subsequent action unless the court certifies that there was reasonable ground for bringing it.[3] As between each other the defendants are entitled to have the total amount of damages apportioned between them by the court, whether or not they have actually been made defendants to the action and regardless of any agreements to indemnify made with third parties.[4]

1 Judgment recovered against one of several jointly liable defendants does not bar an action against others, but where more than one action is brought in respect of the same damage the claimant cannot, unless the court decides it was reasonable to bring the action, recover the costs of the later action (Civil Liability (Contribution) Act 1978, ss 3 and 4).
2 Civil Liability (Contribution) Act 1978, s 3.
3 Civil Liability (Contribution) Act 1978, s 4.
4 Civil Liability (Contribution) Act 1978, s 1, and see *Daily Mirror Newspapers Ltd v Exclusive News Agency* (1937) 81 Sol Jo 924.

8.3 The rules as to who can sue and be sued in the law of tort generally[1] apply to the law of defamation. However, certain categories of case give rise to particular issues in the law of defamation and these are discussed below.

1 See K Oliphant (ed) *The Law of Tort* (2nd edn, 2007) LexisNexis Butterworths, chs 2 and 3.

B. BANKRUPTS AND INSOLVENT COMPANIES

Right to sue

8.4 The general rule of English law is that the assets of a bankrupt, which are defined to include 'things in action',[1] vest in his trustee in bankruptcy on the commencement of the bankruptcy.[2] The effect of this is that the bankrupt ceases to have an interest in either his assets or his liabilities except in so far as there may be a surplus to be returned to him upon his discharge.[3] However, there are certain causes of action personal to the bankrupt which do not vest in his trustee and these were said by Hoffmann LJ in *Heath v Tang*[4] to 'include cases in which— "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property."'[5] In his Lordship's opinion, an action for defamation was an obvious example of such a cause of action. On this basis it has been held that a bankrupt's right of action in respect of defamation which accrued before the commencement of the bankruptcy does not pass to his trustee in bankruptcy.[6] So too, a bankrupt can sue in respect of a defamatory imputation published during his bankruptcy.[7] Moreover, whether the claim arose before or during the bankruptcy the trustee cannot claim any damages which the bankrupt recovers in such an action,[8] nor can his trustees bring an action in the name of the bankrupt even if the defamation was the cause of the bankruptcy.[9] Any damages recovered by the bankrupt claimant can therefore be used by him to pay for his living expenses or in the maintenance of his family.[10] If, however, the bankrupt had invested the damages recovered in property, that property can be claimed by the trustee.[11] A libel claim, therefore, offers the bankrupt an opportunity of collecting a sum of money upon which his creditors will not be able to lay their hands.

1 Insolvency Act, s 436.
2 Insolvency Act 1986, s 306.

3 *Heath v Tang* [1993] 4 All ER 694, at 697.
4 [1993] 4 All ER 694.
5 [1993] 4 All ER 694, at 697.
6 *Benson v Flower* (1629) Cro Car 166.
7 *Howard v Crowther* (1841) 8 M & W 601.
8 *Re Wilson, ex p Vine* (1878) 8 Ch D 364.
9 Per Alderson B in *Howard v Crowther* (1841) 8 M & W 601, at 604.
10 *Re Wilson, ex p Vine* (1878) 8 Ch D 364, at 366, per James LJ.
11 'If the bankrupt had accumulated the money and had invested it in some property, that property might be reached by the trustee. But the fact that he could do that does not enable the trustee to intercept the damages before they reach the bankrupt's hands, or to prevent him, if he has got them, from spending them in maintenance of himself and his family.' *Re Wilson, ex p Vine* (1878) 8 Ch D 364, at 366, per James LJ.

Liability of bankrupts and insolvent companies

8.5 Under the Insolvency Act 1986, no unsecured creditor, which includes a person with a claim for unliquidated damages,[1] shall have a remedy against the person or property of the bankrupt after the commencement of the bankruptcy, nor can any proceedings be brought against the bankrupt without the leave of the court prior to the discharge of the bankrupt.[2] Similar provisions apply in respect of insolvent companies.[3] Claims in respect of a defamatory statement published after the commencement of the bankruptcy may be brought against the bankrupt personally, but if proceedings for bankruptcy are pending or an individual has been adjudged bankrupt, the court may stay any action, execution or other legal process against the property or person of the debtor or bankrupt or allow them to continue on such terms as the court thinks fit.[4] In practice there is little point in bringing a libel claim against a bankrupt, except to prevent a repetition of the libel, unless there is a reasonable prospect that at some time in the future he may be worth something. His discharge from the bankruptcy will not operate to release him from the liability to pay the judgment in such an action.[5]

1 Insolvency Act 1986, s 382; Insolvency Rules 1986 (SI 1986/1925) r 12.3(1).
2 Insolvency Act 1986, s 285(3).
3 Insolvency Act 1986, s 130(2); Insolvency Rules 1986 r 13.12. For further details see K Oliphant (ed) *The Law of Tort* (2nd edn, 2007) LexisNexis Butterworths, at para 2.50.
4 Insolvency Act 1986, s 285(1), (2).
5 Insolvency Act 1986, s 281 (1).

Third Party (Rights against Insurers) Act 1930

8.6 A defendant may have insurance against potential liability in defamation. Where that is the case and the defendant becomes insolvent or bankrupt, then if any such covered liability is incurred by the insured, his rights against the insurer are, by virtue of the Third Party (Rights against Insurers) Act 1930, transferred to and vested in the third party to whom the liability was so incurred.[1] The rights acquired by the claimant as a result of the Act are the rights that the defendant himself had against the insurer;[2] the claimant cannot in this respect acquire more rights against the insurer than the insured possessed. Thus, if for some reason the insurer would have been able to avoid

his contract with the insured or would have been entitled to refuse to pay, the third party will have no rights under the Act.

1 Third Party (Rights against Insurers) Act 1930, s 1.
2 Third Party (Rights against Insurers) Act 1930, s 1(4).

C. CORPORATIONS AND COMPANIES

Trading corporation and companies – right to sue

8.7 A trading corporation or company may bring an action for defamation in respect of a defamatory imputation that injures it in its[1] trading or business reputation:[2] '[A trading corporation or company's] property or its business may be injured by defamatory statements whether written or oral. It has a trading character, the defamation of which may ruin it.'[3] That the company is a particularly large and powerful one or even a major multinational has been held not to affect its right to sue.[4] Imputations that have been held to be capable of injuring a company in its trading or business reputation including imputations of insolvency[5] or any allegations made against a corporation or company that imputes fraud or mismanagement in the running of the corporation or company or which attacs its financial position, solvency or efficiency.[6] So too, if the imputation is against the goods sold or services provided by the corporation an action may lie if what is said involves a reflection on the company in its way of doing business.[7] Again, a false statement about the way in which a company treats its staff may be actionable because it will affect the company's ability to recruit staff.[8] Though it is the case that a trading corporation has a reputation that can be defended by a claim in defamation, a question exists whether damage to a company's reputation engages art 8 of the Convention. As a company is an inanimate legal entity that cannot be injured in its feelings a strong argument exists that damage to its reputation should not engage art 8 which is concerned with the protection of physical and psychological integrity. While a company may be able to rely on art 8 where property it owns is intruded upon by another, it is not obvious that damage to its reputation should engage art 8 as in such case neither its physical or psychological integrity are threatened.[9]

1 Where several companies together form a group of companies with very similar names or where there is a holding company and several subsidiaries which share similar names, identifying which company or companies should bring the claim is important because unless the defamatory imputation reflects upon the company which brings the claim no action will lie (see, per Tugendhat J in *Club La Costa (UK) plc v Gebhard and Inventory Solutions* [2008] EWHC 2552 (QB), at [23]–[25], [2008] All ER (D) 243 (Oct)). For a successful claim, it is not enough that the imputation has a tendency to cause damage to the business of one of the other companies in the group or even to the directors of the company which sues; the imputation must reflect upon the company which brings the claim and have a tendency to damage it in the way of its business. By way of example, in *Elite Model Management Corp v BBC* [2001] All ER D 334 (May), claims were commenced by three companies in the Elite Models Management group (one of which was not in existence at the time of the programme that was complained of) in respect of allegations that they had failed properly to protect young models with whom they worked. Eady J refused to strike out the claims holding that it was possible that two of the companies could be treated as 'mother agencies' and identified as having failed to protect the models when they were in their jurisdiction. As to the company not in existence at the time of the programme, the imputations could be treated as continuing ones and authority existed that a claim might be brought in respect of a libel that effectively damaged or destroyed a young company's chance of profitable trading. As to allegations made against

individuals, it was possible that the company might be vicariously liable for them and the programme might be understood as implying that the individuals were acting for the company and not on a 'frolic of their own'. While Eady J concluded that the companies could continue their claim he did make clear (at [27]) that 'the court needs to be alert to the possibility of corporate entities being "put up" to bring claims for libel in respect of allegations truly reflecting upon individuals.' Should this be found to be the case at trial, his Lordship indicated that 'one sanction that will have to be considered is that of indemnity costs.' See also the judgment of Sedley LJ in *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983, at [35], (2004) Times, 26 August, 148 Sol Jo LB 941. In *Hays v Hartley* [2010] EWHC 1068 Tugendhat J commented on this issue, as follows: 'Companies enjoy certain rights under Art 8, and in some cases damage to reputation can be an interference with a person's rights under Art 8. But that is not this case. It follows that the only Convention right engaged in these proceedings (which involved a claim brought by a corporate entity) is the right of the Defendant to freedom of expression under Art 10.'

Not only has it been made clear that no claim can be brought unless the imputation reflects upon the company that brings the claim, the courts have also refused, thus far at least, to allow a holding company to claim on behalf of subsidiary companies. Thus, in *Adelson v Associated Newspapers (No 2)* [2007] EWHC 3028 the claimants' application to amend the corporate claimant's claim to include compensation for injury to its subsidiaries failed because the proposed amendment was inconsistent with established principles of law under which one claimant is not permitted to recover libel damages in respect of injury to other legal entities, whether subsidiaries or otherwise. It is worth noting, however, that Eady J pointed out (at [8]) that counsel for the claimants had said that his argument in the case was fortified by comments made in the course of argument in the Court of Appeal in *Adelson v Associated Newspapers (No 2)* [2007] EWCA Civ 701 to the effect that, in a future case, that court might wish to explain or develop the law in some way which would enable a non-trading holding company to recover in defamation proceedings for injury done to the group as a whole (assuming that it has a 'group pocket') or for damage to the reputation of trading subsidiaries (which may not have been joined as parties). Eady J quite properly refused to be drawn and stated that his duty was to apply the law as it was at the present (at [8]).

Additionally, the courts have refused to allow amendments to add (or substitute) new corporate claimants where doubt existed as to whether the original claimant had not suffered any loss. Thus, in *Adelson v Associated Newspapers Ltd* [2007] EWHC 997 (QB); affd on other grounds [2007] EWCA Civ 701, [2007] 4 All ER 330, [2008] 1 WLR 585 the claimant sought to add new corporate entities as claimants to those in whose name the claim had originally been commenced. The reason for this was, at least in part, to try to avoid argument as to whether the corporate entity in whose name the claim had been commenced (the holding company which was based in the US) had in fact been injured by the defamatory statement. The court refused permission to amend (on the ground that the claimants had not adduced evidence that the existing corporate claimant had been named in mistake for two new proposed claimants) but did not explore the question whether the holding company would have a claim in respect of allegations made. In *Adelson v Associated Newspapers (No 2)* [2007] EWHC 3028 a further attempt was made to add as parties two subsidiaries of the original corporate claimant. The application was refused, inter alia, on the basis that the primary limitation period had expired and it would not in the circumstances of this case be equitable to disapply the primary limitation under Limitation Act 1980, s 32.

2 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133; *Metropolitan Saloon Omnibus Co v Hawkins* (1859) 4 H & N 87; *D & L Caterers Ltd v D'Ajou* [1945] KB 364.

3 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, at 145 per Kay LJ.

4 In *McDonald's Corpn v Steel & Morris* (31 March 1999, unreported) Pill LJ stated that '[it is not open] to this court to invent a category of commercial corporations which, as an exception to a state of law binding on us, should not be able to maintain an action for libel. Some corporations may be very powerful commercially and in homely terms well able to look after themselves. But we consider there is no principled basis upon which a line may be drawn between strong corporations and weaker corporations such as is required by the applicants' submissions.' See further para **8.30** below.

The European Court of Human Rights in *Steel and Morris v UK* (2005) 18 BHRC 545, [2005] EMLR 314 confirmed that allowing a large multinational company to sue in defamation did not constitute a breach of art 10. Indeed the court stated at [94] that it did 'not consider that the fact that the plaintiff in the present case was a large multinational company should in

principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made.'

5 *Aspro Travel Ltd v Owners Abroad Group plc* [1995] 4 All ER 728 (the action by the corporate plaintiff was settled but it appears to have been accepted that an allegation of insolvency against a company could be defamatory).

6 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, at 141 per Lopes LJ.

7 *South Hetton Coal Co Ltd v North-Eastern News Association* [1894] 1 QB 133, at 138 per Lord Esher MR; *Linotype Co Ltd v British Empire Type-Setting Machine Co Ltd* (1899) 81 LT 331. In *Hays v Hartley* [2010] EWHC 1068 Tugendhat J accepted (at [9]) that an allegation that a company had committed acts of racism or condoned acts of racism on the part of its senior employees was a very serious matter for the claimant company: 'Such allegations might impede the recruitment of the best qualified employees, or make people reluctant to deal with the Claimant. These are the sort of allegations which persuaded a majority of the House of Lords that a trading corporation such as the Claimant should be able to recover general damages in defamation without pleading or proving special damage: see eg *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359, at [16]–[17].'

8 *Derbyshire County Council v Times Newspapers* [1993] AC 534, at 547. It should be noted that there are statements in some cases that suggest that no action will lie by a corporation for an allegation that it has indecent or bad manners, or with committing a crime, which it cannot physically commit. Thus, in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, Lord Esher MR stated (at 138) that:

> 'There are statements which, with regard to some plaintiffs would undoubtedly constitute a libel, but which, if published of another kind of plaintiffs would not have the same effect. For instance, it might be stated of a person that his manners were contrary to all sense of decency or comity, and such that, if the statement were true, they would render him deserving in the minds of persons of ordinary sense of contempt, hatred or ridicule; but, if the same thing were said with regard to a firm, or company it would be impossible that it should have the same effect, because a firm or company as such cannot have indecent or vulgar manners.'

So too, in the same case, Lopes LJ stated that a corporation could not sue 'in respect of a charge of murder, or incest, or adultery because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault because a corporation cannot be guilty of corruption or assault although the individuals composing it may be' (at 141). While it is obviously true that a company cannot physically commit certain crimes and cannot, as such, be said to have bad manners, it is submitted that both these dictum state the law too widely (see, per Eady J in *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28, at [41]). Thus, where an allegation is made that a corporation treats its customers or staff in a high-handed or ill-mannered way, there seems to be no reason why such an imputation would not be actionable even though it relates to a corporation's 'manners'. Such an allegation may well be very damaging to a company's trading or business reputation. Thus, in *Elite Model Management Corpn v BBC* [2001] All ER D 334 (May) it appears to have been assumed (correctly) that corporate entities could have sued in respect of allegations that their managers exploited young models and generally that they failed properly to protect them. Similarly, it is submitted that the fact that a company cannot be convicted of the crime with which it is charged should not necessarily mean that an action for defamation should not lie. In this regard, there is surely much in what the learned authors of *Gatley on Libel and Slander* (10th edn, 2005) Sweet & Maxwell say at para 8.18: 'The interpretation of defamatory words should not be constrained by technical rules of criminal law.' See also *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28.

9 In *Hays v Hartley* [2010] EWHC 1068 Tugendhat J commented on this issue, as follows: 'Companies enjoy certain rights under Art 8, and in some cases damage to reputation can be an interference with a person's rights under Art 8. But that is not this case. It follows that the only Convention right engaged in these proceedings (which involved a claim brought by a corporate entity) is the right of the Defendant to freedom of expression under Art 10.'

8.8 A trading corporation or company cannot be injured in its feelings, only in its pocket.[1] Any injury, therefore, must sound in money only: 'Since a

corporation has no character to be affected . . . and no feelings to be injured,[2] an article to be libellous as to a corporation must have a tendency to directly affect its credit or property or cause it pecuniary injury.'[3] However, a trading corporation or company may recover damages for injury to its trading reputation even without proving special damage provided that the publication has a tendency to damage it in the way of its business,[4] and the damages that may be recovered need not be limited to lost income but may also include damages for loss of goodwill.[5]

1 *Lewis v Daily Telegraph* [1964] AC 234, at 262, per Lord Reid. See also *Hays v Hartley* [2010] EWHC 1068, at [24], per Tugendhat J.

2 Though the issue is not without doubt (see further para **15.39** below), the better view is that a corporate claimant cannot recover aggravated damages because it has no feelings that can be hurt. See *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262 (QB), [2006] STC 100, [2006] EMLR 100, para [27].

3 *Golden North Airways Inc v Tanana Publishing Co* 218 F 2d 612 (1955) per Yankwich J.

4 In *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2006] 4 All ER 1279, the House of Lords reconsidered the issue of whether a trading company which had a trading reputation in the jurisdiction (whether or not it was actually trading in the UK), was entitled to sue in libel without pleading or proving special damage. By a majority of 3–2 (Baroness Hale and Lord Hoffmann dissenting), their Lordships concluded that it could provided only that the publication had a tendency to damage the company in the way of its business. In the opinion of the majority, there was no inconsistency in this regard between English law and art 10 of the Convention. As Lord Bingham explained (at [18]–[20]):

> 'First, as the text of art 10 itself makes plain, the right guaranteed by the Article is not unqualified. The right may be circumscribed by restrictions prescribed by law and necessary and proportionate if directed to certain ends, one of which is the protection of the reputation or rights of others. Thus a national libel law may, consistently with art 10, restrain the publication of defamatory material. Secondly, the national rule here in question, pertaining to the recovery of damages by a trading corporation which proves no financial loss, has been the subject of challenge before the European Commission and court which . . . did not hold the current rule to be necessarily inconsistent with art 10: it was a matter for the judgment of the national authorities. Thirdly, the weight placed by the newspaper on the chilling effect of the existing rule is in my opinion exaggerated.'

Moreover, there were, for the majority, good reasons for concluding that a right to sue existed even in the absence of proof of financial loss.

> 'First, the good name of a company, as that of an individual, is a thing of value. A damaging libel could lower its standing in the eyes of its customers, employees and shareholders making it less attractive for investors to invest in, employees to work for and customers to deal with. Contrary to the argument made by the defendant it would not be easy to repair this and there is therefore nothing repugnant in the notion that it is a value that the law should protect. Secondly, it will not always be the case that a truly damaging publication about a company will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue.'

(See Lord Bingham at [26].)

5 *Lewis v Daily Telegraph* [1964] AC 234, at 262, per Lord Reid: 'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.'

No right to sue in respect of imputations against officers and employees

8.9 A trading corporation or company cannot bring an action in its own name in respect of allegations made solely against its officers, members, employees or

shareholders and not against the company itself.[1] As Sedley LJ explained in *Jameel v Times Newspapers Ltd*:[2]

> 'It has to be kept well in mind that a limited liability company is a distinct legal person, not an extension of its proprietor (if I may adopt an imprecise but useful term). To defame the proprietor, even in an article which identifies the business as his, is not to defame the company unless the article also suggests that the company is itself implicated in the wrongdoing or suspicion of wrongdoing attributed to the individual, or that it merits investigation for the same reasons as its proprietor.'[3]

1 'The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation as distinct from the individuals who compose it.' *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, at 141, per Lopes LJ.

2 [2004] EWCA Civ 983, (2004) Times, 26 August, 148 Sol Jo LB 941.

3 [2004] EWCA Civ 983, [2004] EMLR 31, at [35].

8.10 Where, however, an imputation against an individual officer, member, shareholder or employee of the corporation is capable of being understood to refer to the corporation, an action will also lie at the instance of the corporation. Of relevance to this question is the extent to which the person against whom the allegation is made is connected in the mind of the reader with the company so that an allegation against the one would reasonably be understood also to be an allegation against the other.[1] Allegations against an individual may also be actionable by a corporation where the allegations involve some imputations against the corporation's method of selection or supervision.[2]

1 In *Bargold Pty Ltd v Mirror Newspapers Ltd* [1981] 1 NSWLR 9 Hunt J stated that the question whether a corporation could sue as well as the particular person defamed depended 'upon the part that the director or officer is alleged to have played in the operation of the company and upon the extent to which the one is identified with or considered to be the alter ego of the other' (at 11). However, it should be noted that in *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983, (2004) Times, 26 August, 148 Sol Jo LB 941 Sedley LJ commented in response to an argument that a slur on an individual closely connected with a trading corporation was capable of defaming it, irrespective of any allegation of corporate misconduct, that 'as a proposition of law [it had] no visible means of support' (at [34]). Only if the publication defamed the company as well as the individual named would an action lie at the instance of the company.

2 *Duncan & Neill on Defamation* (3rd edn, 2009) LexisNexis Butterworths, at para 10.05.

Liability of companies and corporate entities

8.11 A company or other corporate entity may be sued for defamatory words published by its employees or other agents in the same way as any other employer or principal.[1]

1 Where malice is alleged against a corporate defendant it has been said to be necessary to find an individual who was responsible for the words complained of and who had the state of mind required to constitute malice in law: *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB), at [30], [2003] All ER (D) 339 (May); *Monks v Warwick District Council* [2009] EWHC 959 (QB), at [23]–[24], [2009] All ER (D) 65 (May); *Bray v Deutsche Bank AG* [2008] EWHC 1263 (QB), at [16], [2009] EMLR 215.

Non-trading corporations

8.12 Corporate entities are commonly established for reasons other than to engage in business for profit. By way of example, many charities are established with corporate status. Where such a corporation is authorised to acquire and deal with property which may be a source of income and revenue, it has been said that:

> 'the transaction of the business incidental thereto creates a reputation, rights and interests, in no essential respects different from that of an individual or a trading corporation . . . Non-trading corporations have their affairs, their business, their interest respecting property which must have the same protection and immunities and the same remedies in case of injury thereto as a trading corporation. The same principle applies to both.'[1]

It follows that a non-trading corporation may maintain an action for any defamatory imputation that injuriously affects its purposes, property or financial position.

1 *Chinese Empire Reform Association v Chinese Daily Newspaper Publishing Co Ltd* (1907) 13 BCR 141, at 142–143, per Morrison J.

D. CROWN IMMUNITY

No general immunity from suit

8.13 At common law the Crown was immune from civil suit both in respect of actions brought against the Crown individually and where the Crown was sought to be made vicariously liable. Since the enactment of the Crown Proceedings Act 1947 this general immunity no longer exists and the Crown is subject to all liabilities in tort to which it would be subject if it were a private person, including any vicarious liability.[1] It follows, therefore, that the Crown can be sued in defamation.

1 Crown Proceedings Act 1947, s 2(1).

Right to sue

8.14 Although the Crown can be sued for defamation, it cannot, following *Derbyshire CC v Times Newspapers*[1] sue for defamation. Identifying the 'Crown' for these purposes is not entirely easy. Clearly it includes government departments[2] as well as servants and agents of the Crown. Whether it includes agencies[3] or companies[4] to which formerly government-run functions were transferred or companies that were previously in the private sector but are now wholly or partially owned by the government[5] is more difficult. None of these entities of course have been, or indeed are capable of being, democratically elected and this was a factor considered of importance by Lord Keith in the *Derbyshire* case. Yet, that cannot be decisive and it is submitted that the crucial question remains whether the entity in question should be treated as a governmental body in the light of the functions it undertakes and its legal nature. The legal form taken by the entity, though relevant, is not decisive.

1 [1993] AC 534, at 548–550. See also per Schreiner JA, at 1012–1013, in *Die Spoorbond v South African Railways* 1946 AD 999: 'I am prepared to assume, for the purposes of the

present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation, damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the state's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the state actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. Such actions could not, I think, be confined to those brought by the railways administration for criticism of the running of the railways.'

2 *Derbyshire CC v Times Newspapers* [1993] AC 534, at 549.

3 For example, the Financial Services Authority or the Food Standards Agency.

4 Examples would include British Gas and British Telecom.

5 An example would be the complete or partial state ownership of companies like Northern Rock, Royal Bank of Scotland and HBOS.

E. DECEASED PERSONS AND THEIR REPRESENTATIVES

Effect of death on cause of action

8.15 The general rule of common law is *actio personalis moritur cum persona* and, subject to certain statutory exceptions, all actions and causes of action in tort abated upon the death of either party. By virtue, however, of the Law Reform (Miscellaneous Provisions) Act 1934 most actions in tort now survive for and against the estate of deceased persons. Actions for defamation, however, operate as an exception to this and continue to abate on the death of either party.[1] It follows that on the death of a person any cause of action he had dies with him and this is so even if he had commenced the claim before his death.[2] Nor will the benefit of an action in defamation that a deceased person had at the date of his death survive for the benefit of his estate.[3] So too, no action can be commenced against the estate of a deceased person for defamation and if the defendant dies before the verdict the action abates. Where, however, the deceased was only one of several people sued in respect of the same publication, his death does not affect those other claims.

1 Law Reform (Miscellaneous Provisions) Act 1934, s 1(1).

2 If, however, either party to an action dies between the verdict or finding of the jury and judgment being entered the cause of action does survive.

3 Law Reform (Miscellaneous Provisions) Act 1934, s 1(1).

Defaming the dead

8.16 A defamatory statement about someone who is dead is not actionable on behalf of the estate, however false and malicious the statement.[1] Nor can a

claim be commenced by a relative or friend of the deceased for a defamatory statement made about a person who is dead unless the publication about the deceased also imputes something defamatory about the relative or friend.[2]

1 The Porter Committee on the Law of Defamation (Report of the Committee on the Law of Defamation (Cmd 7536, 1948)) was of the opinion that neither the civil nor the criminal law concerning defamation of the dead was in need of reform, the former because of the essentially personal nature of an action for defamation and the latter for the reason that, in the words of the report:

> 'Historians and biographers should be free to set out facts as they see them and to make their comment and criticism upon the events which they have chronicled. But to produce the strict proof of the statements contained in their writings which the English law of evidence requires, becomes increasingly difficult with the lapse of time. If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a Court of law, records of the past would, we think, be unduly and undesirably curtailed' (at paras 27–29).

The Faulks Committee on Defamation (Cmnd 5909, 1975) took a different view, recommending (at para 423, p 116) that for five years after a person's death, his near relatives should be entitled to sue in respect of a defamatory statement concerning the deceased, for a declaration that the matter complained of was untrue, and for an injunction. The committee recommended that no damages should be awarded in such an action, but that an order for costs should be made. The committee was also of the view that a cause of action for defamation should survive against the estate of a deceased person and that where a person defamed dies after starting an action, his personal representatives should be able to continue it and to recover general and special damages. If the person defamed died before starting an action, the committee suggested that his personal representatives should be able to start an action, but to the extent only of claiming an injunction and any actual or likely pecuniary loss suffered by the deceased or his estate as a result of the defamation. The Supreme Court Procedure Committee under the chairmanship of Neill LJ (*Report on Practice and Procedure in Defamation*, 1991) also considered this issue but recommended no change.

2 By way of example, in *Chiniquy v Begin* (1915) 25 DLR 687 a newspaper implied that the plaintiff's mother and deceased father were not legally married in the eyes of the Roman Catholic Church. The plaintiff succeeded in an action for libel on the ground that the article implied she was illegitimate.

F. FIRMS

Right to sue

8.17 In English law a partnership[1] is not an entity separate and distinct from the partners who at any time may compose it. The rights and liabilities of a partnership are the collection of the individual rights and liabilities of each of the partners.[2] Notwithstanding this, proceedings may be brought in the partnership's name and damages recovered.[3] Thus, partners can sue jointly[4] for defamatory words which reflect upon the firm[5] and the damages recoverable will be for injury to the partnership as a whole. However, they cannot recover damages for the injury done to themselves as individuals unless they join their individual claims with the firm's claim or sue separately. If words defamatory of a single partner are capable of being defamatory of the firm as a whole, all the partners should sue in respect of such injury, although the partner defamed may be joined as a co-claimant. The Limited Liability Partnerships Act 2000 created a new form of 'partnership' called limited liability partnership. Under s 1(2) of the Act, a limited liability partnership is a body corporate (with legal personality separate from that of its members) and accordingly should be

treated in the same manner as a company for the purposes of the right to sue in defamation.[6]

1 Under the Partnerships Act, s 4(1), 'Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.'
2 *Partnership Law*, Law Commission (Law Com No 283, 2003), at para 2.5.
3 Para 5A.3 of CPR Pt 7 PD 7A provides that 'Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued.'
4 In the absence of any provision to the contrary in a partnership agreement, a partner has implied authority to commence proceedings in the name of the partnership, subject to providing any non-consenting partners with an indemnity for costs: *Whitehead v Hughes* (1834) 2 Cr & M 318, 149 ER 782.
5 In *Le Fanu v Malcomson* (1848) 1 HL Cas 637, at 669–670 Lord Campbell commented that, 'Now suppose that several persons were in partnership as grocers, and it was alleged that they sold by short measure or false weight, or that they adulterated their goods . . . that is a libel in which they might be jointly included as partners in their trade.'
6 See further, paras **8.7–8.10** above.

Liability of firms

8.18 The partners in a firm may be sued jointly in respect of a defamatory statement made by one partner provided that the words were published with the authority of the co-partners or the partner was acting within the ordinary course of the firm's business.[1] Partners can also be liable in defamation in accordance with the ordinary principles of vicarious liability. It is usual to sue partners in the name of the firm, though if there is any doubt as to the liability of the firm as a whole, the individual partner should be joined as a co-defendant. So far as limited liability partnerships are concerned, there is no provision in the Limited Liability Partnerships Act 2000 similar to the Partnership Act 1890, s 10. However, under s 6 of the 2000 Act, '(1) Every member of a limited liability partnership is the agent of the limited liability partnership. (2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if – (a) the member in fact has no authority to act for the limited liability partnership by doing that thing, and (b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership.' In determining therefore whether a limited liability partnership is liable for acts of members, ordinary principles of agency law should be applied.

1 Partnership Act 1890, s 10.

G. FOREIGN NATIONALS, ALIEN ENEMIES

8.19 Generally speaking, a foreign national is in the same position as regards defamatory words published either within or outside the jurisdiction of the English courts as a British subject.[1] However, when he is abroad when sued or where the tort is committed abroad, issues of choice of law and jurisdiction will arise. These are dealt with in **CHAPTER 7**. The only category of person who is barred from bringing an action in the English courts is an alien enemy. This term includes any person who is voluntarily resident or who carries on business in any state at war with the Queen, or in any country occupied by the enemy, whether or not that person is a national of the enemy state, as well as

any national of the enemy state resident in that state.[2] The rule is that an alien enemy cannot begin or continue an action, or appeal against a judgment, without the authorisation of the Crown. During the period of his disability statutes of limitations do not cease to run against him and he may find that by the time the hostilities have ceased his action is barred, subject to the court exercising its discretion to allow proceedings under the Limitation Act 1980, s 32A.[3] An alien enemy is always permitted to defend an action for it would be a plain injustice if judgment were to be pronounced against a man who had not been given the opportunity of being heard.[4]

1 See, eg, *Porter v Freudenberg* [1915] 1 KB 857, at 869, per Lord Reading CJ.
2 *Porter v Freudenberg* [1915] 1 KB 857, at 867–869, per Lord Reading CJ.
3 See further para **14.63** ff below.
4 *Porter v Freudenberg* [1915] 1 KB 857, at 882–883, per Lord Reading CJ.

H. HUSBAND AND WIFE

Right to sue and be sued

8.20 The common law rule was that during the subsistence of a marriage, that is to say at any time before the pronouncement of a decree absolute (of divorce and irrespective of whether the parties were living apart either voluntarily or as a result of a decree of judicial separation or a separation order), neither the husband nor the wife could sue the other for defamation[1] nor prosecute the other for criminal libel.[2] The only exception to this rule was that by virtue of the Married Women's Property Act 1882, s 12, a married woman could bring civil proceedings against her husband for the protection of her own property. Now, by virtue of the Law Reform (Husband and Wife) Act 1962 each of the parties to a marriage has the same right of action in tort against the other as if they were not married subject to the right of the court to stay proceedings pursued during marriage if it appears that no substantial benefit would accrue to either party by their continuance.[3]

1 Married Women's Property Act 1882, s 12.
2 *R v Lord Mayor of London* (1886) 16 QBD 772.
3 Married Women's Property Act 1882, s 1. See also Civil Partnership Act 2004, s 69.

8.21 As regards third parties, neither a husband nor a wife can, during the subsistence of the marriage, be sued in respect of the publication by the one to the other of defamatory matter concerning the third party;[1] but each can be sued in respect of defamatory matter which he or she has published to a third party, and if the publication is a joint publication, they can be made co-defendants. Although a husband may be liable for the publication of defamatory matter by his wife if, for example he authorised the publication, a husband is not by reason only of the marriage liable for his wife's torts no matter when they were committed.[2] A husband who has been defamed and a wife who has been defamed have independent causes of action, and if both have been defamed in the same publication they may be co-claimants, but neither can sue a third party for defamation of the other: for example, a husband has no claim for words which impute that his wife is a prostitute.[3] He would, however, have a cause of action if the statement also defamed him; for

instance it might be argued that the defamation also imputed that he was satisfied to be the husband of a prostitute or pressurised her into prostituting herself.[4] If, independently of the defamatory tendency of the words, the words are also an injurious falsehood affecting the husband, he will have a cause of action.[5]

1 *Wennhak v Morgan* (1888) 20 QBD 635. See para **5.10** above. If this rule still exists whether on the basis that there is in such a case no publication or the publication is protected by absolute privilege, the same rule should presumably apply to same sex partners who have registered a civil partnership under the Civil Partnership Act 2004.
2 Law Reform (Married Women and Tortfeasors) Act 1935, s 3.
3 *Finburgh v Moss' Empires Ltd* 1908 SC 928.
4 See, for example, *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, [2006] 4 All ER 613, [2006] 1 WLR 3469, [2006] EMLR 703 where the allegation was, inter alia, that the claimant had pressurised his wife into having sex with other men. Such an allegation would be defamatory of both husband and wife, though in *Turner* it was the wife making the allegation.
5 *Riding v Smith* (1876) 1 Ex D 91.

I. INSANITY, MENTAL DISABILITY, DRUNKENNESS

Insanity, mental disability – right to sue

8.22 That a person is insane or possessed of a mental disability does not affect his right to sue for defamation. However, where a person 'lacks capacity to conduct proceedings', as that is defined in the Mental Capacity Act 2005, proceedings must be conducted on his behalf by his 'litigation friend'.[1]

1 CPR 21.1, 21.2.

Liability of the insane and those with mental disabilities

8.23 There is not a great deal of English authority on the question of the civil liability of the insane or those with mental disabilities. In *Morriss v Marsden*,[1] a civil action for assault, it was said that for liability to arise a voluntary act was necessary in the sense that the mind prompted and directed the tortious act, so that a person in a state of automatism would not be liable. Applied to defamation, a person would escape liability only if he had no control over what he was saying; it would not provide a defence to a person who while aware of what he was saying was unaware that it was defamatory or untrue. Lord Esher MR's comments in *Hanbury v Hanbury*[2] may suggest a wider exclusion for the insane however. His Lordship there commented that:

> 'he was prepared to lay down the law of England that whenever a person did an act which . . . if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and quality of the act which he was doing, that was an act for which he would be civilly and criminally responsible.'[3]

Read at its broadest this would seem to suggest that a person who is incapable of understanding that what he is saying is untrue or defamatory would not be liable. However it must be doubted whether Lord Esher MR correctly stated the law in *Hanbury* as it is, of course, the case that liability in defamation depends not upon the intention of the defamer but upon the fact of the defamation, and therefore the defendant's state of mind ought to be irrelevant to the question of his liability.

1 [1952] 1 All ER 925.
2 (1892) 8 TLR 559.
3 (1892) 8 TLR 559, at 560. See also *Emmens v Pottle* (1885) 16 QBD 354 where Lord Esher MR commented during argument that a 'lunatic' would only be liable in defamation if he was sane enough to know what he was doing.

8.24 Even if it is accepted that insanity or other mental disability does not affect liability in defamation, the fact that the defendant is insane may have an important bearing upon the outcome of an action. By way of example, if the case required proof of express malice it would certainly be difficult, and might be impossible, to establish malice against such a person. Again, if the defamer was well-known to be insane no one would attach any importance to anything he said or wrote and it might therefore be possible to prove that the words complained of were not understood in a defamatory sense. Finally, the fact that the defendant was insane would, no doubt, have a very important bearing upon the damages.

Drunkenness

8.25 Drunkenness, where self-induced, should afford no defence to an action for defamation. Even where not self-induced, for the same reasons that apply to insanity, it is probably the case that drunkenness will not provide a complete defence to a claim for defamation but it would nevertheless have an important bearing on the outcome of the claim.

J. LOCAL AUTHORITIES AND GOVERNMENTAL ENTITIES

Right to sue

8.26 In *Derbyshire County Council v Times Newspapers*[1] the House of Lords held that at common law a local authority does not have the right to maintain an action for damages for defamation.[2] Having reviewed the common law authorities and most particularly those of US and Commonwealth jurisdictions,[3] Lord Keith concluded that a rule prohibiting local authorities from suing was necessary to avoid the likely chilling effects on free speech of granting such an action:

> 'There are . . . features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.'[4]

1 [1993] AC 534.

[2] The decision of the House of Lords was reached without their Lordships finding any need to rely on the European Convention on Human Rights. However, their Lordships were satisfied that the English law in this area was consistent with the requirements of the Convention. By way of contrast, although the Court of Appeal in *Derbyshire County Council* [1992] QB 770 had also held that the decision in *Bognor Regis UDC v Campion* [1972] 2 QB 169, in which it had been held that a local government corporation had a 'governing reputation' which was protected by the law of defamation, should be overruled they had reached their decision principally by relying on art 10 of the European Convention on Human Rights, applying dicta that its provisions are the same as the common law and to be resorted to both for clarification where the law is uncertain and for guidance when it is certain (eg, see *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429). The Court of Appeal held that allowing a local authority to sue for defamation was contrary to common law and art 10 by imposing a greater restriction on the right to freedom of expression than was 'necessary in a democratic society'. There was no 'pressing social need' to afford it more opportunity to protect its reputation than was provided by the ability of its officers and members to sue for libels on them and its own capacity to pursue actions for malicious falsehood and to secure prosecutions for criminal libel.

[3] See *City of Chicago v Tribune Co* 139 NE 86 (1923); *New York Times Co v Sullivan* 376 US 254 (1964); *Hector v A-G of Antigua and Barbuda* [1990] 2 AC 312, PC; *Die Spoorbond v South African Railways* 1946 AD 999.

[4] *Derbyshire County Council v Times Newspapers* [1993] AC 534, at 550, per Lord Keith.

8.27 Though the *Derbyshire County Council v Times Newspapers*[1] case concerned a local authority exercising governmental and administrative functions,[2] it is clear that their Lordships thought that the same rule should apply to any democratically elected governmental body, whether at central or local level, and to institutions of central and local government exercising governmental and administrative functions. As Lord Keith explained:

> 'It is of some significance to observe that a number of departments of central government in the UK are statutorily created corporations, including the Secretaries of State for Defence, Education and Science, Energy, Environment and Social Services. If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments (apart from two which are made corporations only for the purpose of holding land) was not also entitled to sue. But as is shown by the decision in *A-G v Guardian Newspapers Ltd (No 2)*, a case concerned with confidentiality, there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is in the public interest to do so. The same applies, in my opinion, to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.'[3]

It is submitted therefore that neither central government departments nor the Crown[4] can sue for defamation in respect of imputations that reflect on their governmental and administrative functions. However, their Lordships made clear that the decision did not affect the right of an individual MP, councillor, officer or employee of a governmental body to sue if the words spoken of the organ of government were capable of referring to the individual.[5]

[1] [1993] AC 534.

[2] The case concerned allegations of impropriety in its operation of its pension fund.

[3] [1993] AC 534, at 548–549.

[4] See paras **8.13–8.14** above.

[5] See also *Goldsmith v Bhoyrul* [1998] QB 459, at 462, [1997] 4 All ER 268 where Buckley J said (at 271) that although a political party seeking power could not sue in defamation, 'any individual candidate, official or other person connected with the party who was sufficiently identified could sue'.

Political parties

8.28 While it is clear from *Derbyshire County Council v Times Newspapers*[1] that organs of central and local government cannot sue in respect of imputations concerning the exercise of their governmental or administrative functions, it would appear from subsequent cases that the rule may not be so limited. Thus, in *Goldsmith v Bhoyrul*[2] it was held that the rule applied to prevent a political party, then seeking power at an election and putting itself forward for office or to govern, suing in defamation in respect of allegations about the conduct of its election campaign. According to Buckley J, while it was true to say that a party seeking power at an election could not be equated with a government body that had power:

> '[T]he 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.'[3]

[1] [1993] AC 534, [1993] 1 All ER 101.

[2] [1998] QB 459, [1997] 4 All ER 268.

[3] [1997] 4 All ER 268, at 270–271.

Other 'governmental' entities

8.29 In *British Coal Corpn v NUM*[1] it was held that the rule prevented British Coal Corporation from suing in defamation over allegations that it had 'stolen' £450m from the mineworkers' pension fund. That the British Coal Corporation was neither democratically elected nor exercising administrative or governmental functions does not appear to have been conclusive against the application of the rule. In contrast in *Southampton Institute v Southern Publishing plc*[2] it was ruled that an autonomous Higher Education Corporation created by statute to manage colleges of further education formerly under local authority control was not such a body and could sue for libel.[3]

[1] (28 June 1996, unreported).

[2] (3 December 1996, unreported).

[3] See also, *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1997] 7 HKPLR 286 the Hong Kong Court of Appeal held, reversing the decision of Keith J ([1997] 7 HKPLR 41) that a university established by statute could sue for libel. The court held that the *Derbyshire County Council* decision was distinguishable: 'In my judgment, the considerations which govern a body like a University are far removed from those in the *Derbyshire County Council* case. In no way does the University take part in the government of Hong Kong. It is not an organ of government, democratically elected or otherwise. If public interest be the test, I would hold that it strongly favours the protection of the reputation of institutions of learning like the University' (at 291, per Litton VP).

Principle not to apply to private sector corporations

8.30 In *Mcdonald's Corpn v Steel & Morris*[1] it was held that the principle laid down in the *Derbyshire County Council* decision was not applicable to a multinational corporation which therefore had as much right to sue in defamation as any other trading corporation, notwithstanding the enormous power possessed by such corporations:

> 'We do not consider that the basis upon which it was decided in the *Derbyshire* case that a local authority could not maintain an action for libel (viz: that democratically elected public bodies should be open to public criticism unrestrained by the possibility of an action for libel) applies to commercial corporations, however large, which are constitutionally in a quite different position. Nor is it, in our view, open to this court to invent a category of commercial corporations which, as an exception to a state of law binding on us, should not be able to maintain an action for libel. Some corporations may be very powerful commercially and in homely terms well able to look after themselves. But we consider there is no principled basis upon which a line may be drawn between strong corporations and weaker corporations such as is required by the applicants' submissions.'[2]

1 (31 March 1999, unreported).
2 (31 March 1999, unreported, per Pill LJ).

K. MINORS

8.31 A minor[1] can bring an action for defamation but must do so, unless the court directs otherwise,[2] by suing by his 'litigation friend'.[3] The litigation friend will be responsible for any expense incurred in relation to the litigation,[4] although he will usually be entitled to recover the amount paid or payable out of any money recovered or paid into court provided that the expense has been reasonably incurred and is reasonable in amount.[5] Claims commenced by, on behalf of, or against a minor can only be settled or compromised with the approval of the court[6] and any damages payable must be dealt with as the court directs.[7] A minor can be sued for defamation in the same way as any other individual, but will defend the action by a litigation friend.[8]

1 Family Law Reform Act 1969, ss 1 and 12. A minor is anyone under 18 years of age.
2 CPR 21.3–21.5.
3 CPR 21.2.
4 CPR 21.4(3)(c).
5 CPR 21.12(1).
6 CPR 21.10(1).
7 CPR 21.11.
8 CPR 21.2.

L. STATE AND DIPLOMATIC IMMUNITY

Rights of state to sue

8.32 While foreign states and their various emanations may have sufficient legal personality to sue, a question arises whether, in light of *Derbyshire County Council v Times Newspapers*[1] which prohibits the Crown from suing,[2] foreign states should be permitted to sue. If the underlying rationale for

the decision in the *Derbyshire County Council* case was the desirability of permitting free and uninhibited discussion about institutions of the UK government, then foreign states should not be prevented from suing. Moreover, international comity may require that if our government wishes to be able to sue in foreign jurisdictions, the same right should be accorded to foreign states in England and Wales. However, there was no express restriction in the *Derbyshire County Council* case to UK governmental institutions and bearing in mind the fact that the principle has been extended to political parties[3] and the British Coal Corporation,[4] there is much to be said for prohibiting foreign states from suing not least because of the desirability of allowing free and uninhibited discussion of their actions but also because of their ready access to the media to correct any inaccuracies published about them.

1 [1993] AC 534.
2 Para **8.13** above.
3 *Goldsmith v Bhoyrul* [1998] QB 459, at 462, [1997] 4 All ER 268.
4 *British Coal Corpn v NUM* (28 June 1996, unreported).

State immunity

8.33 The immunity of states is governed by two different regimes – the common law[1] and the statutory regime contained in the State Immunity Act 1978 – though in most circumstances, it is the law contained in the State Immunity Act 1978 that will govern. The State Immunity Act 1978 gave statutory force to a restrictive theory of state immunity. It did this by enacting a general rule of state immunity in s 1 and then subjecting that rule to a number of exceptions that are contained in State Immunity Act 1978, Pt 1. The immunity applies to any 'foreign or commonwealth state' which is defined to include: (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government,[2] but not to an entity which is distinct from the executive organs of the government of the State and capable of suing or being sued,[3] unless the act done by that entity was done by it in the exercise of sovereign authority and the circumstances are such that a state would have been so immune.[4] The immunity, where it applies, can also be claimed in respect of employees of the protected entity.[5]

1 English law adopted until the 1970s an almost absolute form of state immunity for states and their heads. As a result of the increasing involvement of states, in one guise or another, in commercial activities this position was gradually abandoned during the 1970s and a so-called 'restrictive' theory of state immunity was adopted under which acts of a commercial nature would not attract state immunity even if done for governmental or political reasons. This development of the common law was confirmed by the House of Lords in *I Congreso del Partido* [1983] 1 AC 244, [1981] 2 All ER 1064. Where the common law does apply, state liability will depend upon whether the act complained of is jure imperii or jure gestionis with the former attracting immunity.
In *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, L, an American citizen, was a civilian official of the US Department of Defence, working as an educational services officer at a US military base in the UK. His role was to advise the base commander on educational matters. One of the courses offered was conducted by H, an American citizen and a university professor who had been seconded to the base for that purpose. L wrote a memorandum to the university, reporting serious criticisms of H by her students and questioning her competence. As a result, H brought proceedings for defamation against L. L applied to have the writ set aside, contending that the proceedings impleaded a foreign sovereign state and were covered by state immunity both at common law and under the State

ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint' (at 70). In that case, the Court of Appeal could rely only on malicious falsehood to sustain an injunction – more narrow than that allowed by the judge at first instance – to prevent publication.

23.2 This judicial concern with media intrusion is reiterated often by others in the wider policy debate. The 'media scrum' comprising massed hordes of jostling photographers has become for many a leitmotif of unacceptable media practice; an obvious manifestation of the metaphorical 'feral beast' lambasted pointedly by Tony Blair during his last speech while in office as prime minister.[1] The problem has been the focus of a number of official inquiries. In its 1990 report, the Committee on Privacy and Related Matters chaired by David Calcutt QC recommended the introduction of a new offence and a civil remedy covering the commissioning of various newsgathering acts.[2] In his subsequent review of the first years of operation of the Press Complaints Commission, Calcutt reasserted – ultimately without direct impact – that the prescribed offence of physical intrusion should be enacted.[3] In its 2003 report, 'Privacy and Media Intrusion', the House of Commons Select Committee on Culture, Media and Sport indicated that it was similarly concerned by the harassment attendant on the practice of doorstepping and the phenomenon of the media scrum. It called upon the media regulatory bodies together to address the issue,[4] and returned to the general issue in 2007.[5] The problem has also occupied intergovernmental organisations.[6]

1 The speech was delivered at Reuters, London on 12 June 2007. Together with the ensuing 'question and answer' session, it is reproduced as (2007) 'Tony Blair's "Media" Speech: The Prime Minister's Reuters Speech on Public Life', *Political Quarterly*, 78(4), 476–487.

2 Calcutt et al 'Report of the Committee on Privacy and Related Matters', Cm 1102 (HMSO, 1990), paras 6.33–6.34.

3 Calcutt, Sir David 'Review of Press Self-regulation', Cm 2135 (HMSO, 1993).

4 Select Committee on Culture, Media and Sport (2002–03) 'Fifth Report: Privacy and Media Intrusion', HC 458, paras 34–39.

5 Select Committee on Culture, Media and Sport (2006–07) 'Seventh Report: Self-Regulation of the Press', HC 375.

6 For example, in Resolution 1165 (1998) of the Council of Europe, state governments were called upon to ensure that legislation served to prohibit 'following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm' (para 14(v)).

23.3 The aim of this chapter is to consider the main legal options open to claimants who have suffered harassment by media organisations or their agents. It also notes the existence of regulatory alternatives. The primary legal options in this context rest upon the criminal offences and statutory cause of action afforded by the Protection from Harassment Act 1997. That Act has been extended in coverage since its first introduction, and allied by separate statutory intervention that focuses on behaviour in the vicinity of residential property. The main alternative course of action involves complaint to either the Press Complaints Commission (PCC) or Ofcom, either while the impugned behaviour continues in the hope of having it cease or after-the-fact in order to obtain some form of redress.

B. STATUTORY SOLUTIONS: THE PROTECTION FROM HARASSMENT ACT 1997

23.4 The Protection from Harassment Act 1997 was enacted in response to newly widespread perceptions that the practice of 'stalking' was a significant social problem, and that it was inadequately covered by the existing law.[1] The passage of the Bill was notable for its rapidity.[2] The mischief to be caught by the legislation was the obsessive pursuit of another individual, usually motivated by some passion ranging from ardour to animus. The Act introduced a civil remedy (s 3) and two criminal offences (ss 2 and 4) that could be invoked where a person pursued a course of conduct which amounted to harassment of another. Further criminal offences were introduced to apply in case of breach of any civil or criminal restraining orders imposed. The Act came into force in June 1997.[3] Since that time, the coverage of the Act has been extended by the Serious Organised Crime and Police Act 2005, while related powers were introduced under the Criminal Justice and Police Act 2001.

1 The first instance of such anti-stalking legislation was introduced in California in 1990. This lead was swiftly followed by almost all US states, the US Federal Congress, and a number of Commonwealth jurisdictions. Notwithstanding this fact, the problem was often officially downplayed, dismissed or ignored in the UK before the launch of the remarkably successful National Anti-Stalking and Harassment Campaign (NASH) in 1994. Sections 1–7 and 12 of the Protection from Harassment Act 1997 apply in England Wales, and ss 8–12 in Scotland. Equivalent law was extended to Northern Ireland under s 13 in June 1997 by means of the Protection from Harassment (Northern Ireland) Order 1997 (SI 1997/1180) (NI 9). See generally, N Addison and T Lawson-Cruttenden *Blackstone's Guide to the Protection from Harassment Act 1997* (Blackstone Press, 1997); E von Heussen (2000) 'The Law and "Social Problems": The Case of Britain's Protection from Harassment Act 1997', *Web Journal of Current Legal Issues*, 1; E Finch *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Routledge, 2001).

2 It was preceded by a brief consultation published in July 1996: Home Office/Lord Chancellor's Department (1996) 'Stalking: The Solutions – a Consultation Paper' (HMSO, 1996). In the House of Commons, the bill was introduced on 5 December 1996, and then passed through its second reading, committee, report and third reading stages on 17 and 18 December (297 HCDeb 781-853, 965-988). It was then considered in the House of Lords on 24 January 1997 (577 HLDeb 917–943), 17 February (578 HLDeb 511–542), 10 March (579 HLDeb 22–25) and 17 March (579 HLDeb 714–716), becoming the final bill considered in that House before the Prorogation and Dissolution of Parliament. It received the Royal Assent on 21 March 1997.

3 Protection from Harassment Act 1997 (Commencement) (No 1) Order 1997 (SI 1997/1418). For official guidance on the Act, see Crown Prosecution Service 'Legal Guidance: Protection from Harassment Act 1997' (CPS, 2007).

23.5 The following paragraphs undertake two tasks. First, they offer reflections on the introduction of the Protection from Harassment Act 1997 and highlight the fact that application of the new powers to news-gathering behaviours was always understood to be in prospect.[1] Secondly, they describe the basic features of the Act and related powers available to police under the Criminal Justice and Police Act 2001. In doing so, they note specific factors that may facilitate the application of the Act to media practices, and in particular to repeated publication and news-gathering activities. The section closes with reflections on the utility of the legal powers available under the 1997 Act.

1 See, generally, Thomson and McCann (2009) 'Harassment and the media', *Journal of Media Law*, 1(2), 149–158; Scott (2009) 'Flash flood or slow burn? Celebrities, photographers and the Protection from Harassment Act', *Media & articles Law Review*, 14(4), 397–424.

Background to the Act

23.6 The proscriptions contained in the Protection from Harassment Act 1997 are sufficiently broad as to encompass not merely stalking, but also a wider range of behaviours including some journalistic practices. This was understood from the outset. This fact was forcefully demonstrated by the publication of Home Office research in 2000 that had been undertaken to assess the use and effectiveness of the Act.[1] This study found that the legislation was relatively rarely used against 'stranger' stalkers. Ninety-eight per cent of perpetrators in the sample of cases used were known to the victims. They were partners, ex-partners or relatives in 41 per cent of cases, acquaintances in a further 41 per cent of cases, and neighbours in 16 per cent of cases. The Act was deployed most often in dealing with behaviour in the aftermath of the break-up of intimate relationships. In the years since the Act came into force, it has been deployed creatively in a number of wider contexts, including employer's liability,[2] curbing public protest,[3] and restraining domestic violence.[4]

1 J Harris *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203, (Home Office, 2000). The study examined a sample of 167 harassment cases sent by the police to the CPS during 1998 for a decision on prosecution. The work also involved interviews with police officers, Crown prosecutors, magistrates and victims of harassment. The study found that 80 per cent of suspects were male, while 79 per cent of victims were female; that a relatively high proportion of harassment cases were dropped by the CPS (39 per cent compared with an average for all offences of 14 per cent), although the conviction rates on cases brought to court were relatively high (84 per cent of cases).

2 See, for example, *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

3 See, for example, *DPP v Moseley* (1999) Times, 23 June, (1999) Independent, 21 June, DC.

4 See, for example, *R v Miller* [2007] EWCA Crim 2852.

23.7 When the Government introduced its bill in early December 1996, it did so in preference to supporting a Private Member's bill that had also sought to outlaw stalking.[1] As Home Secretary, Michael Howard MP explained that this was due specifically to the fact that the alternative proposal created strict liability offences, and did not include any 'safeguards for journalists or others whose legitimate activities were similar to the actions that amounted to stalking'.[2] In contrast, the Government's bill included a general defence designed to protect behaviour that was reasonable in the attendant circumstances.

1 The alternative Stalking Bill had been introduced by Janet Anderson MP on 6 March in the previous parliamentary session, but its second reading was deferred after it failed to obtain government support (277 HCDeb 609, 10 May 1996).

2 287 HCDeb 781, 17 December 2006.

23.8 Notwithstanding the inclusion of this defence, voices were raised during the legislative phase in Parliament to highlight the fact that the performance of some common news-gathering practices would potentially expose journalists to civil liability and criminal sanction. Some MPs expressed concern that a journalist's liability would depend on interpretations of the reasonableness concept applied by others with the benefit hindsight.[1] It was thought that the measures would therefore interfere with the ability of serious investigative

journalists to conduct important research.[2] An editorial in the *Times* echoed this concern,[3] while members of the paparazzi – although adamant that they weren't engaged in 'stalking' their subjects – expected that the law would be deployed against them.[4] Commentators concurred: 'the boundaries of this legislation are not yet established but it clearly has the potential to create new 'privacy-type' rights which may be an effective weapon against the press'.[5]

1 287 HCDeb 805 and 810, 17 December 2006 (per Rupert Allason MP and Andrew Bennett MP respectively).

2 287 HCDeb 806– 7 and 813, 17 December 2006 and 577 HLDeb 924, 24 Jan 1997 (per Kevin McNamara MP, Janet Anderson MP and Lord Thomas of Gresford respectively).

3 (1996) 'Its Bad to Stalk', *Times*, 19 October.

4 A Travis (1996) 'Di's Revenge: Snappers in Jail', *Guardian*, 15 July.

5 M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) Oxford University Press, at 11.55.

Components of the Act and related powers

23.9 The Protection from Harassment Act 1997 includes two distinct prohibitions on harassment. As originally framed, it prohibited a person from pursuing a 'course of conduct' which amounts to the 'harassment of another',[1] which that person 'knows or ought to know' amounts to harassment of the other.[2] The harassed other must be an individual person.[3] A second prohibition on harassment was inserted by the Serious Organised Crime and Police Act 2005 to become a new Protection from Harassment Act 1997, s 1(1A). This provision impugns the pursuit of a course of conduct which (a) involves harassment of two or more persons, where (b) the perpetrator knows or ought to know that it involves harassment, and which (c) is intended to persuade any person not to do something that he is entitled or required to do, or to do something that he is not under any obligation to do. The amendment was designed ostensibly to ensure that the Act covered the strategy of animal rights and other protesters to target the employees of companies.[4] It ensures that a prosecution can be brought even where the individuals subjected to different episodes in the course of conduct are not one and the same person. As with the original prohibition, there is no reason to presume that the application of this new restriction will necessarily be limited to the circumstances originally contemplated when it was introduced. Depending on the 'flexibility' with which the third criterion in particular is interpreted, this second prohibition might also apply to journalists or photo-journalists engaged in newsgathering activities.

1 Section 1(1)(a).

2 Section 1(1)(b).

3 Section 7(5), as inserted by Serious Organised Crime and Police Act 2005, s 125.

4 Home Office Circular 34/2005, 'Sections 125, 126 and 127 of the Serious Organised Crime and Police Act 2005', para 9. See generally, Home Office/Attorney General's Office/DTI *Animal Welfare – Human Rights: protecting people from animal rights extremists* (Home Office, 2004). For an illustration of problems of applicability of the Act as originally legislated, see *Director of Public Prosecutions v Dziurzynski* [2002] EWHC 1380 (Admin).

be applied by the tribunal of fact to evaluate the incidents in question. There must be a relationship, however, between the repeated interactions between perpetrator and victim.

[1] Section 7(3). As originally conceived, the new law would have required 'persistent offending', implying a need for at least three interactions between the perpetrator and victim. The reduction of this element to only two instances was seen by some as extending the ambit of the legislation too far.

[2] [2000] All ER (D) 224, at 15.

[3] See para **23.12**, fn 2 above. It is noteworthy that in this case Burton J was applying the irrationality standard in assessing the appropriateness of the magistrates' conclusions. It has been suggested that 'on any lesser test the defendant's actions surely constitute one piece of conduct not a "course" of it. If calls within five minutes constitute a "course", where will the courts draw the line?': Ormerod, DC (2003) 'Commentary on *DPP v Kelly*', *Criminal Law Review*, January, 45–47, at 47.

23.15 Where the Protection from Harassment Act 1997, s 1(1A) prohibition is in play, the conduct in question on the separate occasions need not be directed at one and the same individual. In addition, conduct can be imputed to a third person as well as the actual perpetrator where that third party has aided, abetted, counselled or procured such conduct.[1] This raises the possibility, for example, that a an editor or media organisation may be found liable where a journalist has been in some way directed to perform the impugned course of conduct.

[1] Section 7(3A). In this case, the third party's knowledge is presumed to be that which was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.

23.16 No definition of 'conduct' is offered in the Protection from Harassment Act 1997. It is explained, however, that conduct can include speech.[1] Case law has also seen the legislation used in respect of other forms of communication, including the sending of letters or emails,[2] flying banners from aeroplanes or dropping leaflets,[3] making telephone calls or leaving voicemail,[4] sloganeering using a megaphone,[5] or publishing newspaper or Internet-based articles.[6] In the Home Office study conducted in 2000, it was found that common forms of conduct involved in cases sent to the Crown Prosecution Service (CPS) included threats (either face-to-face or by telephone); following the victim; waiting outside the victim's property; making silent or obscene telephone calls; damaging the victim's property; the use of violence; sending unwelcome gifts, and even ordering unwanted taxis on the victim's behalf.[7] It was also found that almost all cases involve more than one form of harassing conduct.

[1] Section 7(4).

[2] *Alexander Baron v Crown Prosecution Service* (13 June 2000, unreported), QBD and *CC v AB* [2006] EWHC 3083 (QB), [2008] 2 FCR 505, [2007] 2 FLR 301 respectively. In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, the Court of Appeal determined that it was at least arguable that a course of conduct comprising the sending of a number of unjustified bills and threats of legal action could comprise a course of conduct amounting to harassment.

[3] *Howlett v Holding* [2006] EWHC 3758 (QB), (2006) Times, 8 February, 150 Sol Jo LB 161.

[4] *Kelly v DPP* [2002] EWHC 1428 (Admin).

[5] *Silverton v Gravett* [2001] All ER (D) 282 (Oct).

[6] *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul); *Gentoo Group Ltd v Hanratty* [2008] EWHC 948 (QB).

[7] J Harris *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203, (Home Office, 2000), at 12–16.

Course of conduct in the media context: harassment by repeated publication

23.17 A number of scenarios that may arise in the media context may amount to a course of conduct for the purposes of Protection from Harassment Act 1997. A first scenario is that exemplified by the case of *Thomas v News Group Newspapers Ltd*.[1] This involved a purported course of conduct comprising publication of a series of newspaper articles. The argument before the Court of Appeal centred upon the failure of the judge at first instance to strike out a civil action brought under the Protection from Harassment Act 1997, or to give summary judgment in favour of the appellants.

[1] [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul). For discussion, see E Finch (2002) 'The Relationship Between Freedom of Expression and Harassment', Journal of Criminal Law, 66, 134–137; J Coad (2002) 'Harassment by the Media', Entertainment Law Review, 13(1), 18–20.

23.18 The impugned course of conduct occurred after a civilian police worker reported allegedly racist comments made by a number of police officers, resulting in their demotion. Referring to these events, the *Sun* newspaper published two articles and a series of readers' letters accompanied by an editorial note. The tenor of the articles and letters was that this was an example of political correctness 'gone mad' at the instigation of the claimant. Lawyers for the *Sun* accepted that the publications were 'strident, aggressive and inflammatory'.[1] They were said to have caused the police worker distress and anxiety, and – by referring to her as a 'black clerk' – to have invited racist hostility against her. She had received racist hate mail addressed to her place of work in consequence of the articles.

[1] A Rusbridger (2001) 'Courting Disaster', *Guardian*, 19 March.

23.19 At first instance, the appellants had contended that publication of a number of articles in a newspaper did not satisfy the requirement for a 'course of conduct'. They argued that this would involve a restriction of media rights to freedom of expression. Counsel revised this approach before the Court of Appeal, however, and accepted that harassment by repeated publication was conceivable in exceptional cases.[1]

[1] A vivid confirmation that a course of conduct involving the deployment of one's own rights to freedom of expression should not be expected to exclude the application of the 1997 Act can be seen in the case of *Howlett v Holding* [2006] EWHC 3758 (QB), (2006) Times, 8 February, 150 Sol Jo LB 161 (for an outline of the facts of this case, see para **23.35** below). The contention was also aired, and rejected, in *Silverton v Gravett* [2001] All ER (D) 282 (Oct).

23.20 The consequence of the Court of Appeal ruling in *Thomas v News Group Newspapers Ltd* was the opening of a new front for media organisations in their contemplation of risk under the Protection from Harassment Act 1997. One commentator has suggested that use of the available cause of action in such circumstances 'is now becoming increasingly common' to the point

COURSE OF CONDUCT IN THE MEDIA CONTEXT: HARASSMENT BY PROCESSING PHOTOGRAPHS

23.25 A final point on course of conduct in the media context is offered by way of addendum. It has been mooted by commentators that 'the taking, developing, printing, distribution and sale of the photograph . . . might be divisible into "conduct on several occasions"', with the result that someone engaging in this sequence on one occasion only would become liable under the Act.[1] At first glance, this argument seems untenable. Certainly, the events interspersed between the taking and the publication of the photographs do not involve any interaction between the putative perpetrator and victim, and so could not each comprise aspects of a course of conduct amounting to harassment.

1 Morgan (2003) 'Privacy, Confidence and Horizontal Effect: *Hello* Trouble', *Cambridge Law Journal*, 62(2), 444–473, at 463.

23.26 There may be a sustainable argument, however, to the effect that the taking and the subsequent publication of a photograph by the same person amount to two distinct events justifying intervention under the Protection from Harassment Act 1997. Should the photograph be acquired in intrusive and upsetting circumstances, publication might compound this distress. Alternatively, publication of photographs that depicted intimate events would no doubt be distressing in itself, but where publication also manifested a previous invasion – for example, if the photograph could only have been acquired by means of intrusive surveillance at a private location – appreciation of this trespass could itself be devastating in retrospect. This may involve too mechanistic an understanding of a 'course of conduct'; it may stretch the concept too far. It would also raise the prospect of criminal liability arising in some circumstances and not others by reference to quirks of factual circumstance (such as whether the taking of the photograph could properly be attributed to the writer or publisher of the subsequent article). The question may well be an academic one. There would likely be other causes of action, based perhaps on the tort of misuse of private information or the Data Protection Act 1998, that would allow preferable means of obtaining redress in such circumstances.

Knowledge possessed by the perpetrator

23.27 With its reliance on the knowledge or attributable knowledge of the protagonist, the Protection from Harassment Act 1997 overcomes the central difficulty of responding to stalking behaviour under the pre-existing criminal law: the requirement to prove some degree of intent to cause harm. In the scheme of the Act, all that is required is that the course of conduct would be viewed as harassment by a 'reasonable person in possession of the same information' as the alleged perpetrator.[1] In *R v Colohan*, a case involving the writing of a number of abusive and threatening letters to a local MP by a person suffering from schizophrenia, the Court of Appeal confirmed that the test was an objective one.[2] The hypothetical reasonable person should not be endowed with the characteristics of the perpetrator, such as a recognisable mental disorder. To ascribe such characteristics would remove from the

protection of the Act a very large number of victims, and would thus risk significantly thwarting the legislative purpose.

1 Section 1(2).
2 [2001] EWCA Crim 1251, [2001] All ER (D) 230 (May).

Exclusion of the section 1 prohibitions

23.28 Neither of the s 1 prohibitions apply where it can be demonstrated that the course of conduct in question benefits from a lawful excuse. Three such justifications are stated in s 1(3): (a) that the course of conduct was pursued for the purpose of preventing or detecting crime; (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, and (c) that in the particular circumstances the pursuit of the course of conduct was reasonable. With respect to the more serious criminal offence contained in s 4 of the Act, justifications equivalent to clauses (a) and (b) are available. In that context, however, the third justification is more limited, applying only in circumstances where the course of conduct was reasonable for the protection of the perpetrator or some other person, or for the protection of property.[1] Each subsection must be interpreted by the courts in light of the right of the wider population to receive information on matters of public importance derived from article 10 of the European Convention on Human Rights.

1 Section 4(3).

23.29 It is also open to the Secretary of State under s 12 to issue a certificate to exclude the application of the Act to a specified person with respect to anything done on a specified occasion. This can be done where the person concerned is acting on behalf of the Crown for reasons of national security, the economic well-being of the United Kingdom, or the prevention or detection of serious crime.

EXCLUSION OF THE PROHIBITIONS IN THE MEDIA CONTEXT: REASONABLE CONDUCT

23.30 The first and third of the s 1(3) defences may be relevant to the media context. The s 1(3)(c) exclusion will clearly apply in many situations in which a journalist is accused of harassment under the Act. In assessing whether a journalist's news-gathering activities were reasonable, account will be taken of their consonance with the appropriate media code of practice.

23.31 In the *Thomas v News Group Newspapers Ltd* case, once the appellants had accepted that harassment may be occasioned by repeated publication, the outcome rested on the question of whether the course of conduct could be excused as reasonable under s 1(3)(c).[1] In reaching their conclusions, the court clearly had in mind the interests of society in media freedom. Lord Phillips MR stated that in general 'press criticism, even if robust, does not constitute unreasonable conduct'.[2] The appellants maintained that to be considered unreasonable, publication of a series of articles 'would have to be extreme and be devoid of any true desire either to exercise freedom of speech or to fulfil the newspaper's responsibility to inform the public'.[3] For the court,

the question was 'whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed'.[4]

1 [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul). For an outline of the facts of this case, see para **22.18** above. So much is implicit in the structuring of the judgment, consideration of the key arguments under the heading 'the nature of reasonable conduct', and most particularly in the discussion presented in para 50 of the judgment.
2 [2001] EWCA Civ 1233, at 34, [2001] All ER (D) 246 (Jul).
3 [2001] EWCA Civ 1233, at 14, [2001] All ER (D) 246 (Jul).
4 [2001] EWCA Civ 1233, at 50, [2001] All ER (D) 246 (Jul).

23.32 An example of such abuse – or extreme publication – offered by counsel was that of the editor who uses his newspaper to conduct a campaign of vilification against a lover with whom he has broken off a relationship.[1] A further example agreed by the parties was that where the purpose of the series of articles was to invite racist hostility against the subject. Unfortunately for the appellants, the Court of Appeal found that this may have been the situation in the immediate case, and that the judge at first instance had therefore been correct not to strike out the action or to dismiss it summarily.[2] The course of conduct that amounted to harassment may not have been excusable as reasonable in the circumstances. The case was returned to the High Court.

1 *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, at 36, [2001] All ER (D) 246 (Jul).
2 It was considered arguable that reference to the police worker's race was gratuitous, that the omission of mention that a white police officer had also made complaints reflected an intention on behalf of the *Sun* that the complaints be seen as having themselves been motivated by race, that publication of details of the police worker's place of work might foreseeably result in the sending of hostile letters causing further distress, and that the letters had been deliberately selected in order to emphasise the racist element in the story. In this last regard, it remained open to a publisher to quote racist comments made by others – as determined by *Jersild v Denmark* (1994) 19 EHRR 1 – but in this case, the *Sun* did not disassociate itself from its readers' letters. Rather, the opinions that they expressed were in line with the tone of the article that had provoked them ([2001] EWCA Civ 1233, at 38–51).

23.33 On the facts, *Thomas* would appear to have been correctly decided. It is submitted, however, that in his references to the concept of harassment Lord Phillips upset the clarity of the judgment as a whole. He suggested that reasonable though sustained press criticism would not fall within the natural meaning of harassment.[1] He noted further that 'before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve', concluding that 'such circumstances will be rare'.[2] The upshot was that 'a pleading, which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment'.[3] This was said to be 'common ground' between the parties. It is not clear, however, that this common ground is adequately shored-up. That is, Lord Phillips' statements are correct only if the concept of harassment as used therein is taken to refer to the s 1 prohibition *in toto*. Certainly, only in the rare, exceptional circumstance

would a course of conduct involving publication that alarmed or caused distress to the victim be considered not to be reasonable, but if it causes distress it may well still have amounted to harassment under the s 1(1) provision.[4] Normally, 'harassment' by means of repeated publication will be legitimised by its reasonableness.

1 *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul), at 32.
2 [2001] EWCA Civ 1233, at 35.
3 [2001] EWCA Civ 1233, at 34.
4 It should be recalled that the approach taken in the Act to describing harassment is to focus upon the effect of conduct upon the victim and the knowledge of the perpetrator, and not to conceive of the concept in line with common usage or the natural meaning of the word.

Exclusion of the prohibitions in the media context: preventing or detecting crime

23.34 While journalists can rely on s 1(3)(c), it is debateable whether the s 1(3)(a) exclusion is open to them. This defence was introduced into the bill as a 'special provision' designed to ensure that various 'police activities' would not be caught by the prohibitions.[1] The openness of the statutory language used, however, leaves room for the contention that the defence should be available to anyone whose purpose is to prevent or detect crime. It is easy to see how, at first glance, this might be deployed by investigative journalists.[2] Robertson and Nicol consider that 'there is no reason why an investigative reporter in appropriate circumstances should not also be able to prove that he had the same purpose and was therefore entitled to the defence'.[3]

1 Per Michael Howard MP, 287 HCDeb 784, 17 December 2006.
2 A Hudson (2003) 'Privacy: a right by any other name', *European Human Rights Law Review*, Supp (Special issue: privacy 2003), 73–85, at 82.
3 G Robertson and A Nicol *Media Law* (Sweet & Maxwell, 2007), at 310.

23.35 An important case on this question of availability of the s 1(3)(a) defence to journalists is that of *Howlett v Holding*.[1] There, Eady J took the opportunity provided by an apparent divergence of views between opposing counsel to perceive a measure of ambiguity in the language of the provision and to deploy the rule in *Pepper v Hart*.[2] Having done so, he concluded that the scope of the defence was limited to public enforcement agencies. He explained that the generic reasonableness defence set out in s 1(3)(c) was expected to encompass journalists' investigations among other miscellaneous purposes. The possible importance to the defendant in *Howlett v Holding*[3] of the availability of the paragraph (a) defence in addition to that in paragraph (c) was that the former defence does not include any explicit reference to a requirement of reasonableness. The paragraph (c) defence was not open to him, as there was 'no reason at all' to view his behaviour as reasonable in all the circumstances.[4]

1 [2006] EWHC 3758 (QB), (2006) Times, 8 February, 150 Sol Jo LB 161. The defendant had, for a period of four or five years, occasionally flown banners from an aircraft addressed or referring to the claimant in abusive, derogatory and defamatory terms. He had also dropped leaflets from time to time over the surrounding areas, and had placed her under 'surveillance'. He was explicit that his aim was to cause her 'hell' and to enjoy his 'payback time' after she had spoken against a planning application while acting as a local councillor (para 7). He also

maintained that he was interested in demonstrating that she was perpetrating a 'benefit fraud' by claiming a disability allowance. She had previously brought two successful libel actions in response to his behaviour, during which the defendant had had access to her medical records indicating that she had a degenerative disorder of the spine.

2 [1993] AC 593, [1993] 1 All ER 42, at 30–33.

3 However, Eady J considered that even if it were available, any reliance on the paragraph (a) defence by a private citizen must invoke, objectively judged, some rational basis for the course of conduct ([2006] EWHC 3758 (QB), at 33, (2006) Times, 8 February, 150 Sol Jo LB 161). He cited in favour of this conclusion the consonant view of Tugendhat J in *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB), at 144.

4 [2006] EWHC 41 (QB), at 35.

23.36 Notwithstanding the view expressed in *Howlett v Holding*, it is argued that the point remains open. As noted by Eady J, on the facts of that case there was no strength to the defendant's claim to benefit from s 1(3)(a). Moreover, the judge readily accepted that there were two views on the legal point, and that his own may be incorrect. It is noteworthy in this respect, that in its legal guidelines on the Act the CPS maintains that 'it is possible that [the section 1(3)(a) defence] could . . . also be raised by individuals . . . such as investigative journalists . . . who claim that their activities are for the purpose of detecting or preventing crime'.[1] The last revision of the guidelines took place in December 2007, post-dating *Howlett v Holding*. Whether this debate is important in practice is a moot point. It is unlikely ever to be the case that an instance of journalistic behaviour would be defensible under subparagraph (a) and not subparagraph (c).

1 Crown Prosecution Service 'Legal Guidance: Protection from Harassment Act 1997' (CPS, 2007).

The criminal offences

23.37 The Protection from Harassment Act 1997 introduced two primary criminal offences. Section 2 prescribes the less serious of these measures. Unexcused breach of either the s 1(1) or s 1(1A) prohibitions is made a summary offence, punishable by imprisonment for a term not exceeding six months, and/or a fine not exceeding level 5 on the standard scale.[1] To date, there has been no prosecution of a journalist or paparazzo under this head. Moreover, it is not clear how often purported victims of news-gathering harassment call upon the police to intervene in their favour.

1 The upper limit of this fine is currently £5,000. Amendment to fining levels can be made by order under the Magistrates' Courts Act 1980, s 143. The determination of appropriate sentences for the two crimes established under the Act was considered by the Court of Appeal in *R v Liddle*; *R v Hayes* [1999] 3 All ER 816, [2000] 1 Cr App Rep (S) 131, CA. See also *R v Pace* [2004] EWCA Crim 2018, and Sentencing Guidelines Council, *Magistrates' Court Sentencing Guidelines: Definitive Guideline* (Sentencing Guidelines Council, 2008), 68–70.

23.38 The more serious crime is detailed in s 4(1), and covers the scenario where the person subject to the harassment is put in fear that violence will be used against him.[1] The offence is triable either way. A person convicted on indictment under s 4 will be liable to a term of imprisonment not exceeding five years and/or a fine up to the statutory maximum.[2] A person convicted summarily may be imprisoned for up to six months and/or a fine up to the

statutory maximum.[3] Home Office research has found that almost half of convictions in fact result in conditional discharge.[4] Where an offence under s 4 is not made out, it is open to the jury to substitute a finding of guilt under the s 2 offence.[5] The Crime and Disorder Act 1998, s 32(1)(a), (b) created racially or religiously aggravated forms of the two offences.[6] Journalists should be open to prosecution under s 4 only in the most unusual of circumstances. Such a prosecution is conceivable, however. A number of instances of celebrity 'hounding' by paparazzos have involved damage to property (including damage to vehicles occasioned during use), while others have culminated in prosecution of photographers for offences to the person.[7] The most notorious of all such incidents saw the paparazzi carry partial blame for a number of deaths.[8]

1 Here again, the mental requirement on the part of the perpetrator is only that he knew or ought to have known that the course of conduct would cause fear on behalf of the other party: s 4(2).

2 Section 4(4)(a).

3 Section 4(4)(b).

4 J Harris *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203, (Home Office, 2000), at 36. These figures did not vary hugely depending on whether a s 2 or s 4 offence was under consideration.

5 Section 4(5).

6 Racial or religious aggravation arises if (a) at the time of committing the offence or immediately before or after doing so, the offender demonstrates hostility towards the victim based on the victim's (presumed) membership of a racial or religious group, or (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group: Crime and Disorder Act 1998, s 28. In its aggravated form, the s 2 offence becomes triable either way, and punishable on conviction on indictment by up to two years' imprisonment and/or an unlimited fine (s 32(3)). The aggravated form of the s 4 offence remains triable either way, but the potential term of imprisonment on conviction on indictment is extended to a maximum of seven years (s 32(4)). An acquittal on the aggravated form of either offence can be substituted by a guilty finding under the standard s 2 offence, or – in the case of the aggravated s 4 offence – by a guilty finding under the aggravated s 2 offence (s 32(5)–(6)).

7 See, for example, PA Mediapoint (2007) 'Photographer sentenced for Mills-McCartney assault', *Press Gazette*, 16 August.

8 PA Mediapoint (2008) 'Jury: "Paparazzi and Henri Paul to blame for manslaughter of Diana"', *Press Gazette*, 8 April.

23.39 The limitation period for proceedings brought under the s 2 offence and the s 4 offence when tried summarily is six months.[1] For trials on indictment of the s 4 offence, the period is six years. In *DPP v Baker*, the High Court considered an appeal from an acquittal on a s 2 charge made by a magistrates' court.[2] The course of conduct in question had been spread over a period of two years and eight months. The magistrates had concluded that any evidence relating to events that took place more than six months before the complaint was made was inadmissible on the basis that it was outside the limitation period. Fulford J rejected this approach. He noted that the course of conduct was a 'continuing offence', and explained that 'so long as at least one of the incidents relied on occurred within the limitation period . . . the [limitation period was] not violated . . . the offence was only complete when the last act was . . . committed'.[3] He considered that such a 'purposive interpretation of the section meets the overall justice of the situation'; it would not limit the prosecution to pursuing only those courses of conduct that transpired within a six-month period.[4] A similar approach is adopted in the legal

guidelines published by the Crown Prosecution Service: 'the offence is completed with the final act complained of, and the six months' limitation should run from this date'.[5]

1 Magistrates' Court Act 1980, s 127.
2 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov).
3 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov), at 20.
4 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov).
5 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov).

23.40 Notwithstanding the decision in *DPP v Baker*,[1] the question as to whether the relevant limitation periods curtail the course of conduct timeframe may remain contestable. Interestingly, the CPS guidance does suggest that 'prosecutors should be ready to argue this point, as it is anticipated that some magistrates may prefer a stricter interpretation'. That the point is not absolutely fixed is also suggested by the decision in *Daniels v Metropolitan Police Comr*,[2] albeit that this was a civil action based upon s 3. In that case, the claimant had set out 11 purported instances of harassment in her particulars of claim. Some of these predated the Protection from Harassment Act 1997 itself, and could not therefore be taken into account. Mackay J also deployed the six-year limitation period relevant in the civil context to determine that actions that took place outside of that time bracket could not support a claim for damages. Cumulatively, these two factors saw him exclude six purported instances described in the claim from the outset.[3] The effect of the Protection from Harassment Act 1997 is prospective only, and so the judge in *Daniels* was correct to ignore events that predated the Act. The second excluding factor on which he relied, however, would appear to have ignored the conception of the course of conduct as a 'continuing offence' as developed in the earlier case. It is submitted that the approach in *DPP v Baker* is to be preferred for the reasons given.

1 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov).
2 [2006] EWHC 1622 (QB), [2006] All ER (D) 36 (Jul). It should be noted that the point did not become critical in *Daniels* as, on determination of the facts of the case, few of the instances detailed in the particulars of claim were found to have occurred, and those that did were found not to have amounted to harassment.
3 [2004] EWHC 2782 (QB), [2004] All ER (D) 28 (Nov), at 2–3 and 52.

23.41 While the Protection from Harassment Act 1997 contains two primary arrestable offences, now augmented by the powers under Criminal Justice and Police Act 2001, ss 42 and 42A, it is not clear how often they are deployed in aid of press-embattled individuals.[1] It is open to those harassed by journalists and paparazzi to request that the police intercede to disperse those besetting them. No doubt this does occasionally occur; at least one interest group that sometimes advises those experiencing the media scrum specifically recommends that course.[2] Nevertheless, the evidence to be drawn from some of the more notorious recent illustrations of the problem – for example, the experiences of Kate Middleton, the girlfriend of Prince William, surrounding her 25th birthday – does not suggest that it is a frequently adopted approach.[3] It may be that any advantage in shifting the burden of costs is outweighed by the loss of control over proceedings, particularly when for some there may be advantages to be gained by accommodation given the symbiosis of celebrity

figures and the media. There may also be a reticence to introduce the taint of criminality in a context where the justification for action might be based upon freedom of expression, the public interest, and the right of journalists and/or photographers to earn a living.

1 In response to a Freedom of Information Act request made in May 2009, the Metropolitan Police Service (MPS) indicated that a total of 9,228 persons had been accused of offences under ss 2 and 4 of the Act in the previous five years. None of these persons was recorded as being a journalist or reporter on the relevant database. There were, however, 3,301 records where the occupation of the accused had been left blank. The MPS refused to investigate the records further in order accurately to identify whether or not these persons were journalists or reporters on grounds of cost (as permitted under the Freedom of Information Act 2000, s 12).
2 MediaWise Trust (2007) Memorandum. Reprinted in Select Committee on Culture, Media and Sport (2006–07) 'Seventh Report: Self-Regulation of the Press', HC 375, Ev1–9, para 2.01.
3 Middleton's experience subsequently became one focus for a Parliamentary inquiry – see Select Committee on Culture, Media and Sport, fn 2 above.

Imposition of restraining orders following criminal conviction

23.42 In addition to any sentence imposed following conviction under ss 2 or 4, the court may impose a restraining order.[1] The power to make orders was afforded to the court under Protection from Harassment Act 1997 in order to avoid the necessity of a victim having to endure a second hearing in a civil court to gain a preventative order to prevent future harassment.[2] This was a novel concept in criminal enforcement and apes the civil injunction. Otherwise available criminal sanctions do little directly to constrain the future behaviour of the perpetrator. Even a custodial sentence may not prevent further harassment, as achieved, for example, by means of letters, telephone calls or third party instruction.

1 Section 5(1). The Domestic Violence, Crime and Victims Act 2004, s 12 provides further for the imposition of a restraining order where a defendant has been acquitted should the court consider that, notwithstanding acquittal, an order is necessary to protect a person from harassment by the defendant. This section has not yet been brought into force.
2 Per Michael Howard, 287 HCDeb 785, 17 December 2006.

23.43 The aim of any restraining order must be to protect the victim of the offence or any other person mentioned in the order from further conduct that amounts to harassment or that will cause a fear of violence.[1] The purpose of the order is protective, not punitive. Thus, its features should reflect the needs of the victim and not the seriousness of the offence per se. An order prohibits the person convicted from doing anything described therein. The contents of the order are at the court's discretion, subject to their contribution to the purpose of avoiding future harassment. This might include, for example, contacting the victim or their family, or visiting the victim's home or workplace. Although an order can be made only at the time of conviction, it can be varied by the court on the application of any of the concerned parties. Variation can include extension in time. Breach of such an order without lawful excuse is itself a criminal offence punishable to the same extent as the s 4 offence.[2] Orders should contain a written statement of the consequences of

to influence. This latter person can be a company, although s 7(5) clarifies that only individuals are capable of being harassed. Section 3(3)–(9) applies to both s 1 prohibitions.

2 This question was at issue in *Jones v Hipgrave* [2004] EWHC 2901 (QB), [2004] All ER (D) 217 (Dec). The appellants contended that the civil remedy under s 3 is akin to an application for an anti-social behaviour order under the Crime and Disorder Act 1998, and that on the strength of this analogy any action thereunder should be viewed as civil proceedings to which the criminal standard of proof applies (as per the House of Lords decision in *R (on the application of McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593). Tugendhat J rejected that analogy.

3 The special time limit for actions in respect of personal injuries generally (three years) was disapplied by s 6. For further discussion on limitations periods, see paras **23.39–23.40** above.

23.49 Where a claimant considers that any such injunction has been breached, he may apply for the issue of a warrant for the arrest of the defendant.[1] The judge will take evidence on oath and must then determine whether there are reasonable grounds for believing that the defendant has indeed breached the injunction before issuing a warrant.[2] Breach of an injunction imposed under the Act by proceeding with restricted behaviour without lawful excuse is both a contempt of court in the normal way and a standalone criminal offence under s 3(6). A defendant may not be punished, however, under both the standard rules of contempt of court and the particular rules of s 3.[3] Conviction under the specific criminal offence in s 3(6) can result in punishment of up to five years' imprisonment and/or an unlimited fine.[4] The civil remedy became available from June 1997,[5] although the special arrest and prosecution powers under sub-ss (3)–(9) were brought into force only from September 1998.[6]

1 Section 3(3).

2 Section 3(5).

3 Section 3(7)–(8).

4 If tried on indictment. The level of the fine will be fixed in accordance with the Criminal Justice Act 2003, s 164 which requires the court to take into account the seriousness of the offence and the wider circumstances of the crime (including the financial circumstances of the defendant). If the defendant is tried summarily, the sentence imposed can be a maximum of six months in prison and/or a fine up to the statutory maximum (£5,000): s 3(9).

5 Protection from Harassment Act 1997 (Commencement) (No 2) Order 1997 (SI 1997/1498).

6 Protection from Harassment Act 1997 (Commencement) (No 3) Order 1998 (SI 1998/1902). The delay was to allow time for consultation on and development of rules of court and appropriate forms.

23.50 Aside from the restraint of the defendant by means of injunction, a claimant alleging breach of the s 1(1) prohibition may be awarded damages for any anxiety caused by and any financial loss resulting from the harassment. That damages will be available for actual losses suffered follows from that fact that s 3(1) makes the breach of the s 1(1) prohibition the potential subject of a civil claim. Section 3(2) is not intended to grant the court jurisdiction to make a damages award, but rather to make clear that damages will *also* be available for distress alone.[1] Damages may also be awarded for other demonstrable harms caused.

1 *Jones v Hipgrave* [2004] EWHC 2901 (QB), [2004] All ER (D) 217 (Dec), at 38, per Tugendhat J.

Orders in the media context: recent illustrations

23.51 While no s 3 orders were made against (photo-)journalists during the first decade after the Protection from Harassment Act 1997 came into force, more recently celebrity figures have been awarded injunctions to prevent harassment by members of the paparazzi on a number of occasions. The terms of the settlement approved by the High Court in Sienna Miller's case included an undertaking to the court not to pursue a course of conduct amounting to breach of the s 1(1) prohibition.[1] This included commitments not to pursue or follow the claimant by any means whatsoever; to place her under surveillance; to take pictures of her in specified locations, while being pursued by photographers, or otherwise where she enjoys a reasonable expectation of privacy, or otherwise to harass or intimidate her. It was notable, however, that the terms of the order specifically acknowledged that there would be occasions upon which the actress must accept that photography would take place without her explicit consent. This list of occasions included her entry or exit from a bar, restaurant, nightclub or similar establishment; in public places generally when not visibly upset or otherwise distressed, and at 'red carpet events'. The terms of the settlement also included a substantial sum of damages compensating for the anxiety caused by the harassing conduct. In sum, in broad outline the remedies agreed reflected the balancing exercise between articles 8 and 10 of the European Convention on Human Rights as struck under media law more generally.

1 The order is reproduced at: http://www.carter-ruck.com/recentwork/Sienna_Miller_Court_Order21_11_08.pdf [accessed April 2009].

23.52 Lily Allen's order placed significant restrictions upon both the named and unnamed parties. The unnamed parties were identified as those 'individuals responsible for taking photographs of the claimant outside her home and in other public places during February and March 2009'. It applied to those persons in order to prevent a further or an apprehended breach of the s 1 prohibition. Any subsequent hearing on an alleged breach of the injunction by others would necessarily then involve evidence to the effect that the impugned party was a member of the constrained group, or whether those others should henceforth be added as co-defendants.[1] Amy Winehouse's version restrained addressees from seeking to photograph her either at home, in the homes of any members of her family or friends, outside her home, or in other public places after pursuing her. They were also constrained from following her, and from approaching within 100 metres of her home.

1 CPR 19.6(4)(b) provides that 'any judgment or order given in a claim in which a party is acting as a representative . . . may only be enforced . . . against a person who is not a party to the claim with the permission of the court'; see further *Huntingdon Life Sciences Group plc v Stop Huntingdon Animal Cruelty* [2007] EWHC 522 (QB), [2007] All ER (D) 506 (Mar).

Orders in the media context: challenge to over-broad restrictions

23.53 Should a court impose an order following a successful s 3 action that is over-broad in terms of the constraints on behaviour that it imposes, that order can be subject to challenge. The test is whether the restriction is

necessary to prevent future harassment. For example, the constraints placed by the order may extend inappropriately to cover journalists' behaviours with the result that media freedom is abridged.

23.54 Precisely this scenario arose in the case of *RWE Npower plc v Carrol*.[1] The background to the case was that RWE npower had obtained planning permission to dispose of pulverised fuel ash from a coal-fired power station on a site in Radley that had formerly been used as gravel pits, but which had subsequently become a local beauty spot. The company had obtained an injunction under the Protection from Harassment Act 1997 against a number of named protestors, but also vicariously against 'all protestors conducting activities against the claimants' intended use [of the site]'.[2] Under the order, 'protestors' were understood to be the named parties, any person acting in concert with the six named parties to perform any act prohibited under the order, and also 'any other person who has been given notice of [the] order'. Under paragraph 6.2 of the order, protestors were precluded from 'photographing or videoing the protected persons or their vehicles'. Under paragraph 6.3, they were required not 'to publish by any means whatsoever names . . . photographs or any other material serving to identify a protected person'. The company maintained that the order was not intended to restrict media reporting.[3] Whatever the truth of this assertion, this explanation would seem to contradict the clear wording of the order. It was also countermanded by the serving of the injunction upon a photographer who clearly identified himself as a member of the press.

1 [2007] EWHC 947 (QB), [2007] All ER (D) 254 (Apr).

2 A copy of the order is reproduced at: http://www.epuk.org/News/475/the-npower-injunction-in-full [accessed April 2009]. The actions of the company and its ramifications for freedom of expression were criticised by Channel 4 News (see http://www.channel4.com/news/articles/society/environment/injunction+stops+power+protest/323347 [accessed April 2009].

3 Some weeks after having made the order, Calvert-Smith J indicated that it had not been his intention to restrict media reporting of events: (2007) 'Npower injunction judge: it was never meant to be used against professional photographers', EPUK News, 8 March.

23.55 The named defendants, supported by the civil liberties organisation Liberty and the National Union of Journalists, challenged the breadth of the order. In advance of the hearing, the company indicated that it would agree to the revision of the terms of the order that restricted the activities of photo-journalists. Teare J continued the injunction but allowed some further, minor revisions at the behest of the named defendants, and asked the parties to confirm a mutually acceptable rewording. This process culminated in the excision of the third limb of the definition of protestors so as to release journalists from the strictures of the order.[1]

1 (2007) 'Court challenge to npower injunctions lifts restrictions on photography', *EPUK News*, 15 May; (2007) 'NUJ wins fight to lift "Orwellian" injunction', *Press Gazette*, 29 May.

23.56 A parallel case was that of *University of Oxford v Webb*, albeit that there the challenge was brought by one of the named defendants, and unsuccessfully so.[1] The background to the case was the campaign of violence and harassment conducted against Oxford University staff generally, and also against contractors engaged to construct a bio-medical research laboratory. A s 3 injunction was imposed under the Protection from Harassment Act 1997

in November 2004.[2] It was subsequently varied on a number of occasions. In the original order, the tenth defendant was listed as the Animal Liberation Front (ALF). The order was varied in March 2006, with the tenth defendant then being listed as 'Robin Webb sued on his own behalf and as representing all persons acting as members, participants or supporters or in the name of the unincorporated association known as the Animal Liberation Front'. Webb acted as a spokesperson for the ALF.[3]

1 [2006] EWHC 2490 (QB).

2 *Chancellor, Masters and Scholars of the University of Oxford v Broughton* [2004] EWHC 2543 (QB), [2004] All ER (D) 155 (Nov).

3 This role was explained in ALF literature averred to by Irwin J, *University of Oxford v Webb* [2006] EWHC 2490 (QB), at 28.

23.57 Webb applied to have the revised order set aside to the extent that it impugned him personally, inter alia, on the basis that – in line with Strasbourg jurisprudence interpreting article 10 of the European Convention on Human Rights – he should be free to report views sympathetic to violent terrorist action.[1] The injunction constrained his ability to do so. Irwin J acknowledged the freedom of expression issue in play, but concluded that 'there is a world of difference between a reputable journalist reporting extremist views on the one hand, and on the other hand a concerted and considered attempt to build up a threat so as to apply pressure to people, as part of a strategy linked directly to those committing crimes'. He added that Webb was 'not a journalist keeping the public informed . . . [but rather] a propagandist . . . [whose] activity goes far beyond legitimate self expression'.[2] Implicitly, had Webb in fact been acting as a 'mere journalist', the constraint on his reporting may well have been deemed illegitimate.

1 *Surek and Ozdemir v Turkey* [1999] ECHR 24762/94. That case concerned the reporting of violent activities that were intended to promote Kurdish nationalism in the south eastern region of Turkey.

2 *University of Oxford v Webb* [2006] EWHC 2490 (QB), at 72. Irwin J also concluded that Webb was 'a central and pivotal figure in this organisation, who is fully adherent to its aims, strategy and tactics' (at 67).

Reflections

23.58 It is clear that the parameters of the s 1 prohibitions have been designed to be pragmatic, so as to encompass a broad range of situations. For some commentators this is troubling. It has been argued that the courts should be slow to expand the scope of the course of conduct that amounts to harassment given that criminal liability is potentially in question. The fear is that 'creative interpretations' could amount to retroactive criminalisation of behaviour; the diagnosis is defective drafting, and the prescribed treatment is revising legislation.[1]

1 Morgan (2003) 'Privacy, Confidence and Horizontal Effect: *Hello* Trouble', *Cambridge Law Journal*, 62(2), 444–473, 462–464; Ormerod, DC [2001] 'Commentary on *R* v *Hills*', *Criminal Law Review*, April, 318–320.

23.59 The legislation does leave significant room for judicial interpretation, but it is not altogether obvious that such a critical conclusion is justified. The Parliamentary record demonstrates that the open contours of the prohibition were fully intended. Moreover, it is not self-evident that this approach has resulted in deleterious outcomes. Where specific problems, usually technical deficiencies in coverage, have been identified they have been addressed by amending legislation. When applying the prohibitions, interpreting the available defences and determining the breadth of any restraining orders or injunctions, the courts must certainly pay strict regard to the competing rights and interests that will often affected by their determinations. There is not substantial evidence that they have systematically failed to do so.

C. REGULATORY OPTIONS: THE ROLE OF OFCOM AND THE PRESS COMPLAINTS COMMISSION

23.60 One explanation for the relatively light use of the Protection from Harassment Act 1997 to control news-gathering intrusions on privacy may be that regulatory bodies have offered effective alternatives. In the UK, this function is split between the Press Complaints Commission (PCC) and Ofcom. The former, self-regulatory body oversees the newspaper and periodicals sector, assessing performance against the Editor's Code of Practice. This was written and is periodically revised by an industry body. The PCC has also developed a pre-publication intervention regime by which it seeks to end any continuing harassment. Ofcom is a statutory regulator empowered by the Communications Act 2003 to review all UK broadcasters' performance against a Broadcast Code. In addition, the BBC has published Editorial Guidelines to which all programme-makers are required by contract to adhere.[1]

[1] BBC 'Editorial Guidelines: The BBC's Values and Standards' (2010) BBC.

Regulation of press news-gathering activity

23.61 Since its inception, the PCC has recognised the deleterious repercussions of media intrusion. It has asserted often that harassment is an issue on which the Editors' Code is rigorous in its requirements. Clause 4 is the most important clause in this respect. It provides that:

(i) Journalists must not engage in intimidation, harassment or persistent pursuit.
(ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist, nor remain on their property when asked to leave and must not follow them.
(iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

The references to 'persistent pursuit' and the obligation not to use non-compliant material from freelance sources were added in November 1997,

following the death of Princess Diana and the suggestion that members of the paparazzi might be implicated.[1]

[1] The PCC maintained that many of the Code changes dealt with areas – including those focused on news-gathering behaviours and the media scrum – on which it had already been working throughout the year. Nevertheless, Lord Wakeham, as chairman of the Commission, had ordered an urgent review into the issue of harassment and intrusion in the immediate aftermath of Princess Diana's death, which was influential in the revision. PCC 'Annual Report 1997' (PCC, 1998).

23.62 A number of other clauses in the Editors' Code of Practice may also have a bearing on a complaint brought on grounds of media intrusion or harassment. These include elements of clause 3 on privacy generally, clause 5 on intrusion into grief or shock, clause 6 on children, clause 8 on hospitals, clause 9 on the reporting of crime, and clause 10 on clandestine devices and subterfuge. All of these clauses are subject to exceptions relating to the public interest.

23.63 The impact of the Code manifests in three ways. First, many of those working for newspapers are contractually bound to abide by its prescriptions. The range of those covered has extended over time, first including editors, then directly employed journalists and latterly persons providing freelance services. Where adopted, this approach should ensure that compliant behaviour is secured by contractual obligation.[1] Secondly, the credibility and threat of ex post enforcement of the Code is occasionally relied upon to prompt newspapers and magazines to withdraw their own staff from situations in which media subjects become harassed, and further to commit not to publish material provided by others that has been obtained in such a context. The hope is that such contemporaneous intervention can dissipate the media scrum. Finally, the PCC can be asked to apply the Editors' Code either in resolving or in adjudicating on actual complaints. The latter two elements of this enforcement regime are considered in the paragraphs that follow.

[1] This requirement has been endorsed by the House of Commons Select Committee on Culture, Media and Sport: (2006–07) 'Seventh Report: Self-Regulation of the Press', HC 375, para 58. For this contractual oversight successfully to promote compliance with the Code, however, the employer media organisations must be motivated to act.

Contemporaneous intervention to end harassment

23.64 The PCC has published advice for persons subjected to harassment.[1] This document recommends 'a number of practical steps' that can be taken by those subjected to media harassment. The majority of these steps might be described as 'self-help': presenting oneself as cognisant of the regulatory position while politely and firmly rejecting invitations to engage; appending written notices to doors; relying on a trusted intermediary, and altering voicemail messages to rebuff entreaties.[2] The final piece of advice is to contact the PCC, which operates a 24- hour advice service and which promises to act to end harassment through editorial contacts or by means of a general 'desist notice'. The document suggests that contacting the PCC during episodes of harassment will obviate the need for any subsequent complaint to be made.[3]

[1] PCC 'Harassment: what to do if you are being harassed by a journalist', (PCC, 2001). The advice was published following the case of *Swire (Glenn) v Mail on Sunday* (2001) PCC

Report 54.

2 The PCC does not recommend, as some other bodies have done, that victims of media intrusion contact the police to alleviate their immediate concerns.

3 Elsewhere, representatives of the PCC have speculated that the purportedly low number of harassment complaints that it receives is testament to the success of its pre-publication interventions – see C Meyer 'Building Confidence', speech delivered at the Foreign Press Association, London, 25 May 2006.

23.65 While it remains necessarily largely invisible, the PCC maintains that its private advisory notice regime has become an important element in efforts to counteract media harassment. It asserts that such contemporaneous intervention by desist notice can dissipate the media scrum; that editors might 'call off their dogs', and also reject material provided by others. The system has been in place formally since 2003, and from that time the PCC has acted as an informal clearing house for the circulation of messages across the range of media platforms. In 2007, over 50 desist notices were circulated by the PCC although in previous years the figure was either unrecorded or significantly lower.[1] While such notices are advisory only, the PCC can cite a number of instances in which individuals subject to media intrusion has availed of the facility.[2]

1 PCC 'Annual Report 1997' (PCC, 1998), at 15. Seventeen notices were issued the previous year.

2 PCC 'Annual Report 2008' (PCC, 2009), at 8–9; T Toulmin 'Regulation of the Print Media', speech delivered at The Times/Matrix Privacy Forum, London, 28 April 2009.

23.66 In 1995, the PCC brokered a particular pre-emptive arrangement with the press whereby Princes William and Harry would be treated in line with the prescriptions of the PCC Code.[1] In return, the Palace committed to ensure that photographs and other information regarding them would from time to time be made available. The arrangement was revised somewhat in 1999, in line with the more general revisions to the Code made the previous year. The review was prompted by complaints from the Palace in respect of two particular newspapers (the *Mirror* and the *Daily Star*),[2] and the more general 'cumulative intrusion' caused by the accretion of apparently innocuous stories about the princes in late 1998. The revised guidance to editors emphasised the unfairness of continual attention, while accepting that there could be no 'total blackout' on stories regarding the princes.[3] Essentially, this arrangement worked well. At around this time the PCC also took the opportunity afforded by a complaint made by the then prime minister and his wife to offer general guidance on the coverage of children, especially those of public figures.[4]

1 This was achieved by means of a cautioning speech delivered by Lord Wakeham as chairman of the PCC in which he set out the basis of an understanding, co-ordinated with a pragmatic and to some extent conciliatory letter sent to editors by David English, then chair of the Code Committee: A Marr (1995) 'Privacy, the press and happy hypocrites', *Independent*, 24 August; A Culf, (1995) 'Wakeham warns the tabloids off William', *Guardian*, 24 August; (1995) 'Fleet Street royal pack growls as it is called to heel', *Guardian*, 24 August.

2 PCC Report 46 (HRH Prince Charles).

3 PCC 'Annual Report 1999' (PCC, 2000).

4 PCC Report 47 (the Prime Minister and Mrs Blair). See also PCC 'Annual Report 2000' (PCC, 2001).

Ex post adjudication on harassment

23.67 Notwithstanding the willingness of the PCC to intercede early on behalf of those suffering press harassment, several complaints alleging harassment are made to the PCC each year. Between July 1996 and July 2009, around 50 complaints based exclusively or in part upon clause 4 have been adjudicated by the PCC.[1] A further 70 to 80 such complaints were resolved through its offices.[2] Compared with those brought under other clauses of the Code, this is a small number of complaints over this period. The percentage of complaints under clause 4 that proceed to adjudication, however, is relatively very high. This suggests either that complainants are peculiarly unwilling to accept resolution short of public admonition in this context, or that newspapers are often loathe to cede that they have acted inappropriately in their newsgathering practice.

1 Adjudication reports are available on the PCC website from that date. The majority of these complaints (31) were made against national newspapers (including Scottish editions). Fifteen complaints were made against local or regional newspapers, and two against magazines. Two complaints were brought against multiple newspapers drawn from each category. Of the adjudicated complaints made against national newspapers, four were made against broadsheets, 18 against 'middle-brow' papers, and nine against tabloids.

2 Forty-two resolved complaints were made against national newspapers, 29 against local or regional newspapers, and two against magazines. One complaint was brought against multiple newspapers drawn from each category. Of the resolved complaints made against national newspapers, two were made against broadsheets, 27 against 'middle-brow' papers, and 13 against tabloids.

23.68 In applying the Code, the Commission does not operate a strict system of precedent, although it will refer back in its adjudications to earlier rulings in which the interpretation of given clauses has been at issue. Importantly, because the PCC does not act as a fact-finding tribunal – but rather takes the facts as presented to them by the complainant and the responding party – discrepancy of evidence may frustrate the adjudication process. In respect of a number of complaints based upon clause 4, this has proven a particular problem given the centrality of what happened and when in the interaction between the parties.[1]

1 See, for example, *Messrs R & CB Masefield on behalf of their client v Daily Mail* (1996) PCC Report 37; *Lenska (Rula) v Daily Mail* (1997) PCC Report 39; *Connery (Sean) v Daily Record* (1999) PCC Report 47; *Crompton (Barbara) v Evening Standard* (2002) PCC Report 58; *Collins-Plante (Syrita) v People* (2001) PCC Report 55; *Cousins (Keith) v Sunday Times* (2006) PCC Report 73.

Core concepts in clause 4

23.69 There is obviously a difficulty in distinguishing between, on one hand, intrepid journalistic investigations involving multiple contacts with subjects, and on the other, persistent pestering and other behaviours amounting to harassment. In the face of this quandary, the PCC has found it important 'to point out that clause 4 does not amount to a general prohibition on journalists asking questions . . . rather, it says that they must not persist in their attentions, once asked to desist'.[1] The first paragraph of clause 4 is resolute: journalists must not engage in 'harassment', 'persistent pursuit', or 'intimidation'. The second paragraph of clause 4 reads as a development of the

insufficient grounds to order an injunction where the content of the proposed report is still unknown (Court of Appeal – Oberlandesgericht Hamburg ZUM 2000, 163).

The claim for injunction was developed by the courts on the basis of the various general tort provisions in the German Civil Code (section 823, 1004 'Bürgerliches Gesetzbuch') and specifically in connection with defamation offences as regulated by the German Criminal Code (section 186 ff 'Strafgesetzbuch'). On the basis of the Civil Procedure Code (section 32 'Zivilprozessordnung') an injunction may be granted by any court where the violation of the rights in question either took place or is likely to take place. In cases where nationwide publication is at issue, every court is potentially competent. However, a number of courts (located in Hamburg, Berlin and Munich where Germany's major media enterprises are situated) are staffed by judges specialised in media cases and it is therefore advisable for an injunction to be sought in these courts where possible.

In the case of violation of an injunction the court may impose a fine of up to EUR 250,000.

Right of reply

43.3 The right of reply is based on the concept of 'audiatur altera pars' (listening to both sides) and gives an individual affected by a publication in the media the opportunity to reply to the same. The right exists irrespective of the truth or otherwise of the published material. However, the following formal requirements and limitations generally apply (subject to variation between states):

(a) Only individuals named by a publication or otherwise directly affected by it are entitled to a right of reply.
(b) The right of reply is limited solely to statements of fact. There is no right of reply to an expression of opinion.
(c) The reply must address the facts that appeared in the publication and those facts alone. No additional commentary is allowed.
(d) The required reply has generally to be signed by the claimant in person (or by his duly appointed attorney) and the original thereof has to be served on the publisher.
(e) The reply must be served on the publisher 'without delay'. An absolute limitation period of three months applies, but the courts will (if called upon to do so) consider all the facts of the case and, in some instances, service two weeks after the publication came to the offended party's notice has been held to be insufficiently prompt.

Where these conditions are met, the publisher must publish the reply and must do so promptly and in a similar manner as it published the original item. Thus, for example, if the original article was published on the front page of a newspaper under a bold headline, then the court may take the view that the reply should also be published on the front page under a bold heading.

The protection and enforcement of the right of reply is a matter for the various states and is governed by the various press laws and similar statutes relating to the electronic media that have been passed at state level. Claims alleging a

failure to publish a requested reply must be filed in the District Court ('Landgericht') of the place of domicile of the relevant media enterprise.

Retraction

43.4 The general provisions of the German Civil Code (section 1004 'Bürgerliches Gesetzbuch') have also been used by the courts to develop the remedy of retraction or correction.

Again, the remedy is only available in cases involving untrue factual statements (as opposed to opinions) and the claimant must also prove that a retraction is necessary to restore his reputation, ie that the untrue statement is not so minor in effect that it could not harm his reputation anyway.

The remedy goes beyond the right of reply in that it does not merely involve the offended individual expressing his own point of view but obliges the media entity to admit in its own publication that it was wrong and to do so in terms which it may well find unpalatable. In consequence, and given the fact that freedom of the press is guaranteed in Article 5 of the German Constitution, a retraction or correction will only be ordered after a full trial. Indeed, such an order only becomes enforceable when the publisher has exhausted all such appellate avenues as it is inclined to take.

General damages

43.5 Claims for general damages rest primarily on the broad provision of section 823(1) of the German Civil Code requiring a person to compensate for the damage caused if he 'intentionally or negligently violates, without justification, the life, bodily integrity, health, freedom, property or other right of another person'. Privacy and personality rights are held to be covered by this wording. The award of general damages in cases of defamation also follows from the terms of section 823(2) of the Civil Code, which envisages the payment of such compensation in the event of a deliberate violation of a statutory obligation; the prohibition of defamation under section 185 ff of the Criminal Code brings such cases within the boundaries of this provision. Note the requirement for the violation to be committed 'intentionally or negligently' or 'deliberately'.

General damages will only be awarded by way of final judgment after trial. In order for such an award to be made the claimant must prove a causal connection between the published material and the damage that is said to have occurred.

Exemplary damages

43.6 The position regarding exemplary damages is somewhat anomalous under German law. Under civil law doctrine there is no room for punitive elements outside the criminal law. However, the development of compensatory remedies in relation to the infringement of those personality rights that are protected by Article 2 of the Constitution has seen the courts explicitly calculate damages, in part, by reference to an amount needed to deter the

defendant from future violations (German Superior Court of Civil Law – Bundesgerichtshof NJW 1996, 984 – '*Caroline I*').

A claim for damages of this kind can only be brought where:

(a) there has been a severe violation of privacy or other personality rights;
(b) the defendant has acted intentionally or negligently; and
(c) the consequences of the violation could not be remedied by other means (such as reply, retraction, or the general damages that would otherwise be awarded).

Such an award can again only be made by way of final judgment after trial.

Issues relating to the defence of claims in defamation and privacy

Fact and opinion

43.7 The freedom of the press guaranteed by the German Constitution protects both:

(a) statements of fact, provided they are true and do not violate the right to privacy; and
(b) expressions of opinion, regardless of whether these are 'right' or 'wrong'.

As the protection of opinion is much broader than that afforded to factual statements, it is crucial to distinguish between the two. In general, the courts view a factual statement as being one that is capable of proof by reference to witness or documentary evidence, and opinion as being not susceptible to such proof. The interpretation of words is undertaken from the hypothetical point of view of the average reader, viewer etc. Where more than one interpretation is possible, the courts are obliged to select an interpretation which protects the freedom of expression.

Burden of proof

43.8 Under German civil procedure a claimant generally has to prove the entire factual basis of his claim. However, as the remedies of injunction, retraction and damages require the presence of an untrue factual statement and the burden of proving this, if placed upon the claimant, would involve him in attempting to prove a negative (for example, that he was not at a certain place at a certain time), the burden of proving the truth of a published factual statement is placed upon the defendant.

The media also has the burden, when seeking to persuade the court that it has met standards of responsible journalism (see below), of proving that it has been duly diligent in its research. However, if it succeeds in doing this, the burden of proof swings back to the claimant.

Responsible journalism

43.9 Where the media can demonstrate that it observed generally accepted standards of responsible journalism when researching and publishing the

material complained of, it will have a defence, even if elements of the published material transpire to be untrue, and no damages or injunction will be ordered.

A wide degree of latitude is given to the media as regards journalistic standards and the courts have held, for example, that a responsible journalist or editor does not have to double-check the accuracy of reports received from recognised news agencies such as Reuters and AP or of press releases issued by public authorities, such as the police and public prosecutor.

Otherwise, the degree of diligence which must be exercised is dependent upon the seriousness of the material that is at stake; the more serious the subject matter and the defamatory allegation that is to be published, the more detailed and comprehensive the research that must be undertaken and the more careful the language used in publication. By way of practical example, it has been held that reliance on a single anonymous source in support of an allegation that a member of parliament took a bribe represented a grave violation of standards of responsible journalism (German Superior Court of Civil Law – Bundesgerichtshof NJW 1977, 1288).

Reports on the basis of suspicion

43.10 In seeking to balance the legitimate public interest in matters of public significance that is protected by Article 5 of the German Constitution with the personality rights of the individual protected by Articles 1 and 2, the German courts have also developed a defence which protects reports relating to the existence of suspicion or speculation. Where such reports make it clear that they are referring to suspicion or speculation, rather than established fact, they will be protected even if the suspected matters prove, in the event, to be untrue. However, for this defence to apply the report in question must also:

(a) relate to a matter of genuine public interest and significance; and
(b) have been researched and published in accordance with recognised standards of responsible journalism (see above – again, the more serious the reported subject matter, the greater the degree of diligence that must be shown in this respect by the media).

In order to benefit from this defence the publisher must, in particular, seek and report the suspect's comments on the matters at issue and must in its report address those matters in an objective fashion, including any material that is in favour of the suspect.

Privacy

43.11 German law protects 'the right to live a life without the publication of intimate details' (German Constitutional Court – Bundesverfassungsgericht 101, 361, 380 – *Caroline von Monaco*).

However, this right is not protected absolutely but is, in practice, balanced with the freedoms of expression, opinion and the press guaranteed by Article 5 of the German Constitution. In order to achieve this balance, German law has conceptualised different spheres of an individual's life as follows:

(a) The *public sphere* covers all aspects of life which are intentionally conducted in front of the world at large and directed at the public (for example, a public appearance by a politician or celebrity).
(b) The *social sphere* which covers all aspects of life which are conducted in front of the public, without being directed to the public (for example, an everyday shopping trip carried out by a politician or celebrity).
(c) The *private sphere* covers aspects of life which are only known to persons who have been granted access to them (for example, home and family life).
(d) The *intimate sphere* is the 'last resort', where it can be assumed that everyone generally wants not to share their life with anyone save those closest to them (for example, health and sexual matters).

Generally, the publication of facts relating to the intimate and private spheres is, without the consent of the subject, unlawful. However, if an individual person has himself made things public which belong to those spheres, he may no longer invoke the protection of the law (for example, where a celebrity has previously invited the media into his home; see German Constitutional Court – Bundesverfassungsgericht NJW 2006, 3406). Protection will also not be afforded where the facts in question relate to matters of major public interest (for example, a private telephone conversation between two politicians which reveals their political intentions). A lesser degree of genuine public interest will be sufficient to reduce the protection applicable to the social sphere, while no protection at all exists in relation to the public sphere.

A series of decisions handed down by the Constitutional Court (Bundesverfassungsgericht) in 2008, following the European Convention on Human Rights judgment in *von Hannover* (ECHR, 24 June 2004), clarified German privacy law in relation to the use of photographs and recognised a new 'core area of privacy' covering those personal situations where even celebrities and other public figures can reasonably expect to be left alone. While, previously, photos of such persons taken while they were, for example, on holiday or out shopping were held to fall within the social sphere and thus to constitute no infringement of privacy, following these decisions of the Constitutional Court the taking and publication of such photos are to be treated as being unlawful, unless the publisher is able to satisfy the court that there is a legitimate public interest in them, for example because they demonstrate hypocrisy on the part of a public figure.

2. GIBRALTAR

Defamation

43.12 The law of defamation in Gibraltar, codified in the Defamation Act 1960 [1] (formerly the Defamation Ordinance), is largely based on various provisions taken from different stages in the evolution of defamation law in England and Wales, ranging from the Libel Act 1792[2] to the Defamation Act 1952.[3] The Defamation Act 1960 is informed by the common law of Gibraltar as well as that of England and Wales, insofar as it is applicable, in accordance with section 2 of the English Law (Application) Act 1962.[4]

1 Act No 1960-36 (available on Gibraltar Government legislation website www.gibraltarlaws.gov.gi/articles/1960-36o.pdf).
2 32 Geo 3 c 60.
3 15 & 16 Geo 6 and Eliz 2 c 66.
4 Act No 1962-17 (www.gibraltarlaws.gov.gi/articles/1962-17o.pdf).

Bringing a claim

43.13 Defamation claims are heard in the Supreme Court, and are commenced by issuing and serving a claim form as in other civil proceedings. The procedure for bringing and responding to a claim is governed by the English Civil Procedure Rules, which apply in the absence of local rules pursuant to rule 6(1) of the (Gibraltar) Supreme Court Rules 2000. The pre-action protocol on defamation contained in the English Civil Procedure Rules, part C6, should therefore be followed.

Actions can be brought for both libel and slander. The substantive law regarding what must be proved in order to succeed in an action is not laid out in the Act and is therefore governed by common law principles developed in Gibraltar and in England and Wales, the latter where they are applicable to similar provisions in the Defamation Act 1960 and the law of defamation in Gibraltar generally. In both types of action it is necessary to show that a defamatory statement published of and concerning the claimant has been made or conveyed to a person other than the claimant. There is also no requirement of proving actual loss or damage (except in cases of slander where the words are not actionable per se[1]) and no need to prove the claimant's reputation. *Ford v Labrador*[2] is an example of the Gibraltar Court of Appeal's approach to defamation claims. Here the court applied the classic test laid out by Lord Atkin in *Sim v Stretch*:[3] 'Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'. In the leading judgment, Neill P found that reasonably expressed comments on a claimant's cultural background and language barrier were neither defamatory nor insulting.

1 Defamation Act 1960, ss 8–10 for slanders actionable per se.
2 [2001–02] Gib LR 320.
3 [1936] 2 All ER 1237, at 1240.

Defences

43.14 The defendant may argue that the statement was not published to anyone other than the claimant, does not refer to the claimant or is not defamatory in nature. Newspapers also have the benefit of statutory defences of absolute privilege for fair and accurate reports of court proceedings,[1] qualified privilege,[2] and publication without malice or gross negligence coupled with publication or offer of apology.[3] As in England and Wales, the defendant can also avail himself of the common law defences of, inter alia, justification,[4] fair comment,[5] consent to publication and accord and satisfaction.

It is also open to a defendant to show that an offer of amends has been made, but only for unintentional defamation.[6] There is no presumption of lack of intention, however, with the defendant having the burden of proving that the words were published innocently in relation to the claimant (on which Defamation Act 1960, s 24(5) provides further guidance) and that the offer was made as soon as practicable after receiving notice that they were or might be defamatory.[7] The offer must be accompanied by an affidavit specifying the facts relied upon to show innocent publication.

In the case of absolute privilege, it should be noted that the scope of the privilege afforded to newspapers is far more limited territorially speaking than its equivalent in England and Wales, given that Defamation Act 1960, s 3(2) limits its application 'only to courts exercising judicial authority within Gibraltar', and does not extend to any international tribunal proceedings (most notably those of the European Court of Justice or European Court of Human Rights). Only qualified privilege is offered to fair and accurate reports of proceedings in public of the International Court of Justice or any other judicial and arbitral tribunal deciding matters in dispute between states.[8]

Similarly, in respect of qualified privilege, Pts I and II of the Schedule to the Gibraltar Act, although largely mirroring the corresponding English and Welsh provisions, limit the geographical scope of the privilege to a much narrower area in many cases. Rather than extend its scope to all other EU Member States, various paragraphs of the Schedule only refer to 'any part of Her Majesty's dominions outside Gibraltar'[9] or even just Gibraltar.[10] The provision affording qualified privilege to reports of international organisation or conference proceedings is limited to those organisations and conferences of which Gibraltar or the UK is a member.[11] Only public meetings held in Gibraltar can be reported on subject to qualified privilege, as is the case with notices or advertisements published by or on the authority of Gibraltar courts.

Gibraltar Parliament publications are protected in civil and criminal proceedings, with any such proceedings to be stayed if a defendant shows that they are indeed being commenced or prosecuted for or on account or in respect of such publications.[12]

1 Defamation Act 1960, s 3.
2 Section 4.
3 Section 5. This defence is also available to broadcasters pursuant to s 6.
4 On which see Defamation Act 1960, s 25.
5 On which see Defamation Act 1960, s 26.
6 Section 24.
7 Section 24(1)(b).
8 Sch, Pt I, para 3 and Pt III, para 13.
9 Sch, Pt I, paras 1, 4 and 5.
10 Sch, Pt I, para 6 and Pt II, para 12.
11 Sch, Part I, para 2.
12 Sections 11–14.

Limitation

43.15 A significant difference between Gibraltar defamation law and corresponding law in England and Wales is that, unlike the one-year limitation

rule of the latter, actions in libel and slander can be brought up to six years after the date on which the cause of action accrued, pursuant to s 8 of the Limitation Act 1960.[1]

1 Act No 1960-42 (www.gibraltarlaws.gov.gi/articles/1960-42o.pdf).

Remedies

43.16 A successful claimant is entitled to compensatory damages, and, depending on the circumstances, may also be entitled to special, aggravated and exemplary damages. The claimant may also seek an injunction to prevent further publication of the defamatory statement. It is open to the defendant to offer an apology in mitigation of damages caused to the claimant.[1]

1 Defamation Act 1960, s 27.

Criminal proceedings

43.17 Defamation Act 1960, Pt V allows criminal proceedings for the offence of publishing defamatory libel. Such proceedings are very similar in nature to those that could formerly be brought in England and Wales, and are subject to comparable procedural rules, with a prior order of the Chief Justice being required for criminal prosecutions to be commenced against a newspaper proprietor or editor (or any person responsible for the publication of a newspaper) pursuant to s 17. Defences of truth or public benefit and publication by an agent without authority, consent or knowledge are available to a defendant under ss 19 and 20, respectively.

Privacy

Claims under the Gibraltar Constitution

43.18 Section 7(1) of the Gibraltar Constitution Order 2006,[1] in the exact words of art 8 of the European Convention on Human Rights, states that 'Every person has the right to respect for his private and family life, his home and his correspondence'. Section 16(1) of the Constitution provides for a free-standing action to be commenced in the Supreme Court by any person alleging a breach, or potential breach, of any of the fundamental rights laid out Chapter I of the Constitution in relation to him. Such an action can be brought without prejudice to any other action that may be lawfully available to that person.

There are no reported cases in which a constitutional challenge pursuant to section 16 has been brought, so the procedure to be followed and test to be applied remain unclear, particularly because the Chief Justice is yet to exercise the power under section 16(4) to make rules (including to specify time limits) with respect to the practice and procedure of the Supreme Court in relation to this jurisdiction. However, judging by the practice of courts in other Commonwealth jurisdictions with similar constitutional provisions, it is likely that the usual rules for civil proceedings (in the case of Gibraltar, the English Civil Procedure Rules) will apply.

It should be noted, however, that the Constitution, at section 10, also protects the right to freedom of expression, in terms largely similar to art 10 of the European Convention. As a result, a similar balancing exercise to that exercised by English and Welsh courts in breach of confidence actions may have to be adopted by the Gibraltar Supreme Court in such an action. In so doing, the court would have a duty to consider, inter alia, any decision of the European Court of Human Rights that it deems relevant.[2] There is no reported case, however.

[1] www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf.
[2] Section 18(8)(a)(i) Gibraltar Constitution Order 2006.

Common law breach of confidence

43.19 Insofar as the English and Welsh courts recognise a common law action for breach of confidence, at least in the context of the right to respect for one's private life under the Human Rights Act 1998 and European Convention, such an action would also be available in Gibraltar. The action would have to take into account the provisions of the Gibraltar Constitution mentioned above. It would therefore involve the balancing of the right to respect for one's private life against the right to freedom of expression. However, there appear to be no recently reported examples of such application of English and Welsh common law which concern publication by the media.

Damages

43.20 Damages would be recoverable in accordance with principles elicited from English and Welsh common law, with exemplary damages presumably available.

3. GREECE

Defamation

43.21 The right of personality is enshrined in the Greek Constitution, in the European Convention on Human Rights (which is applied as domestic law on the basis of Article 28 paragraph 1 of the Constitution) and in the Greek Penal and Civil Codes, as well as in a number of specific laws (including Law 2472/1997 on the protection of personal data, as amended by law 3471/2006, and Law 1178/1981 relating to crimes committed via the press).

As far as defamation is concerned, the honour and reputation of the individual, and of legal persons, derives protection from a number of sources.

Article 2 paragraph 1 of the Constitution

43.22 Article 2 paragraph 1 of the Constitution states that 'Respect for and protection of the value of the human being constitute the primary obligation of the State'. The phrase 'the value of the human being' is held to incorporate both the internal feeling of honour and the social recognition of reputation and

the state is thus constitutionally obliged to act, and to respond to the actions of third parties, in a manner that both 'respects' and 'protects' these values.

Article 362 of the Penal Code ('Defamation')

43.23 Article 362 of the Penal Code defines the crime of defamation as follows: 'One who by any means asserts or disseminates information before a third party concerning another which may damage his character or reputation shall be punished by imprisonment for not more than two years or by pecuniary penalty. The pecuniary penalty may be imposed in addition to imprisonment'.

In order for the crime of defamation to be committed, a 'fraudulent' state of mind must be established.[1] This includes (a) the knowledge (even as a possibility) that the allegation is likely to injure the reputation of another; and (b) an intention to communicate the allegation regardless of whether it is true or false. The allegation must also go beyond a mere expression of opinion or judgment to be such as could actually injure the reputation of its subject if communicated to third parties (though even if the allegation is insufficient to meet this requirement it may still give rise to the less serious crime of 'insult').

Defamation may be committed regardless of the mode of publication or dissemination that is used. The offence as defined in Article 362 may only be committed against a natural person.[2]

Where the allegation is true the offence of defamation cannot be committed (although the lesser crime of insult may still be committed). Furthermore, if the perpetrator can show that he was labouring under a mistake of fact or that he had reasonable grounds for believing the truth of the allegation, and that he was acting in pursuit of a legitimate interest, he may avoid liability.

[1] Article 26 of the Penal Code.
[2] Though see para **43.25** below.

Article 363 of the Penal Code ('Aggravated defamation')

43.24 Article 363 defines aggravated defamation as follows: 'If in a case under article 362, the fact is false and the offender is aware of the falsity thereof, he shall be punished by imprisonment for not less than three months, and along with imprisonment (from 3 months to 5 years) a pecuniary penalty may be imposed. In addition, deprivation of civil rights may be decreed under article 63'.

Thus the aggravated offence is committed where the allegation is false and is known to be false by the perpetrator at the time of publication.[1] These elements of the crime must be proved by the prosecutor at trial and specific findings in that regard must be reached by the court prior to any conviction.

[1] For the state of the law as to knowledge see N 217/1984, Pinika Hronika, Vol 34 789.

Article 364 of the Penal Code ('Defamation of a corporation')

43.25 Under Article 364, 'One who by any means asserts before third parties or disseminates a certain fact concerning a corporation with respect to its

business, financial condition or in general, its works or the members of its board of directors, which may lower the confidence of the public in the corporation and generally injures its business, shall be punished with imprisonment for not more than one year or with pecuniary penalty'.

Where the accused is able to prove the truth of his assertions he shall not be punished.[1] However, if he is found to have known that the information he communicated was false 'he shall be punished by imprisonment'.[2]

1 Article 364(2) of the Penal Code.
2 Article 364(3) of the Penal Code.

Article 365 of the Penal Code ('Disparaging the memory of the deceased)

43.26 Article 365 provides: 'One who disparages the memory of a deceased individual by rude or malevolent insult or by aggravated defamation (Article 363) shall be punished by imprisonment for not more than six months'.

This provision is primarily intended to protect the interests of the living members of the deceased's family. Again, a 'fraudulent' state of mind must be present and the allegation must go beyond a mere expression of opinion or judgment to be such as could actually injure the reputation of its subject if communicated to third parties.

The Penal Code – general

43.27 Article 367 paragraph 1 of the Penal Code provides a defence where communications that would otherwise give rise to criminal liability constitute either (a) criticisms of scientific, artistic or professional work; or (b) adverse expressions incorporated in a document issued by a public authority for specific purposes; or (c) statements made in the performance of lawful duties or the exercise of legal power or for the preservation of a legitimate right or interest.[1]

For proceedings to be brought under any one of Articles 362–365, the victim must first file a complaint in accordance with Article 368 paragraph 1.[2] The victim has three months from the date he became aware of the offending act in which to take this step.

In addition to the punishments specified above, the court may also, upon convicting a defendant of any one of the crimes specified in Articles 362–365, order the publication of its verdict at the defendant's expense, thereby providing a further element of vindication.[3]

1 Note that this defence does not apply where the constituent elements of aggravated defamation are present as defined by Article 363 of the Penal Code.
2 In the case of defamation of a corporation under Article 364 the complaint should be filed by the board of directors or another party having a substantial interest in the corporation, while in the case of defamation of a deceased person under Article 365 the complaint should be filed by the surviving spouse or children or, in the absence of such immediate relatives, by the deceased's parents or siblings (Article 368(2) of the Penal Code).
3 Article 68(1) of the Penal Code.

Articles 57 and 59 of the Civil Code

43.28 Articles 57 and 59 of the Civil Code – which provide for the protection of 'personality right' and for 'satisfaction from injury to personality' respectively – combine to provide a remedy at civil law for a party[1] whose 'personality right' has been infringed. Unlawful publication of defamatory material constitutes infringement of personality right for these purposes and thus gives rise to an entitlement to claim injunctive relief and compensation in respect of both actual and moral damage.[2]

For such a claim to be made out, the claimant must establish the following:[3] (a) an act or omission performed with culpability by the defendant (ie with a 'fraudulent' or negligent state of mind);[4] (b) the unlawfulness of this act or omission; (c) the presence of damage; and (d) a causal connection between the unlawful and culpable behavior of the defendant and this damage. In the context of defamation, an act or omission will be unlawful if it satisfies the criteria specified under Articles 362–365 of the Penal Code (see paras **43.23–43.26** above). A criminal conviction is conclusive proof, for the purposes of a civil claim, that an unlawful act has been perpetrated.[5]

The sum awarded in compensation for moral or unliquidated damages is not subject to any form of statutory regulation and will be determined by the court taking account of all the circumstances of the case, including the gravity of the published allegation(s), the extent of the resulting reputational damage and the financial and social position of the parties.

1 Including a corporation and the surviving relatives of a deceased person.
2 Articles 914, 920 and 932 of the Civil Code.
3 Article 914 of the Civil Code.
4 Article 330 of the Civil Code.
5 Note that, where criminal proceedings are instituted, any civil claim will be stayed pending their conclusion (Article 367(2) of the Penal Code).

The media

43.29 Law 1178/1981 provides for potential criminal and civil liability on the part of the owner, publisher and/or director where defamatory material is published in a newspaper or magazine.

The right of personality is also protected by way of a right of reply to inaccurate information that has been published or broadcast in the media provided for in Article 14 paragraph 5 of the Constitution and Article 369(1) of the Penal Code.

Privacy

43.30 The right to privacy is enshrined in Article 9 of the Constitution and, of course, in the European Convention on Human Rights (which applies as domestic law on the basis of Article 28 paragraph 1 of the Constitution). Article 9 of the Constitution provides that: '1. Every person's home is a sanctuary. The personal and family life of the individual is inviolable. No house search shall be made except when and as specified by law and always in the presence of representatives of the judicial power. 2. Violators of the

preceding provision shall be punished for violating the sanctuary of the home and for abuse of power, and shall be liable to full damages to the sufferer, as specified by law'.[1]

Article 9A of the Constitution addresses the treatment of personal data in the following terms: 'Every person has the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, save as specified by law. The protection of personal data is assured by an independent authority, which is established and operates as specified by law'. The Authority for the Protection of Personal Data was established by Law 2472/1997 (as amended by Law 3471/2006) and is charged with protecting the individual's rights of personality and private life. Laws 2472/1997 and 3471/2006 specify the manner in which personal data is to be processed and protected, the rights of the subjects of personal data and the administrative and criminal sanctions and civil liabilities that may arise where these provisions are violated.[2]

Article 19 of the Constitution secures the confidentiality of communications as follows: '1. The confidentiality of letters and all other forms of free correspondence or communication shall be absolutely inviolable . . . 2. Matters relating to the establishment, operation and competences of the independent authority which ensures the confidentiality of paragraph 1 shall be specified by law.[3] 3. The use of evidence acquired in violation of the present article and of articles 9 and 9A is prohibited.'[4]

Infringement of the confidentiality of correspondence and communications gives rise to a prima facie offence pursuant to Article 370 of the Penal Code, which is punishable by fine or imprisonment for up to one year.[5]

Infringement of Articles 9, 9A and 19 of the Constitution may also give rise to civil liabilities pursuant to Articles 57, 59, 914 and 932 of the Civil Code, since infringements of this kind will frequently be detrimental to the 'personality rights' referred to above.[6] However, in both the criminal and the civil context other, contrary rights will also fall to be considered – the freedom of the press guaranteed by Article 14 of the Constitution and the freedom of expression guaranteed by art 10 of the European Convention on Human Rights being obvious examples – and the court will always be obliged to seek a solution that maintains an appropriate balance between competing rights.

1 This right is enjoyed by natural persons alone. Other legal persons, such as corporations, are held to have no private life to protect. The law governing the conduct of house searches by agents of the state appears primarily in Articles 253–256 of the Code of Civil Procedure. An individual who is not an agent of the state and who unlawfully enters a home or workplace is liable to a fine and/or custodial sentence of up to one year under Article 334(1) of the Penal Code.

2 For the treatment of personal data in the telecommunications sector see Article 11 of Law 2774/1999.

3 The National Committee for the Protection of Confidentiality and Communications was established by Law 2225/1994.

4 Both natural and other legal persons enjoy the protections afforded by Article 19. These protections are to be limited only in exceptional circumstances (for example, for reasons of national security) and, even then, the limits imposed must be proportionate and subject to safeguards.

5 Or two years in the case of an offender who performs such acts habitually or for financial gain.

6 Action before the administrative courts represents a third alternative to criminal and civil proceedings.

4. GRENADA

Libel

43.31 Grenada's Criminal Code contains provisions relating to libel that are similar in many, although not all, respects to what was formerly the English law of criminal libel.[1]

Title XIX of the Code is headed 'Libel' and contains provisions creating and defining the offences of negligent and intentional libel and setting out the defences to them. Section 252 prescribes that a party convicted of negligent libel shall be liable to imprisonment for six months, while a party convicted of intentional libel shall be liable to imprisonment for two years.

Under Section 253:

> 'A person is guilty of libel who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, either negligently or with intent to defame that other person.'[2]

'Defamatory matter' is defined by section 254 as matter 'which imputes to a person any crime, or misconduct in any public office, or which is likely to injure him in his occupation, calling or office, or to expose him to general hatred, contempt or ridicule'.[3]

Section 256 provides that any publication will be 'unlawful', for the purposes of section 253, 'unless it is privileged on one of the grounds hereafter mentioned in this Title'. Sections 257 and 258 specify the forms of privilege that can apply. Under Section 257:

> '(1) The publication of defamatory matter is absolutely privileged, and no person shall under any circumstances be liable to punishment under this Code in respect thereof, in any of the following cases, namely –
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> . . .
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> (b) if the matter is published in the Senate or the House of Representatives by the Governor-General or by any member of either house;
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> ...
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> (h) if the matter is true, and if it is found by the jury that it was for the public benefit that it should be published.
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> (2) Where a publication is absolutely privileged, it is immaterial for the purposes of this Title . . . whether . . . the matter be true or false, and whether it be or be not known or believed to be false, and whether it be or be not published in good faith.'

Section 258 provides for a form of qualified privilege as follows:

> 'A publication of defamatory matter is privileged, on condition that it was published in good faith, in any of the following cases, namely –
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> ...
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> (d) if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to this personal character so far as it appears in such conduct;
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> (e) if the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct;
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> ...