ltd & Anor*,[2] while referring to the First Amendment and *New York Times v. Sullivan*,[3] did not contend that the good name of the individual would be adequately vindicated by the adoption of a public/private figure divide in Irish defamation law. Part II revealed that despite acceptance in Australian,[4] ECtHR[5] and English[6] jurisprudence, that politicians are expected to undergo harsh criticism, this did not justify the creation a public figure doctrine. The jurisprudence considered that while a politician may be forced to accept the use of more polemical language against him, than would a private individual, liability was determined on speech content rather than plaintiff status. Clearly, given these different comparative approaches, it is important in any Irish re-balancing exercise, that the public figure doctrine is explored for its potential application.

[8-03] The position in United States defamation law[7] as established in the seminal case of *New York Times v. Sullivan*[8] is that the degree of fault required for a defendant to be held liable varies according to the category of plaintiff allegedly defamed so that the nature of the balance between speech and reputation will depend in part on the question of whether the plaintiff is a public or private figure.[9] A public official or figure must overcome a higher evidentiary standard than a private figure plaintiff to ground liability so that the

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[1] The Irish Law Reform Commission rejected the United States approach and did not advocate any change in Irish defamation law based on a distinction between public and private figures. See *Report on the Civil Law of Defamation*, (LRC-38-1991), para. [12.1]. For academic rejection, see, *inter alia*, E. O'Dell, 'Does Defamation Value Freedom of Expression? The Possible Influence of *New York Times v. Sullivan* on Irish law' (1990) 12 *D.U.L.J.* (n.s.) 50 and N. Cox, 'Tort-Public Figures and Defamation Actions Following the *Reynolds* Case' [1999] 21 D.U.L.J. 206.

[2] [2003] I.E.H.C. 81.

[3] (1964) 376 U.S. 254.

[4] *Australian Consolidated Press v. Uren* (1966) 117 C.L.R. 185, 210, *per* Windeyer J. This was extended to those in public office in *Gorton v. Australian Broadcasting Corporation* (1973) 22 F.L.R. 181, 189. More recently, Cox J. in *Peterson v. Advertiser Newspapers* (1995) 64 S.A.S.R.152 explained that '...whether any particular words spoken of a politician are actionable may have to be judged in the light of his occupation – its environment of sharp judgments and point-scoring and uncomfortably plain speaking including at times vehement denunciation – and the public's expectations with respect to it. For that reason, a criticism of occupational inconsistency is unlikely to be actionable when made of a politician, though it may be if made of a University examiner.'

[5] See, *inter alia*, *Lingens v. Austria*, (1986) 8 E.H.R.R. 407, *Oberschlick v. Austria (No.2)* (1997) 25 E.H.R.R. 357 and *Ukranian Media Group v. Ukraine* (2006) 43 E.H.R.R. 25, para. [67]. The ECtHR did point out however in *Nilsen & Johnsen v. Norway* (2000) 30 E.H.R.R. 878 that private individuals who enter the public arena also need to demonstrate a higher degree of tolerance. Similarly, see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft MBH (No.3) v. Austria*, App. No. 66298/01 and 15653/02, 13th December 2005.

[6] *Davis v. Shepstone* (1886) 11 A.C. 187, 190, *per* Herschell LC and more recently the Court of Appeal in *Reynolds v. Times Newspapers Ltd* [1998] 3 All E.R. 961; [1998] 3 W.L.R. 862.

[7] See further Chapter 6.

[8] Above, n. 3.

[9] The shift from liability based on plaintiff status to public interest content in *Time, Inc. v. Hill* (1967) 385 U.S. 374 was quickly abandoned in *Gertz v. Welch* (1974) 418 U.S. 323.

former is required to establish that the material was published with actual knowledge of, or recklessness as to falsity, while the latter faces the lesser standard of proving negligence on the part of the defendant.

[8-04] This distinction was premised on a public interest speech rationale to the effect that it represented a commitment that '...debate on public issues should be uninhibited, robust and wide-open, *and* that [such debate] may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials....' There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.'[10] In his concurring opinion in *New York Times*, Goldberg J. had suggested that a person who assumed public office '...must expect that his official acts will be commented upon and criticized.'[11] This section addresses two aspects of the United States public figure doctrine relevant to Irish defamation law reform. The first is whether creating a distinction based on the public or private figure status of the plaintiff furthers the democratic model of free speech. The second question is whether, even if it serves this objective, it appropriately balances rights of speech and reputation.

[8-05] Despite the focus in United States defamation law on the public interest justification for freedom of expression,[12] the definitional difficulties of the public figure doctrine[13]

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[10] *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85, quoting in part, *New York Times v. Sullivan*, above, n. 3, p. 270. See also the extra judicial comments of Brennan J. to this effect in 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965-1966) 79 *Harv. L. Rev.* 1. Of course, it is also worth noting that there were those who argued that full commitment to freedom of expression required statements concerning public figures to be non-actionable; see A. Lewis, '*New York Times v. Sullivan* Reconsidered' (1983) 83 *Col. L. Rev.* 603, 620-621.

[11] Above, n. 3, p. 299.

[12] In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* (1967) 388 U.S. 130, 163-164, Warren C.J. supported the extension of the actual malice rule to public figures based on a free speech justification as follows: '[I]ncreasingly...the distinctions between governmental and private sectors are blurred....[P]ower has...become much more organized in what we have commonly considered the private sector....This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office...are nevertheless intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large.' See further Chadwick who argued that '[A]s long as the primary denominator remains the status of the plaintiff, the result is not necessarily determined by the main interest justifying the imposition of constitutional limitations: the public interest served by the dissemination of such information.' The writer nonetheless acknowledged that statement content has always played an important role in the Supreme Court's decisions. See J. Chadwick, 'A Conflict in the Public Interest: Defamation and the Role of Content in the Wake of *Dun & Bradstreet v. Greenmoss Builders*' (1991) 31 *Santa Clara L. Rev.* 997, 1008. The content of speech has come to play a determinative role in the area of damages awards and burden of proof following *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749 and *Hepps v. Philadelphia Newspapers* (1986) 475 U.S. 767 respectively. Both of these decisions were discussed in Chapter 6. See C. Estlund, 'Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category' (1990) 59 *George Wash. L. Rev.* 1, for the position that the creation of an explicit constitutional category consisting of speech on matters of public concern is to be avoided.

shifted the focus away from the public interest value of the speech.[14] The lack of definitional clarity[15] and certainty[16] of concepts such as public office, public official,[17] general public figure, limited purpose public figure and public controversy carried costs for protection of freedom of expression. This diversion from the public interest value of the speech created results whereby the lack of public figure status in a case reduced First Amendment protection for legitimate stories of public interest value. An example of the under-protection of public interest speech through strict application of the public figure doctrine is *Hutchinson v. Proxmire,*[18] where a story about receipt of public funds by a scientist was not protected on account of lack of public figure status. Therefore, although the public figure doctrine liberalised defamation law for discussion of the activities of public servants and other figures so that the media were offered a new constitutional defence, the exclusion of some news stories where public figure status was absent offered a narrow conception of political speech.[19]

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[13] The problem filtered down to lower court level. By way of example, the United States Court of Appeals for the Third Circuit complained that: '[T]he Supreme Court has not provided a detailed chart of the contours of the public and private figure categories. In an attempt to avoid "unpredictable results and uncertain expectations", the Court elected to paint with a broad brush rather than to adopt a case by case approach. Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine.' See *Marcone v. Penthouse* 754 F. 2d 1072, 1082 (3d. Cir. 1985) (citations omitted).

[14] One observer criticised the categorical approach on the basis that '[T]his constitutionalization of each policy nuance is in many ways far more troubling than adoption of an absolutely preclusive constitutional doctrine.' See S. W. Halpern, 'Of Libel, Language and Law: *New York Times v. Sullivan* at Twenty Five' (1990) 68 *N.C.L. Rev.* 273, 288. The same author called for a unitary system applicable to all claims irrespective of the nature of the parties or of the utterance and proposed in this respect a professional negligence standard. For an article which supports *New York Times* for its protection of public interest speech, see D. Kohler, 'Forty Years After *New York Times v. Sullivan*: The Good, the Bad and the Ugly' (2004) 83 *Or. L. Rev.* 1203, 1206-1212.

[15] P. Felcher and E. Rubin, 'Privacy, Publicity and the Portrayal of Real People by the Media' (1979) 88 *Yale L. Journal* 1577, 1581.

[16] J. Tobin, 'The United States Public Figure Test: Should It Be Introduced into Australia?' (1994) 17 *U.N.S.W.L.J.* 383, 391. For criticism of the complexity of United States defamation law, see A.W. Langvardt, 'Media Defendants, Public Concerns, and Public Plaintiffs: Towards Fashioning Order from Confusion in Defamation Law' (1987) 49 *U. Pitt. L. Rev.* 91, 92-93.

[17] According to one commentator, '[T]he public official requirement has been blurred beyond recognition by the Court's failure to promulgate a workable standard for differentiating the President from the White House kitchen worker....'. See D. Finkelson, 'The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine' (1998) 84 *Va. L. Rev.* 871, 872.

[18] (1979) 443 U.S. 111. See Chapter 6 for further detail.

[19] M. Chesterman, 'The Money or the Truth: Defamation Reform in Australia and the USA' (1995) 18 *U.N.S.W.L.J.* 300, 304-305, '[W]hatever may have been the position in past times, according to a liberal democratic theory of politics, it is clearly absurd nowadays to attribute greater power and influence within society to a relatively anonymous backbencher or a public official of middle rank than to (for instance) a leading industrialist, such as the Managing Director of BHP, or a media magnate, such as Rupert Murdoch or Kerry Packer.' The Supreme Court had been briefly alive to this danger in *Rosenbloom v.* Metromedia (1971) 403 U.S. 29 , 44, where it stated: '[I]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved....The public's primary interest is in the

[8-06] As regards the balancing of the competing rights of speech and reputation, the public figure concept in American defamation law undoubtedly resulted in increased constitutional protection of some freedom of expression at the cost of reputation.[20] Reconciliation of the rights of expression and reputation in *New York Times* and its progeny was not however a complete constitutional exercise in so far as reputation does not receive explicit constitutional protection. Despite a similar position in the United Kingdom and Australia,[21] the *New York Times* public figure doctrine was criticised and rejected in both of these jurisdictions for its failure to appropriately reconcile rights of speech and reputation.[22] As discussed in Part I, the competing constitutional guarantees for expression and good name in Irish law have necessarily affected the method of constitutional adjudication employed in the balancing of these rights.[23] The presumptive entitlement of speech on public figures to constitutional protection in the absence of malice in American defamation law could hardly be transplanted to the Irish constitutional regime where the right to reputation is a key factor in any balance to be drawn. As one domestic commentator has argued,[24] '[A]fter all, constitutional protection of good name is afforded to "every citizen", and providing politicians with no such protection unless they can provide that the publisher acted maliciously is simply insufficient.'[25]

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event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.'

[20] As Schaffner has argued, by including public figures in the category of plaintiffs that are required to prove actual malice, the law of defamation inadequately protects the plaintiff's interest in his own reputation. He proposed that the actual malice standard should be retained for public officials but eliminated for public figures and private citizens. See J. E. Schaffner, 'Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation' (1989-1990) 63 *S. Cal. L. Rev.* 435.

[21] Neither of the jurisdictions has express constitutional guarantees for reputation. See further Chapters 5 and 7.

[22] See Chapters 5 and 7. In this respect, see also Cameron J. in the South African case of *Holomisa v. Argus Newspapers Limited* (1996) 2 SA 588 (W). As pointed out by some academic commentators, writing on the House of Lords judgment in *Reynolds v. Times Newspapers Ltd*, [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010, '[A]nother gain is that the value of reputation is not entirely overlooked, even in the case of public figures.' R.L. Weaver, A.T. Kenyon, D.F. Partlett and C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006), p. 276.

[23] Barendt has written that '[O]verall, an ad hoc balancing approach is preferable, if only because it is the better way to resolve conflicts between two competing rights. When both rights have constitutional significance, as they do in Germany, this approach must be adopted, unless one right is to be treated as subordinate to the other. In the United States, England, and other systems where freedom of expression has constitutional significance, but reputation does not, there is a stronger case for formulating rules which give the former priority in some contexts. It may be right, for instance, to fashion speech-protective rules to cover the publication of defamatory allegations in the course of political speech.' See E. Barendt, *Freedom of Speech*, 2nd ed. (Oxford University Press, 2005), p. 226.

[24] N. Cox, *loc. cit.*, n. 1.

[25] *Ibid.*, p. 216. Similarly, see S. Frazier, 'Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation' (1999) 32 *Vand. J. Transnat'l L.* 391, 428, (Article 40.3.2° probably forbids the United States approach for weighing so heavily in favour of defendants) and Beloff M.J. Q.C., 'Politicians and the Press' in Freedom of Expression and Freedom of Information, (eds), J. Beatson and Y. Cripps (Oxford

[8-07] Even in the absence of the adoption of the public figure doctrine *per se* in Irish defamation law, it is necessary to consider whether the *Gertz v. Welch*[26] justifications for distinction between private and public figures should play any role in the balancing of speech and reputation. In support of the public figure doctrine, the United States Supreme Court explained in *Gertz v. Welch* that the reasons for the difference in the level of reputational protection for public and private persons are two-fold, firstly, the former usually enjoy greater access to the channels of effective communication in order to make a rebuttal and secondly, have invited comment by generally having thrust themselves to the forefront of particular controversies to influence the resolution of issues involved.[27]

[8-08] Quite apart from whether *effective* access to the media exists for public persons to respond to defamatory statements, the question remains as to whether arguments based on access should to any extent justify the actual malice standard in respect of this plaintiff category. The proposition that media access justifies the actual malice standard[28] represents a position which does not constitutionally reconcile the necessary protection of two competing constitutional rights. This argument becomes stronger when it is questionable whether this access is always easily obtainable[29] particularly where there is a high degree of media ownership.[30] Even if the public figure publicly responds through the same medium as the original publication, the United States Supreme Court in *Gertz v. Welch*[31] itself acknowledged that '...an opportunity for rebuttal seldom suffices to undo harm of

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University Press, 2000), pp. 63-85, 85 (treating politicans differently in this respect is inherently discriminatory and requires powerful justification). For a counter argument, see N. Strossen, 'A Defence of the Aspirations - but not the Achievements - of the US Rule Limiting Defamation Actions by Public Officials or Public Figures' (1986) 15 *Melb. U. L. Rev.* 419, 421, where the author contended that, '[T]o the contrary, *Sullivan removed* such an inequality. Before that decision, government officials were unequally favored by United States defamation law. On the other hand, government officials were immune from defamation suits that arose from their official conduct. On the other hand, if a private citizen should criticize the official conduct of a public officer, he or she could be held strictly liable for defamation.'

[26] Above, n. 9.

[27] See also *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, above, n. 12. These two factors have also featured in the ECtHR's jurisprudence (see, *inter alia*, *Lingens v. Austria*, above, n. 5 and *Ceylan v. Turkey* (1999) 30 E.H.R.R. 73), but as submitted in Chapter 4, they have not been used in the creation of a public figure doctrine *per se*.

[28] According to Powell J. in *Gertz v. Welch*, above, n. 9, p. 344, '[T]he first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.'

[29] For some of those who question whether that access in fact exists, see Chapter 6, n. 60.

[30] Chesterman, *loc. cit.*, n. 19, p. 305. For the United States position, see K.D. Whitten, 'The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of *New York Times v. Sullivan*' (2001-2002) 32 *Cumb. L. Rev.* 519, 553-555, who pointed out that four of the largest newspapers in the country are controlled by parent companies that own many other media interests. As far as Ireland is concerned, there was recently an investigation into media ownership; see M. Hennessy and S. Carswell, 'Authority prompted inquiry on media diversity', *Irish Times*, 31st March 2008 and more recently, *Report of the Advisory Group on Media Mergers*, June 2008, available at www.entemp.ie

[31] Above, n. 9.

defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.'[32]

[8-09] Furthermore, as noted in dissent by Brennan J, '[W]hen the public official or public figure is a minor functionary...the [access] argument loses all of its force.'[33] Of course, this is not to deny that the right of reply type argument carries some weight for as pointed out by Franklin, those in the public eye may be less damaged in the long run because of their notoriety and the likelihood that future public exposure may provide opportunities to remedy the harm.[34] Of potential relevance when the public figure is a politician may be the defence of absolute privilege[35] which protects politicians in defamation law for statements made in Parliament. In response to the argument that this defence should allow others to receive heightened protection when criticizing politicians, the response of the New South Wales Law Reform Commission was that '...parliamentary privilege does not provide a personal benefit to politicians, but is designed to serve the public interest in free debate of issues in Parliament. It is extended to politicians as representatives of the people, and is subject to the control of Parliament and the ultimate sanction of the ballot box.'[36]

[8-10] A final justification put forward in American defamation law for the actual malice standard in respect of public figures is that such persons leave themselves open to the prospect of being scrutinised by voluntarily entering the public domain whereas '[N]o such assumption is justified with respect to a private individual.'[37] This justification must however necessarily be judged in the context of American political life which is characterised by a very open style of politics making the risk-based rationale particularly applicable.[38] Despite increased accountability in Irish political life more recently,[39] the

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[32] Above, n. 9, p. 344, n.9.

[33] Above, n.9, p.363, quoting *Rosenbloom v. Metromedia*, above, n. 19.

[34] M. A. Franklin, 'Constitutional Libel Law: The Role of Content' (1986-1987) 34 *UCLA Rev.* 1657, 1659, n.6.

[35] Article 13.8.1° of the Irish constitution affords the President absolute privilege in respect of the exercise and performance of the powers and functions of office. Article 15.12 provides: 'All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.' See section 15 of the Defamation Bill 2006 which sets out the circumstances for the defence of absolute privilege to apply.

[36] New South Wales Law Reform Commission, *Defamation*, (Discussion Paper 32, 1993), para. [10.51].

[37] Above, n.9, p. 345. This position is not peculiar to the United States. Council of Europe Resolution 1165 (1998) on the *Right to Privacy* employed similar reasoning such that'...public figures must recognise that the special position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy.'

[38] F. Schauer, 'Social Foundations of the Law of Defamation: A Comparative Analysis' (1980) 1 *Journal of Media Law and Practice* 3, 15-16. As noted by Zines, '[M]uch of the criticism of the United States decisions includes statements to the effect that the American distrust of governmental regulation does not have its counterpart (at any rate to the same degree) in other western countries.' See Zines, L *'Freedom of Speech and*

system of politics is not nearly as open as that in the United States. When combined with the express constitutional guarantee of good name, it would seem strongly arguable that voluntary entry into political life should not reduce the weight of this right in any balancing exercise against freedom of expression.[40] The American approach is also open to criticism on the ground that the '...rationale of assumption of risk....'[41] cannot extend to involuntary public figures. Although the Supreme Court in *Gertz v. Welch*[42] considered this category of plaintiff to be exceedingly rare, the case of *Dameron v. Washington Magazine*[43] serves as an example of the injustice that the public figure doctrine can create. The case concerned an air traffic controller on duty at the time an airplane crashed while approaching the airport. He was deemed to be a public figure in respect of an article written about the crash, although he had 'relatively passive involvement in this controversy.'[44] Although the actual malice standard generally applies to voluntary public figures,[45] the *Dameron* case demonstrates its potential in respect of involuntary public figures.

[8-11] Finally, it is to be noted that the democratic rationale of *New York Times* is questionable given that it may deter entry into political life.[46] The New South Wales Law Reform Commission has made the point that:'[I]ndeed, the theory that the public figure test strengthens political democracy by improving performance in public office can be countered by the theory that reduced protection for personal reputation deters otherwise competent people from seeking public office, thus weakening political democracy.'[47] The

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Representative Government' in Beatson, J and Cripps, Y (eds) Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams, (Oxford University Press, 2000), pp. 35-50, 49-50.

[39] See, *inter alia*, K. Spencer, 'A New Era of Tribunalism – the Commissions of Investigation Act 2004' (2005) 10(3) *B.Rev.* 80; C. McHugh, 'Has Curiosity Killed the Cat? The Powers and Functions of Ireland's Tribunals of Inquiry' (2003) IV *C.O.L.R.* and P. Rabbitte, 'A Tribunal of Inquiry or an Investigation by Dáil Committee?' (1998) 4(3) *B.Rev.* 114.

[40] The underdeveloped nature of the right to privacy in this jurisdiction strengthens this position. It is also important to recognise the constitutional guarantee of equality. Article 40.1 provides: 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.'

[41] D. Elder, 'Defamation, Public Officialdom and the *Rosenblatt v. Baer* Criteria – A Proposal for Revivification: Two Decades After *New York Times Co. v. Sullivan'* (1984) 33 *Buff. L. Rev.* 579, 609.

[42] Above, n. 9.

[43] 779 F. 2d 736 (D.C.Cir. 1985), *cert. denied*, 476 U.S. (1986) 1141.

[44] *Ibid.*, p.741.

[45] C. Calvert and R.D. Richards, 'Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and his Attorney, L. Lin Wood' (2004) 35 *McGeorge L. Rev.* 1.

[46] See, *inter alia*, J. A. Barron, 'Punitive Damages in Libel Cases – First Amendment Equalizer' (1990) 47 *Wash. & Lee L. Rev.* 105, 110 and J.P. Cain, 'Protect us from a reckless press', (1985) 71 *A.B.A. Journal* 38.

[47] *Op. cit.*, n. 36, para. [10.50]. Similarly, see R. Epstein, 'Was New York Times v. Sullivan Wrong? (1983) 53 *U. Chi. L. Rev.* 782,799. 'The magnitude of this effect is very hard to measure, but there is no reason to assume that it is trivial.' In *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, 1174-1175, the

potential social political cost of the public figure doctrine is best illustrated by reference to the United States Supreme Court decision in *Ocala Star-Banner v. Damron.*[48] Leonard Damron was a candidate running for election as a county tax assessor. A reporter telephoned his newspaper to report that James Damron (the candidate's brother) had been charged with perjury. The editor had not heard of James Damron and reported that Leonard Damron had been charged. Leonard Damron was defeated in the election. The Supreme Court held that the actual malice standard had not been satisfied by the plaintiff.

[8-12] Arguably, however the potential for some form of injection of *New York Times* into Irish defamation law is evident in section 24(2)(a) of the Defamation Bill 2006. Section 24(2)(a) provides that when a court determines whether a publication was fair and reasonable, the court shall if it considers it relevant, take into account a number of matters, one of which is the extent to which the statement concerned refers to the performance by the person of his or her public functions.[49] This public function factor appears to be no more relevant than the other factors listed in section 24 which include, for example, the seriousness of the allegation and the extent to which the plaintiff's version of events was represented in the publication or to which a reasonable attempt was made to obtain and publish the plaintiff's response. Nonetheless, section 24(2)(a) provides a legislative basis, which had not existed prior to the Bill, for the status of the plaintiff to play a role. What differentiates the proposed Irish position from *New* York *Times* is that the status of the plaintiff will not even arise as a matter for consideration if the elements of section 24(1)(a) and (b) are not satisfied such that the allegedly defamatory statement was published in good faith and in the course of, or for the purposes of, the discussion of a subject of public interest, the discussion of which was for the public benefit. This section is reflective of the good faith public interest privilege endorsed by the ECtHR throughout its jurisprudence.[50] However, even upon satisfying section 24(1)(a) and (b), and unlike the *New York Times* and ECtHR approaches, the legislation empowers the court to determine if the performance

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Canadian Supreme Court held: '[I]t would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation'. The Court was quoting from *Gately on Libel and Slander* (4th ed,, 1953), p. 254.

[48] (1971) 401 U.S. 295. For discussion, see F. Schauer, 'Uncoupling Free Speech' (1992) 92 *Colum. L. Rev.* 1321, in particular, pp. 1326-1328.

[49] It is important in the development of a democratic model of free speech that the concept of public functions is not restricted to governmental or official functions, whether elective or appointed, but is applied more widely to activities of importance to citizens. As Loveland has previously pointed out, '...the distinction between elective and appointed office is quite formalistic.' Loveland I, *'Privacy and Political Speech: An Agenda for the Constitutionalisation of the Law of Libel'* in P. Birks, Privacy and Loyalty in the Law of Obligations, (ed) (Clarendon Press, 1997), pp. 51-92, 86.

[50] See further Chapter 4.

by the person or his or her public functions is relevant in its determination of whether the fair and reasonable test has otherwise been satisfied.

[8-13] The United States experience advises against the creation of the public figure doctrine in this jurisdiction. The heavy focus on the status of the claimant has detracted from the content of the speech and on occasions, has provided weak protection to high value speech and strong protection to low value speech.[51] This approach runs counter to the democratic theory of free speech. The public figure doctrine also failed to reconcile speech and reputation in a manner proportionate to the values of each right and as explained above, this approach cannot comfortably sit within the Irish constitutional framework. Finally, the reference to public functions in section 24(2)(a) of the Defamation Bill 2006 should be read in connection to the content and context of speech as distinct from the American public figure type approach. If section 24(2)(a) comes into play, it could be operated by the courts against freedom of expression, if read so that defamatory statements in respect of public functions are more serious than those relating to private reputation and require a stricter approach.[52] It is suggested that such a reading of the section would not afford with the democratic theory of free speech.

THE PUBLIC INTEREST DEFENCE

[8-14] As an alternative to the American approach of balancing based on plaintiff status, this section examines the reconciliation of speech and reputation rights according to the public interest content of the speech. Despite the role of the public interest concept in the traditional defences of justification, fair comment and qualified privilege, the absence of any definition for the term is evident from the case law discussed in Chapter 3.[53] This section commences with the question of whether a definition of public speech should be adopted. It considers the generic privilege for political speech recognised most notably in Australian defamation jurisprudence (see Chapter 7) and addresses this approach in the Irish constitutional context, from the perspective of both speech and reputation rights. The Australian approach in this respect is rejected on a number of grounds explored below. The

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[51] The language of high and low value speech is taken from G.R. Stone, L.M. Seidman, C.R. Sunstein and M.V. Tushnet, Constitutional Law, 4th ed., (Aspen Law and Business, 2001).

[52] The dangers of this approach are evident in the area of damages awards from the cases of *De Rossa v. Independent Newspapers* [1999] 4 I.R. 432 and *O'Brien v. Mirror Group Newspapers* [2001] 1 I.R. 1. See further Chapter 2.

[53] The term was not defined in the *Report of the Legal Advisory Group on Defamation*, (March 2003).

next section addresses the more familiar concept of the public interest and within this, the distinction between the public interest and matters of interest to the public, the meaning of public interest speech and the limits on the protection of public interest speech.

Generic Privilege for Political Speech

[8-15] A purposive democratic-based reading of Article 40.6.1(i)[54] does not demand the adoption of a generic privilege for political speech. Alongside Article 5,[55] the constitutional free speech guarantee supports a broad model of democratic governance and protects the right of citizens to communicate and of the press to educate in this respect. Criticism of government policy by the press is included as part of the wider subject of the education of public opinion. Although the meaning of the education of public opinion is to date undetermined in jurisprudence, the commitment in recent jurisprudence to the democratic basis for free speech[56] does not generally appear to support any distinction between political discussion and discussion of other matters of public concern or interest. The prioritisation of protection for political speech in Irish defamation law would not only fail to adequately protect the communication rights of the press and in turn, citizens' rights as recipients, but would also fail to protect the competing constitutional right to good name.[57]

[8-16] The problems with the adoption of a generic privilege for political expression are demonstrated with reference to Australia (see Chapter 7). Linked to the constitutional system of representative government, the High Court in *Lange v. Australian Broadcasting Corporation*[58] prioritised information concerning government and political matters. The initial concerns raised by some critics that this institutional or establishment view of political speech[59] would reduce protection for non-political public interest speech[60] have to

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[54] See more generally Chapter 1.

[55] Article 5 reads: 'Ireland is a sovereign, independent, democratic State.'

[56] *Hunter v. Duckworth and Co. Ltd & Anor*, above, n. 2 and *Mahon v. Post Publications Ltd* [2007] I.E.S.C. 15.

[57] For a similar position, see Binchy, W *'Some Unanswered Questions in Irish Defamation Law'* in J. Sarkin and W. Binchy (eds) Human Rights, the Citizen and the State: South African and Irish Approaches (Round Hall, Sweet and Maxwell, 2001), pp. 243-263, 249. See also Hare, I *'Is the Privileged Position of Political Expression Justified?'* in J. Beatson, and Y. Cripps, (eds) Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams, *op. cit.*, n.38, pp. 105-121, for the argument that there are characteristics of expression and speech regulation which may be more relevant to determining the level of protection to which the speech is entitled than an *a priori* categorisation of the type of speech involved.

[58] (1997) 189 C.L.R. 520.

[59] For adoption of an even narrower definition of political speech, see the Court of Appeal in *Lange v. Atkinson* [1998] 3 N.Z.L.R. 424, 428, where it was held that '...the defence of qualified privilege applies to generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly

a large extent been realised. As discussed in some detail in Chapter 7, the scope of political communication in the aftermath of *Lange v. Australian Broadcasting Corporation*[61] has largely been directed to political speech in the narrow sense. Both the Court of Appeal and House of Lords in *Reynolds v. Times Newspapers Ltd*[62] had cautioned against the adoption of the generic privilege adopted in *Lange*, on account of its incorrect prioritisation of political expression given there are many other matters which relate to government and politics and are equally as important to the community.[63] Lord Cooke in the House of Lords argued that:

> '[I]t is doubtful whether the suggested new defence could sensibly be confined to political discussion. There are other public figures that exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such power or influence may indeed exceed that of most politicians. The rights and interests of citizens in democracies are not restricted to the casting of votes.'[64]

[8-17] Subsequently, in *Jameel v. Wall Street Journal Sprl*[65] Baroness Hale noted that the power yielded by some non-governmental organisations increases the democratic importance of protecting critical speech about them and emphasised the increasing difficulty of drawing a dividing line between governmental and non-governmental organisations.[66] Similarly and despite its categorisation of speech into political,

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affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.' Commenting on this, Williams made the point that '...picking out just one sort of domestic power-holder for special treatment...seems inappropriate. All the more so when a variety of individual and corporate, public and private, national and international players exercise diverse forms of influence that may broadly be regarded as politically significant.' See K. Williams, 'Defaming Politicians: The Not So Common Law' (2000) 63 *M.L.R.* 748, 753-754. See more generally on New Zealand, J. Burrows and U. Cheer, *Media Law in New Zealand* (Oxford University Press, 2005), chapters 2 and 5. See further R. Tobin, 'Political discussion: Freedom of Expression and Qualified Privilege: *Lange v. Atkinson*' (1997) 7 *Torts L. Journal* 32.

[60] E. Handsley and G. Davis, 'Case Notes: Defamation and Satire: *Hanson v. Australian Broadcasting Corporation*' (2000) 9 *TLJ Lexis* 12, 39 and M. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot, 2000), p. 31.

[61] Above, n. 58.

[62] [1998] 3 All E.R. 961; [1998] 3 W.L.R. 862 (CA); [2001] 2 A.C. 127; [1999] 4 All E.R. 609; [1999] 3 W.L.R. 1010 (HL).

[63] The Court of Appeal explained that '...there are, after all, many matters which affect the public interest and the health of society much more profoundly than the small change of political controversy.' [1998] 3 All E.R. 961, 1005; [1998] 3 W.L.R. 862, 910.

[64] [2001] 2 A.C. 127, 220; [1999] 4 All E.R. 609, 640; [1999] 3 W.L.R. 1010, 1042.

[65] [2007] 1 A.C. 359.

[66] *Ibid.*, para. [158].

commercial and artistic, the ECtHR[67] supports a general public interest defence rather than any form of generic privilege for one type of speech.[68] Indeed, even in respect of commercial and artistic speech, the ECtHR focuses on the extent to which the expression can be linked to the direct functioning of democratic society.[69] Commentators have observed the ECtHR's case-by-case approach[70] which includes strong emphasis on the importance of general public debate and the role of the press in the dissemination of material of public interest value.[71] It is clear that neither the English courts or the ECtHR limits the democratic commitment to free speech to institutional government, in the sense of, for example, the public conduct of elected officials. In addition to the dangers of excluding important active issues of public debate through adoption of a generic privilege, this approach may also chill future speech. As argued by one commentator,[72] '[S]peech on currently non-political subjects may be crucial for setting the future political agenda. A very limited understanding of the scope of free speech could help freeze the political agenda. Setting the agenda is often more crucial than arguing about things already on the agenda.'[73]

[8-18] As regards the Irish model of free speech, as revealed in Chapter 1, the form of democratic speech protected by Article 40.6.1°(i) was until quite recently undetermined, as a result of lack of engagement with the values underpinning the constitutional guarantee. However, as pointed out previously in this chapter, Article 40.6.1°(i) has come under increased scrutiny in a number of different areas over the last number of years. In *Hunter v. Duckworth and Co. Ltd & Anor*,[74] Ó'Caoimh J. addressed freedom of expression in the context of the democratic nature of the state, and Clarke J. in *Cogley v. RTE*[75] referred to protection for 'vigorous and informed public debate on issues of importance.'[76] Although

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[67] The framework used by the ECtHR to assess restrictions on the right of freedom of expression was addressed in Chapter 4.
[68] *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843.
[69] See *Hertel v. Switzerland* (1998) 28 E.H.R.R. 534 and more generally, L. Wildhaber, 'The Right to Offend, Shock or Disturb?' – Aspects of Freedom of Expression under the European Convention on Human Rights' (2001) xxxvi *Ir. Jur.* 17.
[70] M. McGonagle, 'Modernising Defamation Law' (2006) 1(3) *Qtly. Rev. Tort Law* 19 and Dillon-Malone,P '*Privacy and Media Law'* in U. Kilkelly, (ed) ECHR and Irish Law (Jordans, 2004), pp. 243-279.
[71] See, *inter alia*, *Bladet Tromso and Stensaas v. Norway* (1999) 29 E.H.R.R. 125, paras. [59] and [64], *Bergens Tidende v. Norway*, (2001) 31 E.H.R.R. 16, para. [49] and *Pedersen v. Denmark*, App. No. 49017/99, 19th June 2003.
[72] M.K. Curtis, 'Monkey Trials: Science, Defamation, and the Suppression of Dissent' (1995-1996) 4 *Wm. & Mary Bill Rts.* J. 507.
[73] *Ibid.*, p. 542.
[74] Above, n. 2.
[75] [2005] 4 I.R. 79; [2005] 2 I.L.R.M. 529.
[76] [2005] 4 I.R. 79, 94; [2005] 2 I.L.R.M. 529, 543.

in the recent defamation case of *Leech v. Independent Newspapers (Ireland) Ltd*,[77] Charleton J. adopted the *Reynolds* public interest defence and in this context, referred to the governance of the country, safety and security and the right to judge public representatives fairly as examples of public interest speech, the examples given appeared excessively directed to institutional speech. It is submitted that the broader statements of principle in *Hunter v. Duckworth and Co. Ltd & Anor* and *Mahon v. Post Publications Ltd* are to be preferred over the arguably narrower *Leech v. Independent Newspapers (Ireland) Ltd.* position and require re-enforcement in case law to prevent any move towards generic privilege for political expression.

[8-19] Moving to the Article 40.3.2° right to good name, adoption of a generic political speech privilege would arguably under-protect reputation. The danger of presumptive entitlement of a category of speech to protection is likely to reduce engagement in the necessary balancing exercise between the rights of speech and reputation.[78] Indeed, the private and public reputational cost of adopting a generic category was one of the reasons for its rejection in *Reynolds v. Times Newspapers* despite the absence of any constitutional right of reputation. Lord Nicholls explained that:

> '...it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make informed choices, the electorate needs to be able to identify the good as well as the bad.' [79]

The Public Interest Concept

[8-20] The premise of traditional qualified privilege lies in the promotion of the 'common convenience and welfare of society.'[80] The case law discussed in Chapter 3 revealed a narrow functional approach to this concept which did not extend to protect the media when communicating public interest material to citizens. The general introduction to Part III of the thesis set out the grounds for preferring the introduction of a public interest defence over the expansion of the common law qualified privilege defence. The support for a *Reynolds* style public interest defence in the recent cases of *Hunter v. Duckworth and Co.*

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[77] Above, n. 56.
[78] For further discussion of constitutional balancing in the Irish context, see Chapter 1.
[79] [2001] 2 A.C. 127, 201 ; [1999] 4 All E.R. 609, 622; [1999] 3 W.L.R. 1010, 1023.
[80] *Toogood v. Spyring* (1834) 1 CM & R 181, 193.

Ltd & Anor[81] and *Leech v. Independent (Newspapers) Ltd*[82] and the proposed introduction of a statutory defence of fair and reasonable publication on a matter of public interest [83] have therefore not opted for reform of an existing defence. Whether the Defamation Bill 2006 is enacted or not, the breadth of the public interest concept in the operation of a public interest defence should be developed through case law on the basis of the democratic underpinnings of the free speech guarantee. By adopting this approach, it avoids two problems; firstly, that the media is not permitted to determine whether a matter is of public interest[84] such that coverage of a story simply makes it *ipso facto* in the public interest[85] and secondly, that an exhaustive legislative definition of public interest prevents its necessary expansion in the light of ever-growing democratic demands.[86]

[8-21] The jurisdictions addressed in Chapters 4-7 have provided valuable assistance on the meaning of public interest in the context of defamatory statements of fact. Of course, the scope of the public interest concept must necessarily be qualified by the constitutional guarantee of good name. Having analysed Article 40.3.2° in Chapter 2, it was argued that the traditional emphasis on honour and dignity rather than reputational injury contributed

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[81] Above, n.2.
[82] Above, n. 56.
[83] It is worth noting that section 24 of the Defamation Bill 2006 as initiated referred to public importance. However, when the Bill was passed by Seanad Éireann, the term was changed to public interest. This is where the passage of the Bill stood at the date of submission of the thesis.
[84] The observations of Sir John Donaldson M.R. in *Francome v. Mirror Group Newspapers Ltd* [1984] 1 W.L.R. 892, 898, are worth noting in this context, when he pointed out that the media '...are peculiarly vulnerable to the error of confusing the public interest with their own interest.' More recently, in *Reynolds v. Times Newspapers Ltd*, above, n.22 , Lord Nicholls explained that '[T]he common law approach does mean that it is an outside body, that is, someone other than the newspaper itself, which decides whether an occasion is privileged. This is bound to be so, if the decision of the press itself is not to be determinative of the propriety of publishing the particular material.' [2001] 2 A.C. 127, 202-203; [1999] 4 All E.R. 609, 624; [1999] 3 W.L.R. 1010, 1025. In contrast, see D. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell L. Rev.* 291, 353 for the argument that the economic survival of publishers and broadcasters depends upon their ability to provide a product the public will buy.
In the Irish context, the Preamble to the Code of Practice for Newspapers and Periodicals provides that it is for the Ombudsman and Press Council '..to define the public interest in each case, but the general principle is that the public interest is invoked in relation to a matter capable of affecting the people at large so that they may legitimately be interested in receiving and the press legitimately interested in providing information about it.' This Code of Practice is available at www.presscouncil.ie
[85] There are some who advocate such an approach. See in this respect D, Meiklejohn, 'Public Speech and Libel Litigation: Are They Compatible?' (1985-1986) 14 *Hofstra L. Rev.* 547, 556, '[I]n sum, public is that which the media or other groups or persons make public i.e., "publish." If this challenges the common law tradition of defamation, so be it.' It must be noted that the author also called for an absolute privilege for all comment on public affairs. A judicial example of such an approach is *Heath v. Playboy Enters., Inc.*, 732 F, Supp. 1145, 1149 (S.D. Fla. 1990) where it was held '[W]hat is newsworthy is primarily a function of the publisher, not the courts.'
[86] See F. Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 *Vand. L. Rev.* 265, 306-307, where the author accepts the reality of accepting general or larger categories over smaller and finer distinctions in order to deal with the reality of applying theory. The case law of the ECtHR also adopts the position that democratic society evolves and rights must be interpreted accordingly – see further Chapter 4.

to the lack of protection for media public interest speech. It is important therefore, that while protecting the constitutional right to good name, the democratic discourse model of free speech is not undermined by outdated understandings of reputation which are now unreflective of this model of expression rights. The public interest concept is considered below under three headings: (i) the distinction between the public interest and matters of interest to the public (ii) the meaning of public interest speech and (iii) the limits of public interest speech.

(i)Distinction between the Public Interest and Matters of Interest to the Public

[8-21] The English Court of Appeal approved the following dicta of the first instance judge in *London Regional Transport v. Mayor of London*:[87] '[O]ne can think of many stories that are published in the newspapers in which the public are interested. But it would be difficult for a journalist to say with a straight face that there is a public interest in them being published.'[88] The democratic values of Article 40.6.1°(i) discussed above and throughout Chapter 1 protect public interest material in so far as it serves an instrumental function in the education of public opinion. Speech which merely interests the public as distinct from contributing to democratic debate must necessarily carry less weight when weighed against the competing constitutional right to good name.[89] As explained by Baroness Hale in *Jameel v. Wall Street Journal Sprl* [90], in the context of balancing expression and reputation rights:

> '[F]irst, there must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public – the most vapid tittle-tattle about the

[87] [2003] E.M.L.R. 4.

[88] *Ibid.*, para. [40]. In the first case decided by the Irish Press Council on the issue of the privacy of a public figure, in this case, an elected politician, it concluded that the practice of so-called 'door-stepping' especially when it involves the person's private home, requires a high level of justification. It also upheld the decision of the Press Ombudsman (18th February, 2008) in which in the context of ill-health and medical treatment of the politician, it held that the test is not whether the matter complained about was of interest to the public, but whether its publication was in the public interest. See *Gregory and Evening Herald*, 18th April 2008.

[89] In the United States, a distinction has been drawn between public and private speech. The Supreme Court held in *Dun & Bradstreet v. Greenmoss Builders* above, n.12, that in light of the reduced constitutional value of private as distinct from speech involving matters of public concern, presumed and punitive damages may be awarded even absent a showing of actual malice in respect of the former.

[90] [2007] 1 A.C. 359.

activities of footballer's wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.' [91]

[8-22] It appears that Baroness Hale wished to encourage investigative and not celebrity journalism when she later pronounced the need for '...much more serious journalism in this country and our defamation law should encourage rather than discourage it.'[92] The English approach has been echoed in recent Irish case law. Clarke J. in the privacy case of *Cogley v. RTE*[93] demanded a high level of scrutiny of any public interest label attached to speech, while in the defamation context, in *Leech v. Independent (Newspapers) Ltd*,[94] Charleton J. excluded protection of matters which the public are merely interested in such as those which are '...merely titillating or salacious or gossipy.' Similarly, the defence of fair and reasonable publication in section 24 of the Defamation Bill 2006 protects statements made in the course of, or for the purposes of discussion of a subject of public interest, the discussion of which was for the public benefit. Judicial or legislative failure to distinguish between the public interest and matters of interest to the public allows for too easy an invocation of the chilling effect argument by media organs in a manner which fails to properly protect reputation and the democratic theory of expression rights. [95]

[8-23] At the same time, limiting public interest speech to an objectively narrow view of 'establishment' news may result in the exclusion of other forms of important news stories. McNair[96] has offered by way of example of this danger, the coverage of the former British Prime Minster Tony Blair's hair during the 1996 Labour election campaign:

'[T]he coverage of Tony Blair's hair, for example, far from being a journalist's dereliction of duty or a commercially driven surrender to the principles of

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[91] *Ibid.*, [para]. 147. Similarly, see Lord Bingham, para. [31] and Lord Hoffmann, para. [49]. The ECtHR recently adopted a similar division in *Von Hannover v. Germany* (2005) 40 E.H.R.R. 1; see further Chapter 4.
[92] Above, n. 90, para. [150].
[93] Above, n. 75.
[94] Above, n. 56.
[95] The United States offers many examples regarding the chilling effect argument made by the media failing to protect privacy, which may equally be extended to the protection of reputation in the defamation context. By way of example of the former, in *Sipple v. Chronicle Publishing Company* 201 Cal. Rptr. 665 (Court of Appeal of California, First Appellate District, 1984), a man who helped to thwart an assassination attempt on the life of the President of the United States brought an action against two newspapers for invasion of privacy. The first newspaper had published an article disclosing the plaintiff's homosexual orientation. The second newspaper had reprinted information from the first article. On appeal, it was held, *inter alia*, that the publications were not motivated by a morbid and sensational prying into the plaintiff's private life but rather were prompted by legitimate political considerations – to dispel the false public opinion that homosexuals were timid, weak and unheroic figures and to raise the equally important political question whether the President entertained a discriminatory attitude or bias against a minority group such an homosexuals.
[96] B. McNair, *Journalism and Democracy: An Evaluation of the Political Public Sphere* (Routledge, 1999).

infotainment, should be seen instead for what it was, one of those rare occasions in the pre-election period when the Labour leader's highly manicured, carefully designed public persona was challenged by the media, and the more serious issue of New Labour's style-consciousness interrogated. Jokes about hair was used as a way into quite deep analysis of the MORI poll on women's attitude to Blair, and New Labour's attitudes to women.'[97]

(ii)The Meaning of Public Interest Speech

[8-24] The Australian jurisprudence discussed in Chapter 7, serves as a strong example of the inhibitory effect to public discussion of limiting protection to overtly political speech in the sense of an institutional or governmental understanding of the term. In contrast to the Australian approach, the English courts appear to have heeded the warning of Lord Nicholls in *Reynolds v. Times Newspapers* to the effect that they should be slow to conclude a publication lacks public interest value. The jurisprudence in the post-*Reynolds* decisions illustrates a purposive approach to the public interest concept so that the defence has more often been defeated by lack of responsible publication than public interest.[98] Similar to the English position, although the ECtHR has not provided a working definition of public interest speech, its jurisprudence points to a broad view of such speech informed by democratic values. On this basis, Article 10 protection has included discussion of suspected irregularities in the award of public contracts to commercial entities,[99] motor related issues such as traffic policies, road safety and the environment,[100] killing methods in the seal-hunting industry,[101] cosmetic surgery[102] and alleged police brutality.[103]

[8-25] The starting point for the meaning of public interest speech is the model of free speech which operates here. The commitment to the democratic model for free speech requires a broad view to be taken of the public interest concept. The public interest defence in section 24 of the Defamation Bill 2006 does not define the concept. In *Leech v. Independent (Newspapers) Ltd*,[104] Charleton J. conceded the difficulty of formulating a

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[97] *Ibid.*, p. 51.
[98] See Chapter 5.
[99] *Cumpana and another v. Romania* (2005) 41 E.H.R.R. 14.
[100] *Demuth v. Switzerland* (2004) 38 E.H.R.R. 20.
[101] *Bladet Tromso and Stensaas v. Norway*, above, n.
[102] *Bergens Tidende v. Norway*, above, n.
[103] *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843.
[104] Above, n. 56.

definition of public interest.[105] Similarly, Ó'Caoimh J. had not attempted to exhaustively define the public interest concept in *Hunter v. Duckworth and Co. Ltd & Anor.*[106] Both judgments appeared to favour its development on an incremental basis reflecting the case-by-case approach adopted in England and the ECtHR in preference to a working definition.[107]

[8-26] While Ó'Caoimh J. in *Hunter* supported *Reynolds* in broad terms in the absence of legislative reform, Charleton J. in *Leech* defined matters of public interest as those '...which affect the public in terms of their governance of the country, their safety, their security, and their right to judge their public representatives fairly on the basis of real information.' The examples of public interest speech proposed by Charleton J. are more reflective of the Australian definition of political speech than English and ECtHR public interest speech approaches. It is submitted that the adoption of the *Reynolds* public interest defence requires a much broader interpretation of public interest speech to fully protect the broad spectrum of modern political debate. The Irish courts are advised to recognise this point, which has recently been explained in clear terms by a number of academic commentators '...in a late modern state where contract rather than election is on the rise, a focus on the [latter] as the determinant of political debate seems outdated.'[108]

(iii)Qualified Protection for Public Interest Speech

[8-27] If we accept the democratic model for freedom of speech, then it is also necessary to accept the limits of that model. Despite the absence of an express constitutional guarantee for reputation, in *New York Times*, Goldberg J. in a concurring judgment, considered that '[P]urely private defamation has little to do with the political ends of a self-governing

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[105] See also *Hunter v. Duckworth and Co. Ltd & Anor*, above, n. 2.

[106] Above, n. 2.

[107] There were some attempts made however to define the term. The Court of Appeal in *Reynolds v. Times Newspapers Ltd* provided the following definition: '[M]atters relating to the public life of the community and those who take part in it, including...activities such as the conduct of government and political life, elections...and public administration...[Also,] matters such as...the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private such that there is no public interest in their disclosure.' [1998] 3 All E.R. 961, 1004; [1998] 3 W.L.R. 862, 909. In *Theophanous v. Herald & Weekly Times* (1994) 182 C.L.R. 104, 124, the High Court defined political discussion as including '...discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators.'

[108] R.L. Weaver, A.T. Kenyon, D.F. Partlett and C.P. Walker *The Right to Speak Ill: Defamation, Reputation and Free Speech*, above, n.22, p. 276.

society...',[109] while in *Garrison v. Louisiana*,[110] the Supreme Court held that for the application of the actual malice standard, statements must relate to the office of the public official and not merely the officer personally. In the Irish context, discussion of the cases of *De Rossa v. Independent Newspapers*[111] and *O'Brien v. Mirror Group Newspapers*[112] in Chapter 2 revealed the application of dignity and honour concepts to political and business reputation respectively. These reputational values were used to support very large damages awards to a politician and leading businessman in the absence of any convincing discussion of whether the material carried public interest value. While this thesis does not argue for the adoption of a public/private figure divide in defamation law, or for absolute protection for public interest speech given the constitutional protection for good name, it does submit that the status of the plaintiff must be taken into account in respect of the public interest content of speech. However, plaintiff status in this respect should be judged solely by reference to the content and context of the speech and not by any external factors such as whether the plaintiff can exercise media access to reply to a defamatory statement or voluntarily entered into public life or debate.

[8-28] Furthermore, public interest content should enhance public discourse so that protection is excluded for matters which do not contribute to the development of the democratic model of freedom of expression. The role of content may however differ depending on the plaintiff involved so that information which may have public interest value if written about a politician may have far less, if any such value, if it involves, for instance, a celebrity. The theme of public office and importance of discussion of official functions has been central to the ECtHR's jurisprudence.[113] However, equally the ECtHR has recognised that politicians and those in public life are entitled to reputational protection and privacy.[114] This point is wider than the rights of the public office holder for it can be argued that 'expository journalism'[115] which centres on the private lives of public figures does not serve to promote democratic self-governance.[116]

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[109] Above, n.3, p.301.
[110] (1964) 379 U.S. 64.
[111] [1999] 4 I.R. 432
[112] [2001] 1 I.R. 1.
[113] See, *inter alia*, *Lingens v. Austria*, above, n. 5 and *Von Hannover v. Germany*, above, n. 91.
[114] See Chapter 4.
[115] McNair B., *'Journalism, politics and public relations: an ethical appraisal'* in M. Kieran (ed) Media Ethics, (Routledge, 1998), pp. 49-65, 59.
[116] See, *inter alia*, Feldman D., *'Privacy-related Rights and their Social Value'* in P. Birks, (ed) Privacy and Loyalty in the Law of Obligations, *op. cit.*, n. 49, pp. 15-50; P. Gerwitz, 'Privacy and Speech' [2001] *Sup. Ct. Rev.* 139 and D. J. Solove, 'The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure'

[8-29] To limit discussion of the democratic theory of free speech to the scope of the public interest concept alone would not complete the constitutionalisation process that this thesis set out to achieve. The following section attempts to complete a further part of this exercise with analysis of the standard of fault liability that should be imposed on media organs in the publication of public interest material. Part II revealed varying standards adopted by different jurisdictions ranging from actual malice to responsible journalism. This jurisprudence is now returned to from an Irish constitutional perspective.

Actual Malice

[8-30] With its '...constitutional scheme of fault liability....'[117], the American case law reveals the potential that a constitution may play in re-shaping the tort of defamation. Despite the absence of much analysis in this jurisdiction, the *New York Times* actual malice standard has not commended itself to the judiciary or legislature in this jurisdiction. This thesis similarly favours its rejection in favour of a fault standard. In support of this position, the following section addresses some of the lessons on offer from the American experience.[118] Empirical research reveals that the actual malice standard has created a climate whereby the United States media is far less exercised about the possibility of defamation litigation than is the position in England.[119] The reason offered for this difference is that the United States media is sued far less frequently than the English and Australian media.[120] Although the actual malice standard in respect of public officials and figures appears to leave the media freer to report,[121] in fact, this standard of liability carries costs for both the protection of reputation and freedom of expression.

(2003-2004) *Duke L.J.* 53. For an article which questions the justifications offered for disclosure of sexual impropriety on the part of a person in public office, see Archard, D., *'Privacy, the public interest and a prurient public'* in M. Kieran, (ed) Media Ethics, *ibid.*, pp. 82-96.

Chapter 4 discussed some recent ECtHR jurisprudence which has moved to consider reputation not merely as an Article 10(2) restriction on the right to freedom of expression but as an aspect of the Article 8 right to privacy.

[117] E.Barendt, *op. cit.*, n.23, p. 208. There remain commentators who are critical of the current United States approach and support a return to strict liability. For a strong critique, see R.A. Epstein, *loc. cit.*, n.47.

[118] For further detail on actual malice in United States defamation law, see Chapter 6.

[119] See Weaver et al, *The Right to Speak Ill: Defamation, Reputation and Free Speech*, *op. cit.*, n.22, p. 184.

[120] Weaver at al, *TheRight to Speak Ill: Defamation, Reputation and Free Speech*, *op. cit.*, n.22, p. 185. The same authors also point out that it is exceedingly rare for a politician to file a defamation suit.

[121] This is also evident from the amount of damages awarded. See D. Anderson, 'Freedom of the Press' (2002) 80 *Tex. L. Rev.* 429, 484, n. 298 where he reveals that '[F]rom 1980 through 2000, the total amount of final libel judgments against the media was less than $21 million...This is 0.01% of the media revenues for *one year.*'

[8-31] White J. who had joined the *New York Times* judgment, subsequently declared in *Dun & Bradstreet v. Greenmoss Builders*[122] that '[I] have...become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.'[123] The Media Law Resource Center reported[124] that in libel trials since 1980, plaintiffs won full victories (meaning that the initial damages amount awarded to them after trial survived post-trial motion and appeals, if any, intact) in 19.5 per cent of cases, partially won 7.4 percent of cases (meaning that plaintiffs walked away with some damages but less than the amount initially awarded at trial) and entered into settlements in 13.2 per cent of cases. [125]

[8-32] Rejection of the reasonable care standard in preference to the actual malice standard for public figures and plaintiffs in the United States [126] has contributed to the lack of adequate protection for reputation given that it has encouraged irresponsible journalists, who fail to establish the truth of a statement pre-publication, to act with disregard of whether it is true or not.[127] The public discourse cost of this standard of liability was also referred to in Chapter 6 in terms of the injection of false and uncorrected information into the public domain. As explained by White J. in *Dun & Bradstreet v. Greenmoss Builders*:[128]

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[122] Above, n. 12.

[123] *Ibid.*,p. 767. In similar terms, when addressing the United States actual malice test, the Australian High Court in *Theophanous v. Herald & Weekly Times*, above, n. 106, p. 136, held that '...the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.' In the context of a constitutional privacy case, the Indian Supreme Court held that the right to privacy did not allow for a defamation action for statements made with respect to the discharge by public officials of public duties, even if the statements are false, unless the public official could demonstrate that the publication was made with reckless disregard for the truth. See *Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632.
Finkelson (already ref) p. 876 made the point that '[W]hile subsequent cases, most notably *Gertz*, extrapolated this reputational interest and highlighted the presence of a balancing test in constitutional libel law, the interest's shortchanged treatment in *New York Times* continues to be reflected in lower court decisions in which the reputational interest is perpetually undervalued.'

[124] Media Law Resource Center, *Report on Trials and Damages* (2008). This was formerly the Libel Defence Resource Center. Its website is www.medialaw.org

[125] See also M. Newcity, 'The Sociology of Defamation in Australia and the United States' (1991) 26 *Texas Int'l L. Journal* 1, 59-61, for discussion of the success of media defendants in overturning adverse trial verdicts on appeal.

[126] The negligence standard applies in respect of private persons.

[127] The Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 rejected the actual malice standard for this very reason: '[T]hose who publish statements should assume a reasonable level of responsibility.' Similarly, the Neill Committee in England rejected the test on the ground that it could lead to irresponsible press activity. See the UK Supreme Court Procedure Committee *Working Group on Practice and Procedure in Defamation* (1991), para. [164].

[128] Above, n.12.

'[C]riticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.'[129]

[8-33] Finally, as pointed out in Chapter 5, Lord Nicholls in *Reynolds v. Times Newspapers*[130] considered that given the protection afforded under English law to the protection of journalists' sources, it would be unduly difficult to oblige a plaintiff to prove malice on the part of the defendant. [131] The actual malice rule also carries costs for the American media in terms of potentially protracted and expensive discovery,[132] although the data in the previous paragraph revealed that the media are rarely subjected to intrusive discovery procedures.[133] As regards the perception of the media industry, the reckless disregard test has been criticised given that it incentivises this industry to perform as badly as possible,[134] whether this relates to speedy publication with little verification[135] or engaging in superficial journalism.[136] Bad performances then come under intense scrutiny with the intrusion into editorial processes mandated by a subjective state of mind test of

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[129] Ibid., p. 767.
[130] Above, n. 22.
[131] Likewise, one of the grounds for the Court of Appeal's rejection of Lord Lester's proposition to expand qualified privilege with the onus on the plaintiff to prove express malice was that '...it exposes those who are properly the subject of political speech to false and defamatory statements about them with no protection save on proof, which will often be difficult or impossible, that the publisher lacked an honest belief in the truth of the statement.' [1998] 3 All E.R. 961, 1005; [1998] 3 W.L.R. 862, 910.
In contrast and for more general discussion of the protection of journalists' sources in United States law, see A.L. Fargo, 'The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege' (2005-2006) 14 *Wm. & Mary Bill Rts. J.* 1063. There has been a recent trend in the United States for finding journalists in contempt of court for refusing to testify before grand juries, see W.N. Davis, 'Squeeze on the Press' (2005) 91 *A.B.A.J. 22.*
[132] According to Anderson, '[T]his is a complex factual issue that normally cannot be resolved without discovery, sometimes in prodigious quantities.' See D. Anderson, 'Is Libel Law Worth Reforming?' (1991) *U. Pa. L. Rev.* 487, 511.
[133] See R.L. Weaver, A.T. Kenyon, D.F. Partlett and C.P. Walker *The Right to Speak Ill: Defamation, Reputation and Free Speech* p. 249.
[134] M. M. Shapiro, 'Libel Regulatory Analysis' (1986) 74 *Cal. L. Rev.* 883, 885. See also R. Bezanson, 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska L. Rev.* 754, 775, where the author argued that '[I]t would be mistaken to assume that a publication decision made without actual malice is for that reason entitled to protection as an exercise of editorial judgment under the First Amendment. The absence of actual malice, in other words, tells us little about the nature or value or quality of the decision or the resulting publication. It reveals little about the nature of the judgemental process that yielded the publication. '
[135] D. A. Logan, 'All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions' (2000) 23 *U. Ark. Little Rock L. Rev.* 201, 205-209.
[136] W. P. Marshall and S. Gilles, 'The Supreme Court, the First Amendment and Bad Journalism' (1994) *Sup. Ct. Rev.* 169, 181.

liability.[137] Related concerns have been raised by some commentators as to the '...role of the courts as *ad hoc* formulators of standards.'[138]

[8-34] The actual malice standard in defamation law has many drawbacks which include encouragement of careless journalism and in this respect, the potential for the introduction of false information into public discourse. The lack of any apparent balancing of the competing rights of speech and reputation so that the former is prioritised to such a strong extent over the latter would seem irreconcilable with the Irish constitutional guarantee for both rights. Finally, the difficulties and cost of proving malice were addressed in some detail in Chapter 6. The next section argues that the reconciliation of the competing rights is more appropriately served with the introduction of a fault standard.

Negligence

[8-35] The costs of a strict liability defamation regime for freedom of expression have previously been discussed in Chapter 3. It was argued explicitly in *Hunter v. Duckworth and Co. Ltd & Anor* [139] that this position should not continue. In fact, counsel for the Attorney General in the case called for traditional qualified privilege to operate based on a reasonableness standard. Despite not adopting a reasonableness standard *per se*, Ó'Caoimh J. supported the *Reynolds* defence in this jurisdiction, in the absence of statutory development. This position was strengthened when in *Leech v. Independent Newspapers (Ireland) Ltd*, [140] Charleton J. applied the *Reynolds* test of responsible and fair journalism. Finally, as addressed in Chapter 3, section 24 of the Defamation Bill 2006 introduced a new defence for publication on matters of public interest, the operation of which centres on a test of reasonableness. [141]

[8-36] It is submitted that these developments towards a fault based test for liability and away from the traditional strict liability position represent a more appropriate

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[137] D. Anderson, 'Is Libel Law Worth Reforming?' (1991) 140 *U. Pa. L. Rev.* 487, 516-521.
[138] B.C. Murchison, J. Soloski, R.P. Bezanson, G. Cranberg and R.S. Wissler, 'Sullivan's Paradox: The Emergence of Judicial Standards of Journalism' (1994) 73 *North Carolina L. Rev.* 7, 99.
[139] Above, n. 2.
[140] Above, n. 56.
[141] The introduction in section 24 of the Defamation Bill 2006 of a list of conditions which centre on reasonableness of conduct supports the recommendation of the Legal Advisory Group on Defamation to the effect that it was preferable to develop a new statutory defence in preference to the expansion of the traditional qualified privilege defence. The Irish Law Reform Commission had previously argued that: '[G]iven the great variety of circumstances that may arise in cases, it would not be appropriate for the legislation to attempt to provide guidelines as to what, in particular instances, might be properly regarded as a failure to take reasonable care.' *Op. cit.*, n.1, p.54.

reconciliation of the competing constitutional rights of speech and reputation.[142] One of the tools identified in Chapter 1 for the future development of Article 40.6.1°(i) was the doctrine of proportionality. The introduction of fault represents a stronger commitment to the doctrine than had been evident in some previous case law.[143] It follows similar developments in other jurisdictions,[144] particularly England[145] and Australia[146] where the test of responsible journalism is accepted as a fair balance between the protection of public interest speech and reputation.[147] This argument is strengthened in the Irish constitutional context by the reputational guarantee in Article 40.3.2° which protects the right to good name not against every attack but those 'unjust attacks'.[148] It seems very clear that the absence of a fault-based system of liability is not constitutionally prescribed in this jurisdiction. What remains to be addressed in this chapter is how this fault standard should operate to ensure that the constitutional balancing of speech and reputation rights is properly carried out.

[8-37] As regards the standard of negligence proposed, Lord Nicholls explained in *Reynolds* that '[T]he common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse.' [149] The dangers in terms of deterrence of setting the test for journalistic responsibility too high were adverted to in *Loutchansky v. Times Newspapers Ltd (Nos. 2-5).*[150] More recently in *Jameel v. Wall Street*

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[142] The Irish Law Reform Commission had suggested the introduction of the defence of reasonable care to a claim for general damages. *Op. cit.*, n.1, para. [7.27]

[143] See Chapters 1 and 3.

[144] A reasonable publication defence has also been introduced in South African defamation law; see generally D.Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), pp. 195-196.

[145] See Chapter 5.

[146] See Chapter 7.

[147] In endorsing a standard of reasonable care and skill in all the circumstances, Lord Cooke in *Reynolds* v. *Times Newspapers Ltd* [2001] 2 A.C. 127, 224; [1999] 4 All E.R. 609, 664; [1999] 3 W.L.R. 1010, 1046. had explained that '[T]he fourth estate should be as capable of operating within general standards.' See also *Bonnick v. Morris*, [2003] 1 A.C. 300, para. [23]. Similar to the English position, in *Lange v. Australian Broadcasting Corporation*, above, n. 58, 574 , the Australian High Court was satisfied that '...the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct.'

[148] For the argument in the Canadian context that where fault does not play a part, the common law of defamation is at odds with the Canadian Charter's values and requires modification of freedom of expression, see D. W. Boivin, 'Accommodating Freedom of Expression and Reputation in the Common Law of Defamation' (1996-1997) 22 *Queen's L.J.* 229. The author called for the introduction of a due diligence defence in Canadian defamation law.

[149] According to Milo, '...the pronouncement of the judges in *Jameel* leave little room to doubt that the *Reynolds* defence is a defence of lack of negligence.' D. Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008), p. 190.

[150] [2002] Q.B. 783. For discussion of the pressures of combining 'industrial journalism' and 'ethical journalism', see Belsey, A., 'Journalism and ethics: Can they co-exist?' in M. Kieran, *op. cit.*, n.114, pp. 3-14.

Journal Sprl,[151] Hale J. emphasised the need for defamation law to encourage more serious journalism. Even with its strong and robust approach to the protection of media public interest speech, the ECtHR has similarly emphasised throughout its jurisprudence that the media has duties and responsibilities.[152] This emphasis on responsibilities supports the Court's approach to media rights so that the media is not protected *per se* but in so far as it carries out an instrumental role through the provision of accurate and reliable information.[153] The ECtHR does not however prescribe a checklist for best practice journalism but has established guidance on a case by case basis. Despite the absence of any form of European checklist, the ECtHR has endorsed the *Reynolds* approach and many of the standards required are reflective of this.[154]

[8-38] The importance of editorial judgment was recently emphasised by the House of Lords in *Jameel v. Wall Street Journal Sprl.*[155] Adequate respect for the role of editorial judgment required the article to be objectively examined in its totality and not in the sense of whether the judge would have adopted a different editorial policy with the benefit of hindsight. That such a public interest defence requires flexibility in application[156] has been accepted by Charleton J. in *Leech* so that '...it seems that errors have been made by people referring to the ten separate indicia of the existence of public interest and by indicating that if one or other of them is absent, or if a decision as to fact might go against a newspaper in relation to one or the other, that the entire defence is destroyed.' Prior to the introduction of the responsible publication defence in English and Australian law,[157] the traditional focus on the circumstances of publication at the expense of content created a situation of insufficient protection for public interest speech. It is imperative that the public interest content of speech is not relegated by the test of responsible publication but is interpreted to conform to the democratic model of free speech. This was emphasised by a number of the

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[151] [2007] 1 A.C. 359.

[152] For further discussion, see Chapter 5.

[153] See also Cameron J. in *Holomisa v. Argus Newspapers Ltd* 1996(2) SA 588 (W), 607: 'It does not follow, however, from the special constitutional recognition of the importance of media freedom, or from the extraordinary responsibilities the media consequently carry, that journalists enjoy special constitutional immunity beyond that accorded ordinary citizens. In Neethling, Hoexter JA rejected the notion of a general "newspaper privilege" as being alien to our law...That approach seems to be supported by constitutional principle.'

[154] *Times Newspapers v. United Kingdom*, App. No. 23676/03, 11th October 2005.

[155] See Chapter 5.

[156] This supported some earlier English judgments which had likewise emphasised the need for flexibility in the application of the responsible publication test. For examples of this, see *Bonnick v. Morris*, [para]. 24, above, n. and *Panday v. Gordon*, [2006] 1 A.C. 427, [para]. 14.

[157] It was pointed out in Chapter 7 that the Australian legislature has recently introduced defamation legislation which includes a list of factors which centre on reasonableness and many of these factors are similar to the *Reynolds* defence.

Law Lords in *Jameel* in their criticisms of the narrow application of *Reynolds* by judges and as a result, the necessary restatement of its underlying principles. Given the similarity between the *Reynolds* list and section 24(2) of the Defamation Bill 2006, there are important lessons for the operation of Irish defamation law in this respect.

[8-39] A recurring criticism of *Reynolds* lies with the risks of uncertainty in its application. However, as Feldman[158] has argued, '[Y]et, there is in principle no reason why the media should be exempt from the obligation which the law normally imposes on people to take reasonable care when doing things in the line of business which are likely to damage others.' Arguments based on risks of uncertainty for protection of public interest speech carry less weight if the *Reynolds* factors are interpreted to conform to the democratic model of free expression.[159] Chapters 1 and 3 have previously demonstrated a strengthening of protection for public interest speech in some recent domestic case law. These developments point to a *Reynolds* style list being interpreted in the future in the context of recognition of the important democratic role of the press. However, it is submitted that the Defamation Bill 2006 should explicitly endorse this position in the context of a defence of fair and reasonable publication.

[8-40] Whether the Defamation Bill 2006 is enacted[160] or Irish defamation reform occurs judicially through the adoption of a *Reynolds* style public interest defence,[161] the Irish courts have particular guidance from the ECtHR which has established the rights and responsibilities of the media incrementally in its jurisprudence.[162] Two factors have proved important for both the ECtHR and the English courts in the application of the test of good faith or responsible publication; namely, the manner of presentation of the publication in

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[158] D, Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed.,(Oxford University Press 2002), p. 844.

[159] The ECtHR has rejected the uncertainty argument in *Times Newspapers v. United Kingdom,* App. No. 23676/03, 11th October 2005.

[160] According to the Irish Law Reform Commission, '...the relevant provisions of the Constitution leave a wide area of discretion to the Oireachtas in determining how best the good name of the citizen may be protected and vindicated by a properly framed law of defamation.' See Law Reform Commission, *Consultation Paper on the Law of Defamation*, (March 199), pp. 123-124.

[161] See Binchy, W *'Some Unanswered Questions in Irish Defamation Law' loc. cit.*, n.57, pp. 243-263, 250, 'The defence for the media, is in essence, one of due care and moderation. This is a completely new development, though it is presented in *Reynolds* as being rooted in traditional principles relating to qualified privilege.

[162] See Chapter 5.

terms of tone and balance and whether the subject of the publication was contacted or given an opportunity to put forward his version of events. [163]

[8-41] The analysis in Chapter 5 revealed that the English courts have placed significant emphasis on the sort of tone or balance adopted in the publication, in contrast to the more substantial freedom afforded to journalists by the ECtHR. Section 24(2)(c) of the Defamation Bill 2006 provides that the context and content (including the language used) of the statement forms part of the responsible publication test. This type of circumstantial test should not be used to substitute less polemical language for that which is disapproved of and in the context of political speech, the importance of protection for 'political rhetoric'[164] should be respected. It is important therefore that the tone of an article is assessed by an objective standard.

[8-42] As regards contacting the plaintiff, both the ECtHR and the English courts have highlighted the importance of this, but have accepted that failure to do so does not necessarily result in the publication having failed the responsible publication test. It has been explained in Chapter 3 that section 24(2)(g) of the Defamation Bill 2006 includes as a factor the extent to which the plaintiff's version of events was represented in the publication concerned and, if not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person. However, this obligation is tightened further in the following section which provides that failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant to elicit the plaintiff's version of events shall not (a) constitute or imply consent to the publication of the statement, or (b) entitle the court to draw an inference if, in the particular circumstances of the case, the court considers that the plaintiff was reasonable in withholding any response or in believing that a denial or refutation by the plaintiff of a defamatory statement would itself be unfairly used or published. According to one commentator:

> '...the logic of the statute would seem to be that the publisher *must* seek the plaintiff's version of events and should publish that version, but that in certain

[163] McGonagle has observed that '[U]nlike the permissive and illustrative nature of the factors listed in Reynolds, the factors in the Bill "shall" be taken into account. [The Court] may take additional matters into consideration – it must do so if it considers them relevant – and can exclude any of those in the list if, but only if, it considers that they are not "relevant". See M. McGonagle, 'Reforming Media Law in Ireland: Part 1: Defamation and Privacy' (2006) 11 *Comms. Law* 195,

[164] The ECtHR used this term in *Ukranian Media Group v. Ukraine*, App. No. 72713/01, 29th March 2005, para. [66].

circumstances, it may be acceptable for the plaintiff not to provide the publisher with his or her version for publication. In such circumstances, it may well be that under the section if the story is published without the plaintiff's version the section 24 defence will not be available.' [165]

[8-43] Given that the Irish courts must engage in the balancing of two competing constitutional rights, it is likely that section 24(2)(b) of the Defamation Bill 2006, which provides for the seriousness of any allegation to be taken in account if relevant, will feature in future jurisprudence. The seriousness of any allegations is also a *Reynolds* factor. However, unlike section 24(2)(b), the *Reynolds* case explains that the more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true. However, it is suggested that section(24)(b) must be examined alongside sections 24(a) and (c). Taking these sub-sections together so that the assessment of the seriousness of any allegation is examined within the context[166] of the performance of public functions should further the democratic theory of free speech.

[8-44] It has been suggested by some that the burden of proof should be on the plaintiff to show breach of the duty of reasonable care.[167] Others have argued that to place this burden on the plaintiff would be unfair, particularly where the defendant is a media organ, primarily on the basis that it would be difficult for the plaintiff to accumulate evidence of negligence and that the burden should rest with the person who is in possession of the details.[168] Some of the general difficulties relating to the presumption of falsity in Irish defamation law were addressed in Chapter 3 and these are similarly applicable in the context of the allocation of the burden of proof in the operation of the reasonable publication defence. Further to these previous points, however, is the fact that the public interest defence proposed in the Defamation Bill 2006 is intended to improve upon the traditional position for media organs relying on the defence in their dissemination of

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[165] N. Cox, *Defamation Law*, (First Law, 2008), p. 336.

[166] The regulation of political discourse must necessarily take into account the context in which speech was made. Speech made during an election campaign for example may be heated and polemical but as described by Chubb, they are '...the high point of democratic values.' See B. Chubb, *'The Political Role of the Media in Contemporary Ireland'* in Communications and Community in Ireland, B. Farrell, (ed) (Mercier Press, 1984), pp. 75-85, 80.

[167] K. Boyle and M. McGonagle, *Press Freedom and Libel*, (National Newspapers of Ireland, 1986).

[168] Irish Law Reform Commission, *op. cit.*, n.1, p. 51. This was the conclusion reached by Lord Nicholls in *Reynolds*, above, n.22. In *Theophanous v. Herald and Weekly Times*, above, n.106, the Australian High Court held there was no need to include malice within the constitutional defence once the element of reasonableness was included.

material of public interest value. However, as the following observations by Cox suggests, the legislation may actually represent a retreat in such protection:

> '...the further step is taken under section 24(4) (which does not apply in the *Reynolds* scenario) of allowing malice to play a part. This represents a serious ideological shift as between the common law and the statute in that, not alone is malice a factor but the burden of proof in respect of such malice (which under the classical defence of qualified privilege rests with the plaintiff) is on the *defendant*.'[169]

[8-45] In respect of the issue of fault, section 24 of the Defamation Bill 2006 appears to combine elements of traditional qualified privilege (malice) and the public interest defence (fair and responsible publication). It is submitted that the introduction of malice is misplaced and should not play any part in the new statutory public interest defence. As regards the burden of proof in respect of fault, this thesis suggests that this should rest with the claimant. Given the factors listed in section 24(2) such as whether the statement concerned public functions, the seriousness of the allegations and whether the plaintiff was contacted, the argument that the burden of proof of fault should rest with the person in possession of the details is difficult to accept. The plaintiff is equally in the position to give evidence on many of the listed factors. Furthermore, as the test of responsible publication is central to the claim by both sides, in any event, the defendant remains obliged to adduce evidence to show that he or she acted responsibly. Finally, in light of the fact that the introduction of a public interest defence is intended to act towards the re-balancing of speech and reputation rights, it is worth noting the pertinent observations of one commentator in this respect: '...it is urged that it is consonant with freedom of expression that the overall burden of proof should be on the claimant. This is not just symbolic...but it also works where publishers need it most: in situations of equivalent uncertainty.'[170]

[8-46] There is one final point to mention as regards the operation of a *Reynolds* style public interest defence. As pointed out in Chapter 5, section 24(2) of the Defamation Bill 2006 supports the use of the jury in the application of the defence of fair and responsible publication. More recently, in *Leech v. Independent Newspapers (Ireland) Ltd*,[171]

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[169] *Op. cit.*, n.164, 336.
[170] Milo, *op. cit.*, n. 148, p. 210.
[171] Above, n.56.

Charleton J. endorsed the role of the jury [172] as a trier of fact of both the public interest concept and the test of reasonableness of conduct. Trial judges will therefore have an important role to play in instructing the jury on the elements of the public interest defence. Defence counsel will also be likely to remind juries of the values underlying both rights, given that evidence from the United States suggests a certain bias against the media.[173]

CONCLUSION

[8-47] Having explained the grounds for rejection of expansion of traditional qualified privilege in the Introduction to Part III, this chapter considered the alternative option of the introduction of a public interest defence. In support of both the constitutional rights of expression and good name, it is appropriate to balance the rights based on speech content rather than plaintiff status and within this to limit protection to speech which is linked to the democratic rationale. It is important therefore than in applying a negligence test, that the elements of reasonableness are linked to constitutional requirements. The dangers of excessive focus on the test of reasonableness can result in reduced protection for legitimate democratic free speech and the Australian example (Chapter 7) serves as a good example of the dangers of this approach.

[172] F. Schauer, 'The Role of the People in First Amendment Theory' (1986) 74 Cal. L. Rev. 761, 765-768.

[173] See R. M. Goehler, J. A. Tomain and A.G. Main, 'Representing the Media at Trial' (2005-2006) 32 Litigation 30. The writers, backed up by The State of the News Media 2004, (an annual report on American journalism available at www.journalism.org) concluded at p.30 that '[O]ver the past 20 years, public opinion of the media has continually declined. Americans seem to think journalists are sloppier, less professional, less moral, more slanted, and generally more harmful to democracy than they were in the 1980s.' See also C.L. Babcock, 'The Role of the Court and Jury in Libel Cases' (2005-2006) 47 S. Tex. L. Rev. 325, 326.

CHAPTER 9

DAMAGES FOR DEFAMATION

INTRODUCTION

[9-01] The Irish system of damages awards in defamation litigation was criticised in Chapter 3 for its chilling effect on the publication of public interest material by the media. However, the dangers to the protection of good name from unregulated damages awards were also addressed. The same dangers have been recognised to different extents in the jurisdictions considered in Part II. This chapter resumes discussion in the Irish constitutional context of the principal areas of damages highlighted in Chapter 3, namely; the quantum of damages and jury guidelines, the appellate review standard of jury awards and the operation and scope of exemplary damages.

[9-02] As argued in Chapter 3, compensatory damages represent a necessary and just remedy in some cases and should therefore be retained.[1] Nonetheless, their potential consequences for the protection of public interest speech and reputation require refinement in terms of their scope and application to reflect the values underlying each of the rights. As regards exemplary damages, this chapter proposes their abolition in public interest speech cases. It is argued however, that based on case law and section 29 of the Defamation Bill 2006, their abolition appears unlikely and the chapter therefore suggests an appropriate method of regulation of this type of damages.

[9-03] It is necessary to re-emphasise at this point the role of the jury in defamation cases (see further Chapter 3). The importance of the jury's input in defamation actions has been judicially accepted[2] and it was argued in light of this position, that the jury needs to be afforded certain tools to increase the effectivness of this instititon in defamation litigation. This chapter returns to this concept and explains it further.

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[1] By way of example, Cox provides: '[N]onetheless, it is salutary to consider how appalling the consequences of a serious defamation (for example, and perhaps most insidiously, an allegation that a man had sexually abused children) can be in destroying the victim's social life, self-confidence and psychological well being.' The same author in this context reminds us that '[I]ndeed from an Irish constitutional perspective, it is worth remembering that whereas the right to bodily integrity is not mentioned in Bunreacht na hÉireann there is an express right to a good name.' N. Cox, *Defamation Law* (First Law, 2008), p. 363.

[2] *Quigley v. Creation Ltd* [1971] I.R. 269.

[9-04] In the Introduction to Part III, the absence of any recognition in Irish jurisprudence of the constitutional link between protection of public interest speech and the chilling effect produced by high damages awards was highlighted and contrasted with the position in the jurisdictions considered in Part II. This chapter centres on the argument that if the democratic values of freedom of expression are to receive genuine and effective constitutional protection, the reforms suggested should be introduced.

QUANTUM OF DAMAGES AND JURY GUIDELINES

[9-05] A jury award of £300,000 in the political libel case of *De Rossa v. Independent Newspapers*[3] (hereafter *De Rossa*) resulted in an appeal to the Supreme Court by the defendant newspaper with the argument that the general practice of preventing counsel and the trial judge from offering specific guidance to the jury as to the appropriate level of damages violated its constitutional rights of freedom of expression and communication. Counsel for the newspaper urged the Supreme Court to refer the jury to the purchasing power of an award. It also suggested the introduction of references by the trial judge and counsel to an appropriate level of damages and comparative references by counsel and the trial judge to awards made in personal injuries cases and previous libel cases. Delivering the judgment, Hamilton C.J. rejected these suggestions on two grounds; (i) creation of jury confusion and (ii) unjustifiable invasion on the jury's role. In sole dissent, Denham J. emphasised that jury guidelines would result in more informed and consistent decision-making. As a result of the Supreme Court judgment, a jury remains limited to the guidance permitted in *Barrett v. Independent Newspapers*[4] such that a jury should be asked to reduce to actuality the allegation complained of and to fit that allegation into its appropriate place in the scale of defamatory remarks to which the plaintiff might have been subjected.

[9-06] The first change to libel practice proposed by counsel on behalf of *Independent Newspapers* was to the effect that juries should be referred to the purchasing power of any award made. In referring to the purchasing power of an award, whether it is by the trial judge or counsel, a jury is simply being instructed to introduce a strong element of realism into their deliberations. It is akin to criminal lawyers explaining the technical meaning of the burden of proof formula enshrined in the maxim 'beyond reasonable doubt' by

[3] [1999] 4 I.R. 432.
[4] [1986] I.R. 13.

persuading the jury to consider decisions which they themselves might make or have made, which caused them to stop and think. In much the same way, the trial judge and libel lawyers are simply guiding the jury to adopt an everyday approach to awards by considering how they themselves regard a sum of money in terms of its return. Such an objective could be attained by simply reminding a jury of the cost of buying a motorcar, holiday or house.[5] This is a minimum safeguard to be relied upon but does not give the members of the jury any substantive direction in carrying out their task. The Supreme Court, signifying little chance of more far-reaching changes being accepted, did not countenance this slight alteration to current libel practice.

[9-07] Moving on to awards made in previous defamation cases, the former Chief Justice likewise rejected this development on the basis that it would hinder the jury in fulfilling its function competently for the reason that:

> [E]ach defamation action has its own unique features and a jury in assessing damages must have regard to same: these include the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant at all stages and many other matters. These will vary from case to case. Figures awarded in other cases based on different facts are not matters which the jury is or should be entitled to take into account.[6]

[9-08] Directly referring juries to awards made in defamation cases in the past and present Irish climate of awards, as a method of guiding them toward a particular figure is not to be welcomed.[7] Firstly, it may result in the very type of consistency which it is designed to avoid, such that juries may feel obliged to award similar sums to those handed out in the

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[5] In the English case of *Sutcliffe v. Pressdram* [1991] 1 Q.B. 153, 284, the jury was invited '...to consider what the result would be in terms of weekly, monthly or annual income if the money were invested in a building society deposit account without touching the capital sum awarded or, if they have in mind smaller sums, to consider what they could buy with it.'

[6] Above, n.3, p.462. Subsequently, in *O'Brien v. Mirror Group Newspapers* [2001] 2 I.R. 1, Keane C.J. did not consider that *De Rossa* precluded an appeal court from determining the appeal in the light of awards in other defamation cases, which have been the subject of appeals to the Supreme Court. It is submitted that no convincing argument was put forward in the judgment to distinguish the jury from an appeal court in this respect.

[7] P. Milmo and W.V. H. Rogers, (eds), *Gatley on Libel and Slander* 9th ed., (Sweet and Maxwell, 1998), p. 208 reached a similar conclusion in the English context. It was argued that past jury awards are wholly unreliable as a guiding tool, stemming as they do from the 'old regime'. On the other hand, the possible reference to Court of Appeal awards was not to be ruled out as it may provide *some* guidance to juries but not until a substantial body of such awards had been developed.

past, yet if, as is widely accepted, previous Irish libel awards have been both high and erratic, consistency in this respect is the very objective the reforms are intended to preclude. Lacks of guidelines in the past have resulted in unreasonably high awards for the injury suffered and it may be extremely unwise to direct a jury to sums which have been heavily criticised for their size. While rejecting the use of previous libel awards in the above manner, that is not to say that they should not play a part in the jury's decision-making process. Such awards should be an indirect relativity. If counsel believes that particular past awards should be a factor in the jury's decision, they should raise those comparables with the judge in the absence of the jury and these figures may be taken into account when deciding upon figures which may later be mentioned to the jury by the trial judge. In this way, jury confusion will be minimised, while simultaneously allowing previous defamation awards play some role in the jury's calculations.

[9-09] However, the very dangers pointed out above have been resolved in England by only referring juries to awards substituted by the Court of Appeal, following the introduction of the 1990 legislation permitting this (see Chapter 5). It is submitted that there should be a similar statutory provision in this jurisdiction. These figures could then provide future guidance to juries. It will obviously take quite a number of years for this corpus of figures to develop but the alternative of referring juries to previous libel awards may undermine the introduction of other procedural changes. Similarly, until there can be objective assessment of whether the reforms in respect of jury guidance are proving successful, reference to jury awards in libel trials from the time of the introduction of the new jury 'tools' should be avoided pending assessment of their worth, their effectiveness being measured by the awards.

[9-10] The former Chief Justice was no less inclined to the rejection of a comparison to awards in personal injury cases for two primary reasons. Firstly, defamation awards serve two purposes; those of compensation and vindication, which according to the majority, separate such actions from personal injury actions, presumably on the basis that the figure in the latter category is arrived at on the basis of monetary recompense alone. Secondly, in relation to the vindicatory element of an award, there are multiple factors such as the standing of the plaintiff, the extent of the publication, the absence of an apology and so on which affect the outcome of the final award, making it impossible to use personal injury

awards as a useful guide. The answer to the first contention is quite simple: just as non-pecuniary losses play a contributing role in a defamation award, so too do they in a personal injury award. Damages in personal injury actions may be awarded on the basis of aggravated and exemplary damages. As White succinctly notes: 'In the modern law of tort, the award in respect of non-pecuniary loss in a personal injury action may be said to be educational, vindicatory and functional. The vindicatory and functional attributes of the award may be subsumed within the concept of 'satisfaction' to the plaintiff.'[8]

[9-11] The consequential losses in one type of injury are no less readily ascertainable than in the other, just as a sharp statement may cause very different reactions in two persons, so too might a particular physical injury result in varying levels of pain and distress for two victims. Denham J. persuasively rebutted such concerns by deploying the argument that: '[C]ompensation is a notional remedy in both instances. The lame do not walk after an award of compensation. The defamed do not cease to have been defamed after an award of damages. An order of damages is an artificial form by which a court gives a remedy to an injured person.'[9]

[9-12] Recognising the distinction in the number of variables usually present in a defamation action and absent in a personal injury action[10] such as lack of an apology, malice of the defendant and so on, is not sufficiently compelling to support the contention that juries would derive no benefit from learning of awards in previous personal injury actions. The torts themselves comprise different elements, which are not designed to be compared; rather the results are the relevant comparator.[11] It is not therefore a case of considering damages in the two forms of actions as similar in nature as a direct correlation is not possible, thereby rendering comparison between defamation and personal injury cases far less onerous than comparing previous and present defamation cases. Rather, it is about recognising on public policy grounds that a jury should be given sufficient information to put its award in context and an obvious method of doing this is to refer them to previous personal injury awards. In fact, this was recognised in the context of appellate

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[8] J. White, *Irish law of Damages for Personal Injuries and Death* (Butterworths, 1989), chapter 6, para. [6.2.01].

[9] Above, n. 3, p.478.

[10] See *Browne v. Tribune Newspapers* [2001] I.R. 521; [2001] 2 I.L.R.M. 424 in respect of the differences in types of evidence in defamation and personal injuries cases.

[11] The Australian High Court in *Coyne v. Citizen Finance Ltd* (1991) 172 C.L.R. 211, 220 unconvincingly attempted to draw qualitative similarities between physical injuries and injuries to reputation such that severe personal injuries may sometimes lead to reputational alteration '...at least comparable to that caused by an untrue allegation about lack of physical or mental capability or control.'

review of the jury award in *O'Brien v. Mirror Group Newspapers*[12] (hereafter *O'Brien*) where Keane C.J. explained that '...the case must be approached...on the basis that the damages awarded are in the highest bracket of damages appropriate in any libel case. They are comparable to the general damages awarded in the most serious cases of paraplegic or quadriplegic injuries....'.[13] It is submitted that to introduce such guidelines is to ensure a sense of proportionality and rationality in the general scheme of damages. According to the sole dissenter, Denham J. '[I]t is entirely reasonable that there be a degree of uniformity, consistency, a sense of comparability, of rationality, in the wider scheme of damages.'[14] A jury should always be reminded that the ultimate decision as to the amount of damages rests with them. In fact, by failing to refer to personal injury awards, the Irish courts will be failing to adhere to a warning sounded by the Australian courts where it was pointed out that media attention focusing upon large personal injury awards fail to inform the public which proportion of the award represented general damages, with the result that this public when it becomes a group of twelve may make subconscious comparisons in the absence of accurate and relevant information.[15] Therefore, it is important that juries are informed of the pecuniary and non-pecuniary make-up of the awards. It would seem sensible to limit direct guidance in this area from the judge to the jury. The underlying reasoning of the courts in England and Australia in sanctioning the introduction of reference to previous personal injury awards is based on public policy grounds. Since the abolition of juries in personal injury actions,[16] judges have been entrusted with the task of awarding damages and therefore judges are better positioned to undertake this method of reference. It also takes account of the possibility that should too many figures be advanced from too many parties, the effectiveness of the new mechanisms of jury guidance may be substantially undermined.

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[12] Above, n. 6.

[13] Above, n.6, p.20.

[14] *Ibid.*, p.478. The public policy aspect underlying Denham J's approach echoes the earlier Australian authorities of *Coyne* v. *Citizen Finance Ltd*, above, n.11 and *Carson* v. *John Fairfax & Sons Ltd.* (1993) 178 C.L.R. 44, wherein the High Court had emphasised the fairness of ensuring that a 'rational relationship' existed between the two types of awards.

[15] This point was referred to by the Australian High Court in *Carson v. John Fairfax & Sons Ltd.* (1993) 178 C.L.R. 44, 60 where the Court provided a practical example of the real dangers associated with jurors calling to mind information provided to them in the media concerning very large personal injury awards: 'A defamation verdict for $250,000 may, in the mind of such jurors, bear a rational relationship to an award of $ 2.5 million dollars to a person suffering quadriplegia as a result of an accident, even though, unbeknown to the jurors, that person was awarded only $150,000 in general damages.' Since this decision, the new uniform Australian defamation legislation (see further Chapter 7) has introduced a cap for non-economic loss at $250,000 which was intended as a lesser amount than awarded in cases of severe personal injuries.

[16] As mentioned previously, such a change was implemented on foot of the Courts Act, 1988.

[9-13] The danger of avoiding complication in jurors' minds is not served by refusing to mention figures to them, this being the very reason for the current criticism of domestic libel awards. Relevant figures can be a useful guide in assisting them to reach their determination provided that in so doing, the jury is not given so many figures that it leads to the same problem that the solution was designed to prevent. To avoid this result, counsel should be limited to having an indirect input into suggested figures. This should not prevent counsel from encouraging a jury to introduce an element of realism into its awards provided that they do not indicate the number of cars, foreign holidays or houses appropriate to the case. However, the legal teams should be afforded the opportunity to pitch their own awards taking into account previous awards in defamation and personal injury cases, in an indirect manner, by arguing the justification for a particular sum before the judge and in the absence of the jury. A judge should then take these figures into account in suggesting a bracket to the jury. This procedure will avoid the 'battle of comparables' referred to by Simon L.J. in *Kiam v. MGN Ltd*,[17] by avoiding complex arguments by counsel before the jury.

[9-14] In addition to the above reforms, there exists a need to alter the manner in which the trial itself is conducted to reflect the increased information being given to the jury. The trial should become bifurcated so that a jury is not forced to consider liability and quantum simultaneously. Quite apart from leading to unnecessary difficulties for the jury, it may lengthen the trial process. If a jury returns a verdict, which renders a consideration of damages unnecessary, there is nothing to be gained from guidance on damages. Even more importantly however, it means that liability and quantum do not become confused. If defence counsel who are contesting liability are forced to consider figures, even if only indirectly, prior to a jury deciding upon liability, it may undermine their primary argument that no damages should be awarded.

[9-15] Finally, it is important to refer to section 29 of the Defamation Bill 2006 dealing with damages. Section 29(1) allows parties in a defamation action to make submissions to the court in relation to the matter of damages and the following subsection allows the judge to give directions to the jury in relation to the matter of damages in a High Court defamation action. The terms 'submissions' and 'directions' are not however defined in the Bill. Under section 29(4), the court in making an award of general damages shall have

[17] [2002] 2 All E.R. 219; [2002] 3 W.L.R. 1036.

regard to factors which include the nature and gravity of any allegations, the extent of circulation, whether any apology, correction, retraction or offer of amends was made, the extent to which the plaintiff caused or contributed to the publication and evidence concerning the reputation of the plaintiff. Many of these factors resemble those listed in *Barrett v. Independent Newspapers*[18] which subsequently proved ineffective in guiding juries. The Defamation Bill 2006 fails to re-balance rights of reputation and expression by its lack of specificity of 'submissions' and 'directions' and has implicitly endorsed the continuance of the *De Rossa* and *O'Brien* positions.

APPELLATE REVIEW STANDARD OF JURY AWARDS

[9-16] An appellate court is currently directed to overturn jury verdicts should it find that the sum awarded went far beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded.[19] The current position therefore provides for a situation where a jury award will generally not be upset.[20] This jury freedom is more acceptable if one is convinced that the current trial stage of libel proceedings provides for the necessary due balancing of competing constitutional freedoms, in particular the right to freedom of expression and that of a good name. In such a situation, the jury has at least a strong possibility through its award, of attaching equal weight to constitutional rights at trial stage, leaving its decision less open to doubt. At present, the Irish position is not directed towards this goal of equal rights assessment, on account of the lack of adequate trial safeguards given to a jury to carry out its task effectively.[21] The

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[18] Above, n. 4.

[19] *Barrett v. Independent Newspapers*, above, n.4. In this case, Finlay C.J. explained, '[F]irstly, whilst the assessment by a jury of damages for defamation is not sacrosanct, in the sense that it can never be disturbed upon appeal, it certainly has a very unusual and emphatic sanctity in that the decisions clearly establish that appellate courts have been extremely slow to interfere with such assessments, either on the basis of excess or inadequacy.'

[20] The courts have refused to set aside substantial jury verdicts in a number of cases: *Prior v. Irish Press*, The Irish Times, 24th October 1989, (£30,000), *Madigan v. Irish Press*, The Irish Times, 4th March 1989 (£30,000), *McDonagh v. News Group Newspapers* Ltd. (Unreported, Supreme Court, 23rd November 1993), (£90,000). More recently, in *Crofter Properties Ltd v. Genport Ltd (No.2)* [2005] 4 I.R. 28, Denham J. held that an appeal court should intervene in the award of a libel jury with diffidence. Section 96 of the Courts of Justice Act 1924 more generally provides that an appeal against a jury verdict needs to allege that the verdict of the jury was against the weight of the evidence or was otherwise perverse.

[21] In *Barrett v. Independent Newspapers*, above, n.4, the only real guidance given to the jury was the direction to reduce the allegation complained of to actuality, then to fit the allegation into its appropriate place in a scale of defamatory statements to which the plaintiff might have been subjected, and to measure damages accordingly.

retention of the current formulation for reviewing jury awards means that these deficiencies do not stand a substantial chance of being corrected on appeal.[22]

[9-17] The Supreme Court was afforded the opportunity in *De Rossa* of introducing the English standard of appellate review such that the test is whether '...no reasonable jury could have thought that the award was necessary to compensate the plaintiff and re-establish his reputation.'[23] This new test was rejected on the basis that Irish law includes an element of proportionality and that jury awards are subject to a right of appeal during which the award is scrutinised to ensure compliance with the proportionality principle. Nonetheless, the application of the proportionality test in *De Rossa* resulted in an acceptance of an award of £300,000 for a political libel given the gravity of the libel and the defendant's conduct, with little or no weight attached to the public interest value of the material. As discussed in Chapter 3, the Supreme Court was invited in *O'Brien* to overturn *De Rossa*. However, Keane C.J. supported *De Rossa* for its interpretation and application of the ECtHR's judgment in *Tolstoy Miloslavsky v. United Kingdom*[24] (hereafter *Tolstoy*) (see Chapter 4 for further discussion of the ECtHR's judgment) and was not persuaded that an incorrect test had been applied in the determination of the satisfactory level of the award against the requirements of Article 40.6.1°(i) and Article 10 of the Convention. The section below analyses *O'Brien* for its endorsement of the *De Rossa* majority position in light of the judgment of the ECtHR in *Independent News and Media plc v. Ireland*[25] which upheld Irish law on damages for defamation.

Independent News and Media plc v. Ireland (hereafter Independent Newspapers)

[9-18] This case has been addressed previously in Chapter 4. It is addressed in this chapter from the Irish perspective of balancing rights of expression and good name within the

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[22] The present position following *Holohan v. Donohue* [1986] I.L.R.M. 250, is that the Supreme Court may substitute its own award of damages in a case on appeal from a High Court civil action involving a jury as an alternative to a re-trial. Section 12(1) of the Defamation Bill 2006 gives the Supreme Court jurisdiction in defamation appeals from a decision of the High Court to substitute for any amount of damages awarded to the plaintiff such amount as it considers proper and sub-section (2) explains that 'decision' includes a judgment entered pursuant to the verdict of a jury. However, Cox has rightly pointed out that that the section does not appear to extend to include a Circuit Court judgment. *Op. cit.*, n. 1, p. 377, n.84.

[23] *Rantzen v. Mirror Group Newspapers Ltd* [1993] W.L.R. 953, 972 ; [1994] Q.B. 670, 689; [1993] 4 All E.R. 975, 994.

[24] (1995) 20 E.H.R.R. 442.

[25] (2006) 42 E.H.R.R. 46. This decision is the result of an application by the defendants in the *De Rossa* litigation. An application was lodged on 20th December 1999 and declared admissible on 19th June 2003. Judgment was delivered on 16th June 2005 in *Independent News and Media plc v. Ireland* (App. No. 55120/00).

domestic constitutional framework. The analysis which follows is premised upon the fact that the Convention imposes certain minimum human rights obligations but does not prevent increased protection of some rights, provided that this does not excessively compromise other Convention rights. In fact, this very point was made by the Court in *Independent Newspapers* when it explained that the Convention lays down certain international standards and in this respect, does not require absolute uniformity. It will be argued that the mechanisms suggested below to regulate damages awards do not impinge to an unacceptable degree on the Convention right of reputation, and in fact more appropriately reconcile protection for this right alongside the right to freedom of expression. The applicants' claim in *Independent Newspapers*[26] essentially was that, given the exceptional damages award and the absence of adequate safeguards against disproportionate awards, its Article 10 rights were violated under Irish law. The majority ECtHR judgment may be considered under the following headings, namely: the size of the award, safeguards against disproportionate awards at first instance and finally, safeguards against disproportionate awards at second instance.

(i)The Size of the Award

[9-19] Despite the Supreme Court in *McDonagh v. Newsgroup Newspapers Ltd* [27] describing an award of £90,000 as being 'at the top end of the permissible scale',[28] it was considered acceptable in *De Rossa* that, less than ten years after this decision, figures in the region of three times this amount could be awarded. A key factor in this regard is the fact that the jury members in *De Rossa* were denied the opportunity of hearing of this previous award of £90,000 and the comments made by the Supreme Court as to the nature of the award. The unfortunate irony of the Supreme Court's decision not to countenance jury guidance in the assessment of libel damages while holding the award excessive, is such that a new jury will decide on the issue of damages with the same lack of guidance as the original jury. Apart from the dangers associated with erratic awards occasioned by the lack of guidance given to juries in Irish law, the permission of a figure in *De Rossa* of £300,000 and initially of £250,000 in *O'Brien* brings into sharp focus, policy arguments based on the

[26] For further academic commentary on this decision, see, *inter alia*, M. Kealey, 'ECHR Gives Press Bad News' (2005) 99(6) *L. Soc. Gaz.* 7 and R. Ryan and D. Ryan, 'Assessing Proportionality in Damages for Defamation: *Independent Newspapers v Ireland'* (2005) 23 *I.L.T.* (n.s.) 220.
[27] Above, n.20.
[28] *Ibid.*, p. 17.

need to ensure an element of consistency and rationality between awards in personal injury cases and those in libel cases in light of the Chief Justice's observations that the damages awarded to Mr. O'Brien were comparable to those awarded in the most serious personal injury cases of paraplegic or quadriplegic injuries. As pointed out in Chapter 4, the ECtHR did not subject the Irish award in *De Rossa* to the same scrutiny as had been applied to the English award in *Tolstoy*. The reasoning of the Court in *Independent Newspapers* is open to question given that it justified its position on the basis that Irish juries had previously made relatively similar awards in libel cases. To have accepted consistency in respect of the nature of the restriction on freedom of expression as a valid argument is at odds with the more established jurisprudence of the Court which has approached Article 10 restrictions strictly, particularly in the field of political discussion. The ECtHR did however consider the award in *De Rossa* as remaining '...sufficiently unusual as to require...review of the adequacy and effectiveness of the domestic safeguards against disproportionate awards.'[29]

(ii)Safeguards against Disproportionate Awards at First Instance

[9-20] In *Tolstoy*, the ECtHR endorsed the observations of the English Court of Appeal in *Rantzen v. Mirror Group Newspapers Ltd*[30] (hereafter *Rantzen*) to the effect that in order to conform to Convention requirements, libel awards must be 'necessary in a democratic society' and subject to a more searching scrutiny then had been customary in the past. To this end, it welcomed the changes in practice and procedure introduced in England such that over time a series of the decisions of the Court of Appeal taken under section 8 of the Courts and Legal Services Act, 1990 would establish some standards as to what would be 'proper' awards and that the interim period would see juries being invited to consider the purchasing power of any award which they might be minded to make.[31] The Irish courts have ruled out either of these avenues of reform. While it had endorsed the developments in English law in *Tolstoy*, the ECtHR explained that *Rantzen* mechanisms were not the only means of preventing disproportionate awards. Instead the Court asked whether, having regard to the entire proceedings, the protection against disproportionate awards is sufficient. Despite the absence of express guidance to the respective juries in *De Rossa* and

[29] Above, n. 24, para. [118].
[30] Above, n. 23.
[31] Above, n. 24, para.[50].

Tolstoy on the issue of proportionality in defamation awards, the ECtHR distinguished the jury directions in the cases. It explained that the trial judge's directions in *De Rossa* were more specific than those in *Tolstoy*. In *De Rossa*, the judge provided an example of a relatively minor defamatory comment to allow the jury to assess the relative seriousness of the defamatory article in the proceedings before them and followed up that example by directing the jury that of it was to award damages, they would have to be substantial. With respect to the Court, a single reference to a far less serious defamatory comment is hardly likely to adequately assist a jury in arriving at a proportionate sum nor is a vague direction to the effect that an award needs to be 'substantial.' The lack of scrutiny[32] by the ECtHR can also be criticised on the ground that counsel for *Independent Newspapers* had urged on the Irish Supreme Court more specific guidelines. These included reference to the purchasing power of any award which the jury might be minded to make and to the income which the award would produce, reference to what the trial judge and counsel considered to be the appropriate level of damages and reference by way of comparison by counsel and the trial judge to awards made in respect of personal injuries and to awards made in previous libel cases. The rejection of these suggestions by the Irish Supreme Court has been critcised above and it represented a disappointment that both the suggestions and their rejection were not addressed in any level of detail by the ECtHR.

(iii)Safeguards against Disproportionate Awards on Appeal

[9-21] As discussed in Chapter 4, the ECtHR in *Tolstoy* endorsed the use of the necessity test in the review of jury awards, such that the question is whether the sum was necessary to provide adequate compensation and re-establish reputation. The Irish position established in *Barrett* and endorsed in *De Rossa* and *O'Brien* is to ask whether a reasonable jury applying the law to all the relevant considerations could reasonably have made the award, and whether it was so disproportionately high that it could not stand. This appellate standard of review was discussed in some detail in Chapter 4, essentially on the basis that it did not include any requirement to examine the necessity of any award. The necessity of any restriction on a Convention right is a requirement set by Articles 8-11 of

[32] This conclusion was also reached by M. McGonagle, 'Recent Developments in Defamation Law' (2005-06) 1(1) *Qtly Rev Tort Law* 7, 8.

the Convention and is a well-established requirement in ECtHR jurisprudence.[33] It is therefore surprising that the ECtHR did not insist on its application in this political libel case. Unusually, for the ECtHR, it did not place any emphasis on the fact that the damages were awarded in a political libel case nor did it any raise any criticism for the failure of the Irish Supreme Court to do likewise. To bolster the democratic speech rationale located in recent domestic free speech jurisprudence, it is suggested that regardless of the lack of insistence by the ECtHR, the Irish judiciary should include in any scrutiny of a jury award, whether that award was necessary in a democratic society. This should promote greater application of the values underlying the constitutional guarantees of freedom of expression and good name as examined in Chapters 1 and 2.

EXEMPLARY DAMAGES

Some General Arguments for and Against Exemplary Damages and the Irish Position

[9-22] Judicial support for the operation of a non-compensatory damages regime within Irish law can be traced back to the early years of the twentieth century.[34] While modern decisions likewise support the place of such damages in the civil law,[35] the practice has not lacked for critics.[36] The summary treatment of the issue of exemplary damages in *O'Brien* [37] hides the fact that a very wide discussion is taking place across the academic world on

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[33] P. Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 Hum. Rts. L. J. 57.

[34] In *Worthington v. Tipperary (S.R.) County Council* [1920] 2 I.R. 233, 245 in the course of his judgment, Moloney C.J. highlighted that '...punitive or vindictive damages stand upon an entirely different footing, and are given not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner....'. Similar commentary had been advanced by Sir James Campbell L.C. in the earlier case of *Noblett v. Leitrim County Council* (1919) 53 I.L.T.R. 25, 28 wherein the following passage was cited from Halsbury's Laws of England, Vol. X, 306 '...Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principles of restitution in integrum no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendants wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a willful and an innocent wrongdoer....Such damages may be awarded in an action for tort, as, for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment.'

[35] Amongst others, the following cases are relevant in this respect: *Dillon v. Dunnes Stores Ltd.*, (Unreported, Supreme Court, 20th December 1968), *McDonald v. Galvin*, (Unreported, High Court, 23rd February 1976), *Garvey v. Ireland* [1981] I.L.R.M. 266, *Kearney v. Minister for Justice* [1986] I.R. 116, *Kennedy v. Ireland* [1988] I.L.R.M. 472, *McIntyre v. Lewis* [1991] I I.R. 121, *Conway v. Irish National Teachers Organsiation* [1991] 2 I.R. 305, *Cooper v. O'Connell*, (Unreported, Supreme Court, 5th June 1997), *Crofter Properties Ltd v. Genport Ltd (No.2)* above, n.20 and most recently *Shortt v. Commissioenr of an Garda Síochána* [2007] I.E.S.C. 9.

[36] Their abolition is recommended by K. Boyle and M. McGonagle, *A Report on Press Freedom and Libel* (National Newspapers of Ireland, 1988).

[37] The Supreme Court in a matter of lines stated that as there was no evidence to indicate that the defendants had intended to defame the plaintiff, or knew that the article was untrue, the trial judge had been correct not to allow the issue of exemplary damages to be considered by the jury.

the issue of non-compensatory damages generally and exemplary damages in particular.[38] Indeed, it is vital to consider the merits of the competing arguments for and against the use of exemplary damages in light of the Irish Law Reform Commission's conclusion that it would be open to the legislature to abolish them. While it does not support such a move, it concludes that it would be constitutionally permissible for the Oireachtas to determine that exemplary damages should not be recoverable.[39] Given the absence of specific arguments on exemplary damages in respect of expression and reputation rights in Irish jurisprudence, the following section briefly considers the arguments for and against exemplary damages in non-defamation cases, before moving to consider such damages by reference to the specific constitutional values of expression and good name.

[9-23] One argument commonly advanced against the availability of exemplary damages is that it leads to a lack of proper division between the civil and criminal law. The criminal law is there to punish and deter wrongdoers, where as the civil law has as its primary function the need to compensate a victim for civil wrongs done to him/her and exceeds its ambit if it goes on to punish civil wrongdoers.[40] As against this, it is contended that it cannot simply be assumed that punishment cannot be chased and imposed through the civil law in a manner, which although necessarily different in form and substance from the criminal law, plays an important role in the regulation of civil society.[41] It is however regarded by some as unacceptable that the defendant against whom exemplary damages are awarded is deprived of certain evidential and procedural safeguards available to defendants

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[38] See for example Burrows, A., 'Reforming Exemplary Damages: Expansion or Abolition?' in P. Birks, (ed) *Wrongs and Remedies in the Twenty First Century* (Clarendon Press, 1996), A. Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23(1) *Oxford Journal of Legal Studies*, 87 and Law Commission of England and Wales, *Report on Aggravated, Exemplary and Restitutionary Damages* (LawCom No. 247, 1997).

[39] Law Reform Commission, *Report on the Civil Law of Defamation*, (LRC 38-1991) p. 67. Section 30(2) of the Defamation Bill 2006 makes provision for awarding punitive damages.

[40] See the reasoning of Lord Reid to this effect in *Broome v. Cassell & Co.*, [1972] A.C. 1027; [1972] W.L.R. 645.

[41] When examined both historically and presently, the partition between criminal and civil regulation is more apparent than real. Hodgkin and Vetch cite trespass as an example of the intermingling of the criminal law given that historically trespass was both tortious and criminal with the wrongdoer not only liable to pay compensation but also open to fine or imprisonment. In the modern context, they point to developments in New Zealand, where Crimes Compensation Tribunals have been established providing compensation to victims of criminal attacks, for example the New Zealand Criminal Injuries Compensation Act, 1963: R. W. Hodgkin and E. Vetch, 'Punitive Damages Re-Assessed' (1972) 21 *I.C.L.Q.* 118. The mixing in of a compensatory flavour to criminal proceedings has similarly occurred in Ireland with s. 6 of the Criminal Justice Act, 1993 which makes provision for the payment of compensation by the offender to the victim. Such instances highlight the overlap between the civil and criminal law.
For discussion generally on the role of tort law, see G.H.L. Fridman, 'Punitive Damages in Tort' (1970) 48 *Can Bar. Rev.* 373.

in criminal proceedings.[42] Generally, punishment in respect of civil wrongdoing is aimed at the regulation of individual relationships, while criminal punishment is concerned with the will of the State to condemn wrongdoing.[43] However, if constitutional rights are being infringed upon, there is an argument to be made that civil liability may also include an element of State condemnation.

[9-24] Another recurring criticism of exemplary damages concerns the resultant windfall benefit accruing to the defendant. Exemplary damages are a social policy tool in that they are not given to the plaintiff in compensation for the injury he/she has suffered but rather to indicate the court's disapproval of the wrong and to warn both the defendant and others not to engage in such harmful behaviour in the future. However, their effect in practice is that they result in an increased award to the plaintiff in excess of what is needed to compensate for the wrong committed upon him/her. There are those that argue that this leads to unmerited windfalls to plaintiffs which are neither morally nor socially conducive.[44] The responses most usually given are that firstly, the defendant in theory learns a moral lesson from an adverse finding and the final destination of the award is of no consequence in this attempted objective. Secondly, society has benefitted from the plaintiff's instigation of litigation, which has resulted in a wrongdoer being held accountable. Although it may be assumed in the vast majority of cases that a plaintiff initiates court proceedings on his/her own behalf and not with wider societal considerations in mind, the individual case may nonetheless result in positive community benefits which may not have transpired but for the plaintiff's willingness to run the risk of litigation, or as is more colourfully put '...the

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[42] The rationale in Australian defamation law for the abolition of exemplary damages is that if punitive measures are imposed, then the safeguards afforded under criminal law should be equally available in this type of award. See Western Australia, Parliamentary Debates, Legislative Assembly, 15th September 2005, 5516, (Mr. J. A. McGinty, Attorney General).

[43] See H.M. Hart,' The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems*, 401, 404. G. Pipe, 'Exemplary Damages After Camelford' (1994) 57 *Mod L. Rev.* 91 points to two factors which make criminal liability particularly serious: loss of liberty by the plaintiff and damage to his employment prospects. See also K. Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101 *Yale L.J.* 1795, who makes an argument for the increased use of punitive civil sanctions to reflect a middleground between the civil and criminal law such that procedural rights are connected to the severity of sanctions.

[44] Concerns of resultant windfalls to plaintiffs lead to the introduction in the late 1980's in the United States of 'split-recovery' statutes, which have as their objective distributive allocation of punitive damages awards. Such statutes operate by requiring a plaintiff to share a percentage of a punitive damages award with the general public, either through the allocation of a particular sum to the State or a charity. These statutes have proven problematic both in terms of constitutional challenges and workability, yet remain in many states. See generally M.J. Klaben, 'Split Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses' (1994) 80 *Cornell L. Rev.* 104.

plaintiff had to shake the tree to obtain the fruit of justice; and, in so doing, he risked a large branch landing on his head rather than an apple.'[45]

[9-25] It is submitted that that those who call for the extirpation of punitive damages in civil claims are doing no more than attacking a label; they do not regret the use of compensatory damages as a means of benefitting a plaintiff, but they object to the use of non-compensatory damages. However, a defendant is rebuked for his conduct through the medium of compensatory damages and it is incongruous to suggest that tort law serves a reparative function to the exclusion of an admonitory function.[46] All defamation damages, including compensatory damages have a punitive element. However, as noted by one domestic commentator: '[I]n the case of punitive damages, however, there is a clear and dramatic statement from the tribunal of fact that what has occurred is beyond the norm and beyond tolerance and that this fact needs to be reflected in the level of financial hit that will be taken by the defendant.' [47]

[9-25] Some of the arguments considered in preceding paragraphs on the role of exemplary damages have featured in Irish jurisprudence. Although there existed early acceptance of the availability of exemplary damages in Irish law, their boundaries were unclear for a considerable time. Despite consideration by the Supreme Court of the leading English cases of *Rookes v. Barnard* [48] and *AB v. South West Water Services Ltd.*,[49] the former having restricted exemplary damages to certain categories of cases,[50] the latter limiting them to a tort for which damages were awarded pre *Rookes v. Barnard*, the

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[45] Pipe, *loc. cit.* 43, p. 91.

[46] This led Morris to argue that '[A]s long as the liability with fault rules are retained, the law of torts will have an admonitory function even though the doctrine of punitive damages is abandoned. So punishment in tort actions is not anomalous (if anomalous only means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function.' See C. Morris, 'Punitive Damages in Tort Cases' (1931) *Harv. L. Rev.* 44,1177.

[47] Cox, *op. cit.*, n.1, p.399.

[48] [1964] A.C. 1129.

[49] [1993] Q.B. 507.

[50] Lord Devlin in a speech in which the other Law Lords concurred restricted exemplary damages to three categories of cases; (i) where there has been 'oppressive, arbitrary or unconstitutional action by the servants of the government' (ii) where the 'defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff' (iii) where exemplary damages are expressly authorised by statute.
He continued by setting out three considerations to be applied in the assessment of exemplary damages. These are; (i) the requirement that the plaintiff be a victim of punishable behaviour (ii) that the power to award exemplary damages be used with restraint (iii) that the means of the defendant play a material role in the assessment of exemplary damages since '[e]verything which aggravates or mitigates the defendant's conduct is relevant.' Above, n. 40, 1226-1228.

circumstances of their application remained unresolved[51] until the Supreme Court decision in *Conway v. Irish National Teachers Organisation.*[52] Finlay C.J., while rejecting the categorical approach of *Rookes v. Barnard*[53] supported the use of exemplary damages in respect of damages for tort or for breach of a constitutional right.[54] However, he cautioned against their automatic operation, for although there are many torts such as assault and *defamation*, which constitute a breach of constitutional rights, nonetheless, these same torts, depending on the surrounding facts or circumstances, might not give rise to an award of exemplary damages.[55] The possible impact that exemplary damages may play was further diluted by Finlay C.J.'s observation that as a general principle they should not be awarded if in the opinion of the court the amount payable by the wrongdoer in the form of compensatory damages constitutes sufficient public disapproval of and punishment for the wrongdoing. In so doing, it appears that the Court was merely giving effect to the principle that any amount of damages should be proportionate to the defendant's wrongdoing. More recently and in the defamation context, the categorical English approach was rejected by

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[51] Despite extensive consideration by the Supreme Court of the *Rookes v. Barnard* limitations in *McIntyre v. Lewis* [1991] 1 I.R. 121, a judicial division emerged, leaving the application of the doctrine in Irish law unresolved. See White, 'Punitive Damages in Irish Tort Law' (1987) 5 *I.L.T.* (n.s.) 60.

[52] Above, n. 35.
The case involved an action for conspiracy to interfere with the constitutional right to primary school education taken by a group of children whose education had been disrupted by an industrial dispute.

[53] Griffin J. confined his rejection to the first of Lord Devlin's categories considering it unnecessary to the case before him to examine the remaining categories yet adopted an approach which does not appear to limit awards of exemplary damages to Lord Devlin's remaining categories or breaches of constitutional rights. His analysis has been academically criticised for failing to distinguish between torts and constitutional rights: R. Byrne and W. Binchy, *Annual Review of Irish Law*, (Round Hall Press, 1991), p. 451. McCarthy J. adopted a wider condemnation of the 'categories' test and refused to accept that the categories for the award of exemplary damages are as limited as set out in that case.

[54] Although the defendants were not considered agents of the executive or of the government, and therefore did not pass Lord Devlin's *'categorisation'* test, this was irrespective to Finlay C.J.'s approach that in order to fully vindicate and protect constitutional rights in the event of their breach, a civil court must use effective tools to this end such as the awarding of punitive damages. Exemplary damages were but one of a number of heads of damages potentially relevant to the plaintiff under Irish law, the outstanding categories being those of compensatory and aggravated damages.
The right to recover damages for breach of a constitutional right was first established in *Meskell v. CIE* [1973] I.R. 132 and re-iterated in *Kennedy v. Ireland* [1987] I.R. 587. It was later held in *Educational Company of Ireland v. Fitzpatrick (No.2)* [1961] I.R. 345 that this right was not restricted to actions against the State, but was also available in actions between two individuals.

[55] The Chief Justice believed that exemplary damages should be awarded for four reasons, above, n.35, p. 321:
the right which was breached on this occasion was one expressly vested in a *child* by the Constitution;
the right which was breached was one which, having regard to the education and training of a child was of supreme and fundamental importance;
it must be presumed that the defendants were aware of that importance;
the breach of the constitutional right involved was an intended as distinct from inadvertent consequence of the defendant's conduct.

Denham J. in *Crofter Properties Ltd v. Genport Ltd. (No.2).*[56] who approved of the award of punitive damages in circumstances of malicious publication. Finally, the case of *Shortt v. Commissioner of an Garda Síochána*[57] which concerned calculated wrongdoing on the part of servants of the State,[58] contained some detailed judgments on exemplary damages. The Supreme Court rejected the application of the *Rookes v. Barnard*[59] categories. Both Murray C.J. and Hardiman J. rejected the argument that exemplary damages should be restrained by the level of compensatory damages awarded. Murray J. in particular recongised the windfall element of exemplary damages but did not accept that the Court was limited by any 'so-called risk' of double compensation. However, this was a case of deliberate State misconduct and Hardiman J. did go on to provide that the means of the parties must be considered where the wrong was committed by a private entity.

Exemplary Damages and the Balancing of the Constitutional Rights of Expression and Reputation

[9-26] Domestic defamation jurisprudence on exemplary damages has tended to borrow from the general tort law principles discussed in the preceding section, with little attention directed to the values underlying rights of speech and reputation. This section considers the role of exemplary damages from a constitutional perspective in respect of the more specific balancing of speech and reputation and whether this approach impacts on the retention or otherwise of exemplary damages.[60] In terms of a constitutional framework, we return to Professor Binchy's ineffectiveness test (see Chapter 1), so that the question is whether the operation of exemplary damages fails in a fundamental way to protect the defendant's constitutional rights. The Supreme Court in *O'Brien* addressed the question of exemplary damages in defamation law in the following manner: '[I]n the case of such a calculated

[56] Above, n.20. In this respect, the judge endorsed the conclusion of Keane C.J. in O'Brien, above, n, 6, pp. 22-23 to similar effect.
[57] [2007] I.E.S.C. 9
[58] The claim for compensation was made under section 9 of the Criminal Procedure Act 1993 which deals with 'compensation for miscarriage of justice.' Although not a defamation case, there was a reputational element involved in terms of exposure from the allegations made by the State.
[59] Above, n.48.
[60] For some empirical research on punitive damages, see D. Hale, 'The Impact of State Prohibitions of Punitive Damages on Libel Litigation: An Empirical Analysis' (2002-2003) 5 *Vanderbilt Journal of Ent. Law and Practice* 96. The Article explores the role of punitive damages in media libel cases by measuring the quantity and quality of libel appeals for a ten year period between 1986-1995 in states with and without punitive damages. At p. 105, Hale concludes that '[T]he legal climate only proved more protective for the media in states without punitive damages in relation to damages awarded by trial courts. Trial courts awarded average damages in an amount ten times greater in punitive damages states than in non-punitive damages states.'

breach of the constitutional right of the plaintiff to his good name, it might well be that, in the light of *Conway v. National Teachers Organisation*, a plaintiff would be entitled to exemplary damages. In the present case, there is nothing to indicate that the defendants published the offending article intending to defame the plaintiff and in the knowledge that it was untrue.'[61] Having indicated that exemplary damages are potentially available in a defamation action involving a calculated breach of the right to good name, the Supreme Court failed to address how any such award might impact on the competing constitutional right of freedom of expression.

[9-27] The starting point in any analysis of exemplary damages in defamation litigation are the values underlying the relevant constitutional guarantees. The acknowledgment of the democratic values underlying Article 40.6.1°(i) in recent case law has not to date been applied in the context of damages awards in terms of the chilling effect they can produce on the exercise of the right. While the lack of engagement with the constitutional free speech guarantee itself partly explains this position, equally the values assigned to the Article 40.3.2° guarantee of good name has contributed to this. Returning to Post's three-part classification of reputation (see Chapter 2), exemplary damages are most closely linked to the dignity concept of reputation '...as a method by which society polices breaches of its rules of deference and demeanor....'.[62] They therefore serve to fulfil a role beyond the constitutional requirements of Article 40.3.2° which provides for *vindication* of good name in the case of *injustice* done. It was argued in Chapter 2 that the absence of any convincing judicial scrutiny of the constitutional values which underpin the constitutional guarantee of good name resulted in the protection of the right on the basis of constitutionally misplaced values. The operation of exemplary damages is a specific application of this more general principle.

[9-28] In addition to the argument that exemplary damages are not prescribed by the terms of Article 40.3.2°, they must be discussed in the overall context of damages awards in defamation law. Even if the dignity concept of reputation can be argued to support the use of exemplary damages, it is necessary to consider whether the other types of damages that can be awarded sufficiently protect this reputational value. Despite not being recognised by

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[61] Above, n.35, p. 22.
[62] R.C.Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *Cal. L. Rev.* 691,710.

the Supreme Court as such, compensatory damages of £300,000 and £250,000 in *De Rossa* and *O'Brien* respectively, to a politician and well-known businessman carried a punitive element and arguably were a disguised form of exemplary damages by the jury. [63] It is difficult to imagine what further role exemplary damages have to play in terms of the deterrence argument.[64]

[9-29] Linked to the dangers of not restraining the award of exemplary damages by reference to the level of compensatory damages, are the risks of unprincipled jury damages awards continuing in this jurisdiction with the rejection of the use of guidelines in *De Rossa* and *O'Brien* and the lack of introduction of precise statutory guidelines in sections 29(1) and (2) of the Defamation Bill 2006. However, in light of the fact that the Irish judiciary has not engaged with these arguments and further, that the Defamation Bill 2006 proposes the retention of damages, the following section is directed to the manner of their regulation so as to reduce their chilling effect on public interest speech so far as is possible.

Regulation of Exemplary Damages

[9-30] To ensure the balancing of the competing rights of speech and reputation, it is vital that the awarding of exemplary damages is strictly controlled in a manner '...necessary to meet the public purpose' of such damages.[65] To allow otherwise would result in disproportionate punishment for a defendant, an excessive windfall to a plaintiff and demise in the faith of the justice system. It is important to make clear that the reforms suggested below operate on the premise that the jury is retained for awards of all types of defamation damages. A number of arguments were advanced in Chapter 3 as to the importance of the jury as the tribunal of fact, essentially in order to retain the community

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[63] These sums also point to the heightened value on the dignity concept of reputation. See para. [9.27].

[64] As opined by Gatley, *op. cit.*, n.7, para. [9.2], '[T]hus, although deterrence may not be a formal *purpose* of general damages for defamation, yet where such damages are substantial (as they are in England) deterrence is an *effect* of them.' (footnote omitted). Similarly, in respect of aggravated damages, Gatley, at para. [9.14] provides that '[H]owever, from the point of view of the defendant, it appears that his liability is increased because of his improper conduct and the fact that there is therefore an inbuilt punitive element in aggravated damages means that this has to be taken into account if there is a claim for exemplary damages, which are overtly punitive in their purpose.' (footnote omitted).

[65] *John v. MGN Ltd* [1997] Q.B. 586, 619, [1996] 2 All E.R. 35, 58. Similarly, the Irish Law Reform Commission in its *Report on the Civil Law of Defamation*, (LRC 38-1991) p. 66, had suggested that if the power to award exemplary damages were to be retained, it should be made subject to certain guidelines but also added that exemplary damages can only be awarded where '[T]he conduct of the defendant has been high handed, insolent or vindictive or has exhibited a disregard for the plaintiff's rights so gross as clearly to warrant punishment over and above that which has been inflicted upon him by an award of compensatory damages.

element within the tort of defamation. It is submitted that the removal of the jury in awards of defamation damages would undermine its role as the tribunal of fact. However, it is suggested that the jury receive proper instructions from the trial judge as to the role of exemplary damages with particular emphasis on the doctrine of proportionality.

[9-31] The principles of assessment operated for many years by the Irish courts[66] have their basis in Lord Devlin's judgment in *Rookes v. Barnard*,[67] wherein the learned judge laid down three considerations for this purpose. Prior to setting out these factors, it is important to note that in the recent case of *Crofter Properties Ltd v. Genport Ltd (No.2)*,[68] Denham J. set out some relevant factors in the assessment of an award of exemplary damages which included: (i) that the totality of the award of damages should be proportionate to the circumstances (ii) the fact that the defendant is a corporation, not a human person (iii) the nature and extent of the publication (iv) the absence of express evidence of actual loss suffered by the defendant and (v) the conduct of the defendant. It is respectfully submitted that the *Rookes v. Barnard* factors are more tailored to exemplary damages and should be retained.

(i) the plaintiff must be a victim of punishable behaviour
(ii) restraint must be exercised in the assessment of damages
(iii) the means of the parties must be taken into consideration.

(i) The Plaintiff must be a Victim of Punishable Behaviour

[9-41] In *Rookes v. Barnard*, Lord Devlin made it a pre-condition to recovering exemplary damages that the plaintiff must have been the victim of punishable behaviour. However, not every victim of oppressive conduct is entitled to recover exemplary damages. Plaintiffs who are entitled to plead exemplary damages are those whom the courts recognise as having a cause of action for such. The courts presently accept that exemplary damages may be awarded for breach of constitutional rights and where tortious wrongs have been

[66] These were first accepted in *McIntyre v. Lewis*, above, n.51 and later endorsed in *Conway v. INTO*, above, n. 35.
[67] Above, n. 48.
[68] Above, n 20.

committed.[69] Even within the relevant causes of action, the behaviour must be 'punishable'. The Commission recommended the following definition to be enshrined in legislative form as the appropriate threshold for a finding of exemplary damages: '...where it has been established that the conduct of the defendant in the commission of a tort or breach of a constitutional right has been high-handed, insolent, vindictive or exhibiting a gross disregard for the rights of the plaintiff.'[70] Such a definition accords with authority in various common law jurisdictions.[71]

(ii) Restraint must be Exercised in the Assessment of Damages

[9-42] Directing a jury in a vacuum to be disciplined when awarding damages is not sufficient to prevent excessive awards of exemplary damages. Practical means of guiding a jury are required. These could include the following; the enactment of a legislative definition of the circumstances under which punishment in the form of exemplary damages may be attached to particular behaviour, a requirement that exemplary damages should only be awarded where compensatory damages have not sufficiently served as a punishment and deterrent for the wrongdoer thereby taking account of the difference between the injury suffered by the plaintiff and the damages and finally that account is taken of the gravity of the wrongdoing.

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69 The Irish Law Reform Commission favours the retention of both exemplary and aggravated damages for breach of constitutional rights or for any torts. It considered that the singling out of some torts as justifying the possibility of exemplary damages would be discriminatory. Similarly, restricting exemplary damages to constitutional cases could result in adverse developments of the law by encouraging greater dependence on the law of torts resulting in a 'constitutionalisation' of the law of torts: *Report on Aggravated, Exemplary and Restitutionary Damages*, (LRC 60-2000) at paras [1.51 –1.68]. The possibility of non-compensatory damages for breach of contract was not ruled out by the Commission but it did not favour legislative provisions in this regard, preferring instead to allow the judiciary to develop the law on a case by case basis, reflecting their concern of the private law nature of contractual rights and obligations.

70 *Ibid.*

The *Report of the Legal Advisory Group on Defamation*, 2003 provides that exemplary or punitive damages may be awarded in proceedings for defamation for the following cases only:

where the defendant intended to publish defamatory matter to a person other than the plaintiff, knowing that the matter would be understood by that other person to refer to the plaintiff, and

where the defendant knew of the falsity of the matter or was recklessly indifferent as to its falsity.

71 The Australian cases speak of '...wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights' and '...contumelious behaviour which falls short of being malicious...'. : *Uren v. John Fairfax & Sons Pty Ltd.* (1996) 117 CLR, 118, 138 and *Lamb v. Cotogno* (1987) 164 CLR, 1, 13 respectively. Canadian dicta indicates the need '...to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible and malicious nature.': *Vorvis v. Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193, 224, recently re-approved in *Whiten Pilot Insurance Co.* (2002) S.C.C.D.J. 8452.

[9-43] Whether a particular sum of exemplary damages is proportionate to a defendant's action and to the compensatory damages awarded is a method employed by the Irish courts to test whether restraint has been exercised in a jury's assessment.[72] On account of the differing social functions between awards of compensatory and exemplary damages, the Irish Law Reform Commission cautioned against a rule requiring that exemplary damages should be in proportion to compensation awarded in the same case.[73] A more favourable alternative of ensuring some form of relationship between the awards is to require that exemplary damages cannot be awarded in cases where the compensatory damages have a sufficiently punitive and deterrent effect.[74] There is no definitive method of guaranteeing that a jury will offer a proportionate sum but the above factors can operate as guideposts in taking the jury in a direction that provides the greatest possibility that an award will be sufficiently moderate to achieve its aim of ensuring justice to each of the parties, thereby ensuring that each type of award can potentially fulfill the function it was designed for.

(iii) The Means of the Parties must be taken into Consideration[75]

[9-44] Ensuring effective deterrence entails tailoring an exemplary damages award to the wealth of a particular defendant. To do otherwise could result in an award which is slight in comparison to the means of a defendant, with the result that such a party may not be deterred from re-committing the wrong at a later date[76] or an amount so severe that it is

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[72] Thus, in *McIntyre v. Lewis* above, n. 51, p. 141, O'Flaherty J. concluded that an award of exemplary damages twelve times the figure of compensatory damages was not sufficiently proportionate to compensate the plaintiff. He commented as follows: 'If the compensatory amount awarded includes aggravated damages then I believe if any award is made by way of exemplary damages it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages).'

[73] To support this approach, the Commission gives by way of example a situation where a defendant has engaged in extremely malicious behaviour, which resulted in relatively minor injury to the plaintiff. Despite little harm having been caused, the defendant's behaviour may justify a large exemplary award.
This approach is in line with the Canadian position, which allows for the awarding of exemplary damages where a plaintiff has suffered no loss but has been the victim of punishable behaviour. See: S.M. Waddams, *The Law of Damages,* (Canada Law Books, 1997), para. [11.360].

[74] The above requirement has it basis in Lord Devlin's 'if, but only if' test in *Rookes v. Barnard* which limits a jury to awarding exemplary damages '...if, but only if, the sum which they have in mind to award as compensation...is inadequate to punish the defendant for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it...'

[75] Although Lord Devlin spoke of the 'means of the parties' it can only rarely arise that the wealth of a plaintiff is a relevant factor. An example cited by the English Law Reform Commission is where the means of a plaintiff affected the culpability of the defendant's behaviour.

[76] Thus, in the Australian case of *XL Petroleum (N.S.W) Pty Ltd. v. Caltex Oil (Australia) Pty. Ltd.* 155 (1985) CLR 448, 472, Brennan J. commented as follows: 'Where exemplary damages may properly be awarded to deter a tortfeasor, evidence of his means is material not only to show that he can afford to satisfy a substantial judgment or to show that he has acted on contumelious disregard of the plaintiff's rights by

oppressively harsh and goes further than what is required to satisfy the deterrent element of the award. However, at a fundamental level the danger is that a jury, in assessing liability and wealth simultaneously, may punish the defendant through the wrong medium: rather than impose punishment through the imposition of exemplary damages, it may allow evidence of a particularly wealthy defendant interfere with the question of liability. There are also practical considerations weighing heavily against the introduction of evidence of a defendant's wealth such that these investigations may raise complex issues, lengthen the trial and potentially render it open to abuse. In answer to the first concern, the danger could be combatted by a trial judge deferring discovery into wealth until liability has been established.[77] A trial judge who exercises his discretion properly at both the discovery stage and later at trial can ensure that undue discovery will not hamper the legal process.[78]

[9-45] As pointed out above, section 30(2) of the Defamation Bill 2006 makes provision for an award of exemplary damages in circumstances where it is proved that the defendant intended to publish the defamatory statement concerned to a person other than the plaintiff, knew that the defamatory statement would be understood by the said person to refer to the plaintiff and knew that the statement was untrue or in publishing it was reckless as to whether it was true or untrue.[79] However, as commented upon by a leading author on defamation law:[80]

> '[W]ithin this statutory formula there appears to be no room for a jury to be instructed in the exercise of its discretion in this regard, and certainly no room for the relatively tight rules that had been created by the common law as a means of binding the discretion of the jury in this context. Indeed, the express and unfettered nature of this discretion is particularly stark when set beside the very detailed list of factors to which a jury is required to have regard under section 29(4) of the [Bill] in addressing compensatory damages.' [81]

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taking advantage of his wealth, but to show what sum will be a sufficient deterrent against repetition of the conduct that attracts the award.'

[77] This is the approach favoured by the Ontario Law Reform Commission, *Report on Exemplary Damages*, 1991, pp. 51-52.

[78] The Irish Law Reform Commission in detail outside the scope of this Article set out further measures to control exemplary damages awards: *Consultation Paper on Aggravated, Exemplary and Restitutionnary Damages*, 1998, pp. 113-123.

[79] See Denham J. in *Crofter Properties Ltd v. Genport Ltd (No.2)*, above, n. 20 .

[80] N. Cox, *op. cit.*, n. 1.

[81] *Ibid.*, p. 408.

[9-46] In assessing damages juries are often encouraged to take account of numerous factors such as the nature of the libel, the standing of the plaintiff, the conduct of the defendant and other matters that vary according to the circumstances of a case.[82] This method of jury guidance, unlike the proposals thus far delineated is not concerned with consistency between cases but rather focuses upon the particular set of facts before the jury. It is submitted that a list of guiding factors should be set on a legislative footing.[83]

While the following list may not be exhaustive, it covers the principal factors to assist the jury in their task: [84]

(i) the nature of the publication i.e. the gravity and the seriousness of it;

(ii) the public interest value of the publication;

(iii) the extent and/or influence and manner of the publication; [85]

(iv) the effect of the publication;

(v) the absence of any apology, retraction, withdrawal or right of reply;

(vi) the conduct of the defendant at all stages; [86]

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[82] Many of these factors derive from *Barrett v. Independent Newspapers*, above, n.4.

[83] The need for a basic provision setting out factors to which regard should be had when making an award of damages has similarly been discussed and supported by the Legal Advisory Group on Defamation, in its Report, para. [18]. Section 29(4) of the Defamation Bill 2006 proposes a list of list of factors. This list does not include any reference to the public interest value of the material.

[84] Some of these factors are similar to the list set out in section 29(4) of the Defamation Bill 2006.

[85] This includes the circulation of the publication and the prominence of the derogatory remark(s) within a publication i.e. were they a front page headline or buried in the body of the publication? Circulation was accepted in *O'Brien v. Mirror Group Newspapers*, above, n.6, as a factor which may be relevant in the assessment of damages in a libel trial but in this respect it was pointed out that a publication may have a wider circulation than merely the sales or readership figures suggested by the defendant newspaper. However, it may also happen that although circulation of the publication is limited, the impact on the plaintiff's reputation due to a particular group of readers is very serious such as occurred in *Gordon v. Mudd* [1992] CA Transcript 1076. Despite the fact that there were only 91 recipients of a defamatory spoof press release, this group was made up of local Conservative councillors and members of a local Conservative association and therefore the influence of the publication gave rise to an award of £50 000. In *Crofter Properties Ltd v. Genport Ltd (No.2)*, above, n. 20, it was argued on appeal that as publication was only to a very limited class of persons, that an award of general damages should be reduced accordingly. Denham J. held: '[I] am satisfied that the fact that the publication was to this limited number of people is not a ground to reduce the award of general damages given the influential people to whom it was published and the fact that the publication was made with a view to damaging the defendant.'

[86] This might include continued attacks on the plaintiff's reputation in the press during the trial or delay caused by the defendant between the commencement of the action and the court's decision. A defendant may not have taken proper steps to verify the information contained in the publication. A plaintiff may also have been aware both before and after publication that a publisher was motivated to make the defamatory imputation(s) by spite or ill will. (Previous defamatory statements of the plaintiff made by the defendant may be illuminating in this regard). Such behavior may result in an award of aggravated damages – see section

(vii) the general reputation of the plaintiff. [87]

[9-47] Although a plaintiff's reputation may have been injured by a publication, it is equally important to examine the size of a damages award from the viewpoint of the defendant. Statutory guidance should also be provided to juries to guide them in the important factors playing a role in the mitigation of damages.[88] The principle that a defendant should be permitted to adduce evidence at trial tending to show that a plaintiff contributed to the damage caused to his reputation by a publication or that he did not act as maliciously as first appeared is by no means a recent innovation. As far back as the nineteenth century this procedure was adhered to, as is evident from Barry L.J's judgment in *Harris v. Arnott* [89] wherein the following pertinent comments were made:

> 'It is quite settled that, whilst, of course, the plaintiff is entitled to reasonable compensation for the injury he has sustained, the defendant...may show in mitigation of damages that the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, or that the defendant acted in good faith, and with honesty of purpose, and not maliciously.'

[9-48] The following is a non-exhaustive list of factors to guide a jury to this end:

(i) the extent to which the publication and subsequent damage was provoked by the plaintiff's own conduct; [90]

(ii) the general conduct of the plaintiff following the defamatory publication ; [91]

(iii) proof that an apology [92], correction order, retraction or right of reply [93] had been offered; [94]

30(1)(b) of the Defamation Bill 2006. It is worth noting that the *Report of Legal Advisory Group on Defamation*, (March 2003) at para. [43] recommending a statutory provision clarifying the circumstances in which aggravated damages may be awarded but this is absent from the Bill.

[87] This is important for a plaintiff in a number of respects. In order to award damages proportionate to injury caused by a defamatory publication, it is necessary that a jury appreciate the plaintiff's reputation in a community. Such evidence also allows a defendant to restore any further damage, which may have been caused to his reputation, by the defendant and/or other parties during the course of the trial. More often than not, juries award higher damages to well-known public personalities than to ordinary members of the public.

[88] Section 29(6) of the Defamation Bill 2006 attempts to do this.

[89] *Harris v. Arnott* (1889) 26 LR Ir 55,76.

[90] An example of this might be a previous unjustified attack by the plaintiff on the defendant.

[91] The plaintiff may have refuted the allegations publicly or have been cleared of such after a much publicised enquiry. A plaintiff may also have caused delay between publication of the defamatory matter and the decision of the court. Delay may affect the adequacy of alternative remedies such as correction orders, which require speed in their operation and may imply that he/she did not regard the defamatory imputation(s) as very serious.

(iv) proof of the plaintiff's bad reputation; [95]

(v) proof that the plaintiff had previously recovered damages or brought a libel action;[96]

(vi) truth of the defamatory matter. [97]

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[92] The importance to be attached to the refusal to accept an apology will vary depending on the terms and circumstances upon which it was offered. For example, if the original defamatory remark was prominently displayed on the front page it is easy to understand why a plaintiff would consider an apology quietly displayed on an inside page unacceptable in terms of restoring his/her reputation. The later an apology is given, the less effective it will be as a mitigating factor. It would also have to be assessed whether the apology retracted all of the defamatory imputation(s).
In *McNamee v. Mirror Group Newspapers*, The Irish Times, 30th November 1989, an apology had been published but the judge considered it unsatisfactory and damages were awarded. If an apology is not considered fulsome it may aggravate damages on account of increased injury caused to the plaintiff's reputation, see: *McSharry v. Waterford Post*, The Irish Times, 1st May, 1985. However, in *Foley v. Irish Times*, The Irish Times, 13th November 1991, allowance was made for the publication of a sincere apology resulting in damages of £5000.

[93] McDonald, *Irish Law of Defamation* (Round Hall, 1989) makes the point that the refusal to accept a right of reply should in certain circumstances only reduce damages slightly given that sometimes a newspaper may have attached conditions to this offer and further the reply does not wholly vindicate a plaintiff's reputation as a right of reply does not constitute a retraction on the part of the defamer.

[94] Section 29(4)(d) of the Defamation Bill 2006 provides that in making an award of damages, the Court shall have regard to the offering or making of any apology, correction order or retraction by the defendant to the plaintiff in respect of the defamatory statement.

[95] This factor is important given that according to the rule in *Scott v. Sampson* [1882] 8 Q.B.D. 481 '...the damage...which he has sustained must depend almost entirely on the estimation in which he was previously held.' However, the rule in this English case is quite restrictive in that it provides that only evidence of bad reputation could be admitted to the exclusion of particular acts of misconduct. See also *Plato Films Ltd. v. Speidel* [1961] 1 All E.R. 876; [1961] A.C. 1090; [1961] 2 W.L.R. 470 and more recently, *Turner v. News Group Newspapers Ltd* [2006] 4 All E.R. 613. This rule has been criticised both domestically and abroad, the former by the Irish Law Reform Commission and McDonald *op. cit.*, 92, at pp.248-249 and the latter by the Porter Committee (*Report of the Committee on the Law of Defamation*, Cmd 7536, HMSO, 1948, 146-156), the Faulks Committee (*Report of the Committee on Defamation*, Cmnd 5909, HMSO, 1975) and the Australian Law Reform Commission (*ALRC Report No. 11- Unfair Publication*, AGPS, 1979, 265). The Irish Law Reform Commission rightly recommends allowing a defendant to introduce in mitigation of damages any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation was concerned. This suggestion was noted by Keane C.J. in *Browne v. Tribune Newspapers*, above, n.10.Section 29(4)(h) of the Defamation Bill 2006 provides that in making an award of general damages, the court shall have regard to evidence given concerning the reputation of the plaintiff. Section 29(6)(a) of the Defamation Bill provides that the defendant may for the purposes of mitigating damages, give evidence of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement. Finally, see s.42 of the Bill as to the position of evidence of acquittal or conviction.

[96] This factor is statutorily provided for by section 26 of the Defamation Act, 1961 which provides as follows: 'In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication.'
See *Browne v. Tribune Newspapers,* above, n.10.

[97] If a full defence of truth or justification cannot be established, the portion of the material that is truthful should remain relevant in the assessment of damages.

CONCLUSION

[9-49] The current inadequacies in jury direction in defamation proceedings have rightly been critisised for their deleterious impact on all parties involved in the proceedings, not least the jury itself. It is submitted that the libel jury has a significant contribution to make in libel proceedings and therefore there is a pressing need to concentrate on the means by which we can improve the effectiveness of this institution. Nonetheless, in the event that reforms for jury guidance are implemented, it remains necessary to realise that juries may on occasion still award what is considered an excessive sum in damages and to this end we also need to look towards setting an appellate review standard to remedy such a result in a manner which conforms to the requirements of the Constitution and the ECHR. Failure to do so results in constitutional imbalancing of speech and reputation rights. There has been persuasive legislative and judicial reform in the United Kingdom and Australia, alongside internal judicial dissent by Denham J., which when combined, have to date failed to impact upon the present Irish position. What is even more startling about the Irish position is that there have been recent cries for help from the jury itself, which have largely gone unnoticed. [98] Finally, the role of exemplary damages needs to be addressed by the judiciary in the specific constitutional context of the balancing of rights of expression and reputation rather than applying general tort law arguments.

[98] In *Hill v. Cork Examiner Publications Ltd*, (Unreported, Supreme Court, 14th November 2001) during the course of its deliberations the jury sent a note to the trial judge requesting assistance on the issue of damages. Bound by precedence, Barr J. was helpless to assist the jury.

CONCLUSION

As is noted throughout this thesis, despite calls for the reform of Irish defamation law over many years, it is only recently that significant developments have occurred, which include the proposed Defamation Bill 2006 and judicial endorsement of a public interest defence in a defamation action. As has also been noted, such developments in defamation law appear to reflect a changing democratic and political culture in Ireland in which the self-governance rationale is becoming stronger. This leads to the question of whether '...we should be asking if the demands of...democratic government require us to think more systemically about the constitutional status of legal regulation of political discourse.'[1]

The recent commitment in some domestic jurisprudence to the democratic discourse theory of free speech has necessitated a shift as far as defamation law is concerned in the manner in which the balance between the competing constitutional rights to freedom of expression and good name is drawn. However, to date, the Irish judiciary has failed to fully engage with the values which underpin each of these rights. This thesis represents an engagement in such a value based constitutional exercise by its examination of elements of domestic defamation law within a constitutional framework. Whether or not reform of defamation law occurs through legislation, the ultimate responsibility of balancing speech and reputation rights will rest with the judiciary. It is imperative that such judgments are arrived at on the basis of constitutional rights' values. Comparative constitutional perspectives have been offered in the thesis, through examination of the balancing of speech and reputation rights conducted in other jurisdictions. Experience elsewhere demonstrates the potential that constitutional guarantees offer.

Ultimately, the domestic and comparative constitutional exercises carried out in the thesis lead to the findings in Chapters 8 and 9 that some elements of Irish defamation law do not apply appropriate values, or fail to reconcile the values in an appropriate manner. The final exercise was to establish the correct method of constitutional balancing in respect of the two areas of the thesis which have traditionally represented the greatest imbalance between

[1] Loveland, I, *'Privacy and Political Speech: An Agenda for the 'Constitutionalisation' of the Law of Libel'* in Birks, P (ed), Privacy and Loyalty in the Law of Obligations, (Clarendon Press, 1997), pp. 51-92, 92, (footnote omitted).

the rights; the absence of a public interest defence and an unregulated system for the award of damages.

As regards the public interest defence, the method of balancing adopted was based on speech content in preference to protection for speech based on the status of the plaintiff. This approach appeared to reconcile and protect each of the rights in a more convincing manner than the alternative. This determination then necessitated discussion of the meaning of public interest speech. The generic privilege approach to political speech was rejected in favour of a broader public interest based test. The contours of the meaning of public interest speech were then discussed in the context of the values of the competing rights. Acceptance of the democratic theory of free speech impacts on the level of protection for reputation, so that restrictions on the latter have to be examined by reference to a democratically based public interest test. This created a distinction in Chapter 8 between speech on matters of public interest and matters which merely interest the public. The self-governance rationale of free speech must also affect the standard of liability which attaches to the public interest defence. To protect the quality of democratic debate, the thesis supported a negligence standard in preference to that of actual malice. This supports a wider point such that reputation is both a private and public interest and it is very important that in so far as possible, citizens receive accurate and reliable information to enable them to exercise their rights as citizens.

The costs of an unregulated system of damages awards to the protection of expression and reputation rights were explored in Chapter 3. The argument in the Introduction to Part III and Chapter 9 centred on the fact that these costs would continue in the absence of recognition of the chilling effects such a system produced. The reform suggestions in Chapter 9 were an attempt to apply the values of the rights in a manner which achieves a better balance. To this end, jury guidelines were proposed alongside reform of the appellate review standard for such awards. The final area of damages addressed concerned exemplary damages. Using a value based-approach their abolition was suggested. However, given the reality that this appears unlikely to materialise, the chapter called for stricter regulation in their application. The absence of discussion in the domestic case law of the role of exemplary damages in free speech regulation points a democratic free speech theory which has yet to be fully explored.

Certainly, some elements of re-balancing of speech and reputation rights in domestic defamation law have occurred recently. This thesis proposes that this re-balancing exercise continue within a constitutional framework which addresses the underlying values of both sets of rights and which leads inevitably to the practical reforms which have been suggested.

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