Franco British Lawyers' Society

Northern Ireland Inaugural Colloquium 2007

The Individual, the state and the Press

Michael Tugendhat

In 1523 Sir Thomas More was appointed the Speaker of the House of Commons. A speech he made on that occasion is the first record in the English language of a claim to freedom of speech. The speech is remembered as one of the significant events in the development of English constitutional law[i].

More reminded Henry VIII that as King he had commanded Parliament to be assembled. According to his biographer, More said this:

"Therefore, most gracious sovereign, considering that in your High Court of Parliament is nothing entreated but of matters of weight and importance concerning your realm, and your own royal estate, it could not fail to let and put to silence from the giving of their advice and counsel many of your discreet Commons to the great hindrance of common affairs, except that every of your Commons were utterly discharged of all doubt and fear how anything that it should happen them to speak, should happen of your Highness to be taken: ... It may therefore like your most abundant Grace, our most benigne and godly King to give to all your Commons here assembled, your most gracious licence and pardon, freely, without doubt of your dreadful displeasure, every man to discharge his conscience and boldly in everything incident among us to declare his advice; and whatsoever happen any man to say, that it may like your noble Majesty, of your inestimable goodness, to take all in good part, interpreting every man's words, how uncunningly soever they be couched, to proceed yet of a good zeal towards the profit of your realm and honour of your royal person, the prosperous estate and preservation whereof, most excellent Sovereign, is the thing which we all, your most humble loving subjects, according to the most bounden duty of our natural allegiance, most highly desire and pray for."

During the Renaissance, as states emerged from the Roman Empire, a number of books were written on the duties of Princes. More's friend Erasmus had written one of the best known under the title "The Education of a Christian Prince". Erasmus wrote this in 1516, initially for Charles on his accession to the throne of Spain. However, in 1517 Erasmus sent a specially prepared edition of his work to Henry VIII. Henry sent him in return the sum of £20, the equivalent of over £20,000 in today's money.

The speech that More made in 1523 echoes the sentiments submitted by Erasmus to the King six years earlier. To support his claim that a prince was bound to do good and avoid evil, and to govern for the benefit of the people and not for himself, Erasmus cited numerous references from classical writers, as well as from the Old and New Testaments. On freedom of speech he wrote, in translation from the Latin[ii]:

"... the prince must ... accustom his friends to the knowledge that they find favour by giving frank advice. It is indeed the job of those who keep the prince company to advise opportunely, advantageously, and amicably, but it will nevertheless be well to forgive those whose advice is presented clumsily in order that no precedent may deter those would advise him properly from doing his duty".

Later he put it summarily: "In a free state, tongues too should be free".

Since 1523 the House of Commons has always claimed the right of freedom of expression in their debates. The Crown conceded the principle on the grounds that Parliament would not be useful to the monarch unless Parliament did give its advice freely. At this time the principle did not apply outside Parliament because the proceedings of Parliament were in theory supposed to be secret. This was no more than theory. As More's biographer notes: "nothing was so soon done or spoken therein, but that it was immediately blown abroad in every alehouse".

There remained some dispute with the Crown as to how wide the principle extended even within Parliament. Even the most enthusiastic advocates of freedom of expression did not claim that it extended to matters of religion.

When the Stuart kings ascended the throne in the early 17th century, they challenged this and other claims of Parliament. The result was the Civil War fought in England between the Crown and Parliament. Parliament won and established the Commonwealth, or, in modern English, a republic.

The monarchy was in due course restored after the Commonwealth and in 1688 there was again a constitutional crisis when James II abandoned the Crown. Parliament invited William of Orange to the throne. By then Parliament was able to impose its own terms upon the monarch. The terms that Parliament imposed are known as the Bill of Rights, and are set out in the Bill of Rights Act 1688, which is a statute still in force in England to this day. It included the following by which Parliament:

"vindicating and asserting their ancient Rights and Liberties, declare;

"5. That it is the Right of the Subjects to petition the King, and all Commitments and Prosecutions

for such petitioning are illegal....

9. That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament. ”

Article 9 is the final enactment into law of the principle which More had claimed over 150 years before.

The provisions of the Bill of Rights in 1688 did not fully implement the right of freedom of expression in England. One reason for this arose from the invention of printing. Following this, restrictions were imposed on the production and distribution of books which had never been considered necessary in the days when books were written in manuscript. The latest of these restrictions in England was imposed during the Commonwealth by the Long Parliament in June 1643. This law prohibited the production and sale of any book without two licenses. The first license was to be granted by a body of censors to be appointed by Parliament. The second licence required was that of owners of any book being copied. This second license was of course an early provision for what has since become the law of copyright.

In 1694, six years after the Bill of Rights and the restoration of the monarchy, Parliament refused to renew the Licensing Act. Allowing the Licensing Act to lapse was a momentous decision. The effect of that has described in these terms by Lord Scarman[iii]

“By this refusal, as Dicey has pointed out, Parliament "established freedom of the press without any knowledge of the importance of what they were doing"... Thenceforward freedom of communication became part of the English common law. Everyone thereafter had that right, except in so far as the communication offended against some clear provision of the law (such as defamation or, later, copyright)”.

In the 17th and 18th centuries what we would now call the right to private life was also developing in English law. One development was the law of defamation, which tends to conflict with freedom of expression. Another development was the protection of individuals from having their homes searched and their correspondence seized. This protection tends to support freedom of expression.

When in 1789 the British colonists in America came to frame their own Bill of Rights, they did not consider that they were making new law, but rather that they were ensuring that there should be no change to the rights they understood the common law already gave them. They included as two of those rights:

“1 Congress shall make no law ... abridging the freedom of the press ... or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances...

4 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ....”

The extent of a legal right does not depend simply on the words in which it is expressed in a law or statute. The extent of a legal right depends above all upon the spirit in which the interpretation of the right is carried out by the courts.

The law of defamation was developed in a manner which in some cases supported freedom of expression, and in others conflicted with it.

The development that favoured freedom of speech was the principle that any civil law claim for defamation could always be defeated by a defendant who could prove that the defamatory allegation was true. In civil claims, an absolute priority was accorded to the truth. As Blackstone put it in 1765[iv]:

“if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself ”.

The development of the law of defamation which limited freedom of expression was the requirement that the writer or speaker prove that what he said was true. If the defamatory words could not be proved to be true, then the defences that remained available were very limited. It was therefore difficult to publish statements for which the writer did not have the evidence available to prove what he wrote was true.

Defamation proceedings were tried, not by a judge alone, but by a judge and a jury. It is still the law that either party to a defamation action generally has the right to trial by jury.

In general terms the division of functions between a judge and jury is that the judge decides issues of law and directs the jury on the law, and the jury decides issues of fact. It is not always clear what counts as an issue of law and what as an issue of fact. In most cases, where the meaning of a document is in question, that has been categorised as an issue of law for the judge. That is the principle that was adopted in defamation proceeding in the seventeenth and eighteenth centuries in England. The judge decided whether a document was defamatory, and the jury decided whether it had been published or not, and whether it was true. This often left the jury with very little of importance to decide, since it was generally obvious whether the words complained of had been published or not, and whether a statement is true or not depends on what it means.

There was a further point. The meaning of words alleged do be defamatory can be a politically

sensitive matter. Libel actions can be used, and in some parts of the world are still used, to silence and oppress the political opponents of the government. If judges are not sufficiently independent, or are politically biased, the law of defamation can be a powerful means of interference with the right of freedom of expression under the guise of protecting the rights of individuals to their reputations.

In England in the eighteenth century there was concern that that is what was happening. The 1780s and 1790s were momentous decades in North America and in France, and it is no co-incidence that it was in 1792 that Parliament passed a Libel Act which is still on the statute book in England. It is commonly known as Fox's Libel Act after the leading politician Charles James Fox, who was known for his sympathy for, first the American, and then the French, Revolutions. The effect of the Act is described in its Preamble:

"the Jury ...may give a general Verdict of Guilty or Not Guilty upon the whole Matter put in Issue .... and shall not be required or directed, by the Court or Judge ... to find the Defendant or Defendants Guilty, merely on the Proof of the Publication by such Defendant ... of the Paper charged to be a Libel, and of the Sense ascribed to the same in such Indictment or Information."

In other words, from then on it is a jury alone that has decided what meaning any words complained of bore, and whether that meaning was defamatory or not. In addition, the jury decided whether that meaning was true or false, and if false, what damages to award, if any.

The purpose of the Act of 1792 was to secure the freedom of the press against the possibility of judges being disposed in favour of the Crown[v]. The Act undoubtedly achieved that purpose. In form it appears to be no more than a small change in legal procedure. In practice the Act took away from the state, and gave to the people, the ultimate control over the press in matters of defamation.

While juries are in theory bound to apply the law as directed by the judge, there is in practice nothing that can be done if they refuse to do so. Juries could and did (and for that matter they still do) simply refuse to give verdicts against individuals with whom they may be sympathetic. The most famous example of this was the case of William Penn, the founder of the state of Pennsylvania. In 1670 he was charged with sedition for taking part in a Quaker religious ceremony, when the law required all worship to be in the Church of England. Penn was more fortunate in his court than More had been, when a London jury declined to find him guilty, even when the judge unlawfully imprisoned the jury in an attempt to force a verdict of guilty.

In 1840 there was a further extension of freedom of expression when the Parliamentary Papers Act extended to reports of what was said in Parliament the same immunity as applied to what was said in Parliament, subject only to an exception where the publication was made with malice. The effect

of freedom of speech in Parliament is that statements made by Members of either House of Parliament in the House, even if known to be false, can not be made the foundation of any legal proceedings, however injurious such statements might be to the interests of a third party. The extension of the immunity to press reports therefore represented a significant reduction in the protection the law afforded to the reputations and private lives of individuals. The justification for this development was of course the progress towards democracy which occurred in England in the 19th century, in particular from the extension of the right to vote in 1832.

But trial of libel actions by jury has disadvantages. Since juries do not give reasons, there is no way of knowing whether they have given proper weight to the principles which are in issue before them. There is no way of knowing whether they have properly understood or had regard to the importance of freedom of expression on the one hand, or, on the other hand, to the right of the individual to protection of his or her right to her private life, including reputation.

The confidence the public put in juries rather than judges in the 18th century has tended to be reversed in the late 20th century, with more confidence being placed in judges than in juriess.

In the 1970s and 1980s there was increasing ground for concern that juries were not the protection for the principle of freedom of expression which they were supposed to be, but had instead become a threat to it. One ground for this concern was the number of very high awards of damages which juries made in these years, sometimes of hundreds of thousands of pounds or more, when it was impossible to see how damage of that magnitude could have been suffered.

Not only in England, but elsewhere in the world where the common law is applied, the high awards of damages by juries came to be seen as a serious threat to free and open discussion of political matters. Politicians and other figures with a high public profile are protective of their reputations, and ready to sue for damages. London in particular became renowned for the high awards of damages that were made there. Similar concerns had arisen in the United States in 1964 in a case where an Alabama jury awarded huge damages to a local official against the New York Times in a suit brought by him involving the civil rights movement and Martin Luther King.

As a result of these concerns, in England, as in the USA, there have since occurred the most radical changes in the law of libel since 1792. The changes have in part reduced the protection the law affords to the reputations of individuals and increased the protection of freedom of expression, and in part they have achieved the opposite. There has in fact been a complete review of the protection given to both freedom of expression and the reputations and private lives of individuals.

The theory underlying the claims of the Christian humanists of the Northern Renaissance, such as

Erasmus and More, and of the framers of the English Bill of Rights, was that government ought properly to be conducted *for* the people, and that those who represented the people and advised the government ought to be able to speak freely on matters affecting the government. Few political thinkers in the sixteenth and seventeenth centuries claimed that government should be conducted *by* the people.

In England the claim that government should be *by* the people developed in the eighteenth century. That was the century in which there first appeared a national press, and in which it became practical for everyone to discuss current political issues on an informed basis. Following that development, it became clear that articles 5 and 9 of the Bill of Rights were no longer adequate. It was no longer sufficient for freedom of expression to be confined to petitions to the King and to debates in Parliament. Freedom of expression had to extend to discussion of public affairs by any member of the public.

Although the need to reform the law of defamation became apparent in the twentieth century, there were a number of obstacles to any development of the law. The first obstacle was that any extension of freedom of expression would diminish the protection afforded to the reputation of individuals. There was no consensus in England as to where any new balance between these two principles should be struck. As time passed different solutions were considered and adopted in different common law countries, most notably in the USA, Canada, New Zealand and Australia. All suffered from disadvantages.

The second obstacle was that English law of defamation had become so firmly established in the three centuries both before and following the Libel Act of 1792, that it was difficult to see how the courts, as opposed to Parliament, could makes such important changes. Parliament showed little inclination to embark on such sensitive reform of the law.

In England the first important case was one of the many brought in London by foreign politicians. It was brought by Albert Reynolds against the London Times and decided by the House of Lords in 1999[vi]. The case arose out of a crisis which had culminated in the resignation of Mr. Reynolds as Taoiseach (prime minister) of Ireland and leader of the Fianna Fáil party. The House of Lords developed the common law to create what was in substance a new public interest defence to claims in defamation.

There had always been a limited public interest defence to the publication of defamatory and untrue allegations in circumstances where the writer had a duty to make the publication and the reader had an interest in receiving the communication. Generally this defence was available only in the case of

communications to very limited classes of people, all of whom could be shown to have the necessary interest in receiving the communication. In the *Reynolds* case it was established that there was a defence in cases where the communication was to all the world, for example by newspaper or television, provided that the publication related to a matter of public interest, and provided also that the newspaper or other publisher had acted responsibly. Where a statement is defamatory and untrue, a defendant is nevertheless entitled to publish it to all the world, provided that it is a matter of public interest, and provided he has taken such steps as a responsible journalist would take to try to ensure that what is published is accurate and fit for publication.

This development of the law in favour of freedom of expression comes with a price. As already noted, it necessarily involves a reduction of the protection afforded to the rights of individuals to their reputations and private lives. But a further disadvantage of this new defence is that it lacks clarity. Newspapers commonly take legal advice before publishing risky stories. It may now be difficult to advise a newspaper or an individual whether a statement in question has the necessary degree of public interest, and if so, whether the journalists have acted to a sufficient professional standard.

This is in strong contrast to the clarity of Art 9 of the Bill of Rights. That protects all statements made in Parliament, whether they are of public interest or not, and whether or not the maker of the statement has made any steps to ensure that what he publishes is accurate.

In effect there has been a complete change in the balance established in the 18th century between the protection of the law for freedom of expression and the protection of the law for the private lives of individuals. What made this development possible was the increasing attention paid by the English courts to the European Convention on Human Rights Arts 10 and 8, and to the decisions of the Court in Strasbourg.

The European Convention, and in particular its incorporation into English law by the Human Rights Act 1998, caused the English courts to give fresh consideration to the whole of the law relating to freedom of expression and the protection of the right to private life. And the English law of freedom of expression has been tested in Strasbourg on many occasions.

The framers of the Bill of Rights would have been surprised to learn that over three centuries later the conditions that they had imposed upon William of Orange would be reviewed by a court of judges drawn from all over Europe and sitting in Strasbourg. After all, one the most significant of Henry VIII's reforms had been the Act of 1533 to prohibit the obtaining of judgments of any kind "from ... any ... foreign court or courts out of this realm."

In 2002 the provisions of Article 9 of the Bill of Rights were considered by the European Court of Human Rights in *A v United Kingdom*[vii]. Because of the strong protection the law gave to the reputation of individuals, the practice grew up in Parliament of members naming individuals in the chamber in circumstances where, if they named them outside Parliament, they could not expect successfully to defend an action for defamation. The applicant *A* was an individual who was named in this way. Her local MP made a speech in Parliament which was reported by the press under the headline "MP Attacks 'Neighbours From Hell' ". As a result the applicant and her children suffered such harassment that she and her children had to move to a new house and schools. She applied to the European Court contending that the absolute parliamentary immunity which prevented her from taking legal action in respect of statements made about her in Parliament violated her right of access to a court under Article 6 § 1 of the Convention and her right to privacy under Article 8.

The Court held that the immunity afforded by English law is compatible with Articles 6 and 8 of the Convention, being necessary and proportionate to the pursuit of the the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.

The attention paid by the English courts to the European Convention has also led to a reconsideration of the rule that no statement published about an individual can give rise to an action unless the publication is both defamatory and untrue. In the latter part of the twentieth century the English press became notorious for publishing photographs and information of no public interest concerning the private lives of individual. In 2000 the Court of Appeal considered a claim relating to the unauthorised publication of photographs taken surreptitiously at the wedding of Michael Douglas and Catherine Zeta-Jones[viii]. Referring to the Convention, the Court of Appeal recognised that there could be a development of English law to recognise a right of privacy in relation to personal information. This development was recognised by the House of Lords in a case brought by another celebrity beauty, Naomi Campbell[ix].

Speaking in June 2006[x] Lord Hoffmann summarised the present position as follows:

"Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell v MGN Ltd* ... and in favour of greater freedom for the press to publish stories of genuine public interest in *Reynolds v Times Newspapers Ltd* ..."

The question can now be asked whether English law on freedom of expression and the reputations and private lives of individuals has now reached a state of development that is compatible with the European Convention. The answer must be that many would argue that it has not reached that state. A number of difficulties remain to be resolved.

Some would argue that the law as stated by the House of Lords in *Campbell* is not the same as the law stated by the Strasbourg Court in *von Hannover v Germany*[xi].

Others might argue that it is now unclear what distinguishes the action for defamation (for which the defence of truth is absolute) from the action for misuse of private information (where the truth or falsity of the information has been held to be irrelevant[xii]). It may not be clear to the parties when an action on a true publication will be defeated by the defence of truth and when it will not.

A further question is whether in the 21st century juries should be trying defamation actions. As a matter of practice, parties are increasingly exercising their right to choose to have the trial by a judge alone. They do this to save expense and delay, and to have the benefit of the lengthy reasoned judgments that English judges are expected to deliver. Perhaps we should also welcome the fact that the litigants appear to have more confidence in judicial independence than was the case in 1792.

Defamation cases are becoming rare in England. The reasons for this can only be a matter of speculation. The fact that the law now allows the Court of Appeal to substitute its own figure for damages for that of a jury, and that these figures are now much reduced, may be one reason. The change in the law effected in the *Reynolds* case may be another, either because the new defence is an effective one, or because there is a perception that the lack of clarity in the new law has made litigation unacceptably risky.

On the other hand, privacy claims are now increasingly common. These claims do not lead to large awards of damages. But commonly pre-publication injunctions are granted, and newspapers are discouraged from buying the intrusive photographs that used to be so common.

I started this talk in 1523 and thank you for following me through the long journey that English law has taken to 2007. I could have started this talk two millenia earlier, with the classical and Biblical writings cited by Erasmus. What I hope this story may show is that the problems the courts face today in balancing the rights of the individual and the state are not new problems. They are problems which are affected by technical developments, such as the invention of printing in the 15th century, cheap newspapers in the 18th century, and and even cheaper means of communication of images and text in the 20th century. They are also affected by political developments. The extent of freedom of expression in matters of religion is again a matter of public debate.

The history of English law has included success and failure. At times there have been what seem to us to be scandalous failings by governments and by the courts in protecting both freedom of expression and the individual. There are new challenges today. But whatever the problems, it is to be hoped that that the government and the courts will keep in mind that the principles which they should uphold and apply today are principles which are deeply in rooted in our common European tradition.

---

[i] Q. Skinner *Liberty before Liberalism* Cambridge University Press 1998, p87-88; GR Elton *The Tudor Constitution* 2nd ed Cambridge 1982 pp265-6.

[ii] *Ibid* p64-5, 88

[iii] *Harman v The Home Office* [1983] 1 A.C. 200, 312; Dicey's The Law of the Constitution , 10th ed. (1959), p. 261.

[iv] Blackstone's Commentaries on the Laws of England, Book IV ch.13, 1st Ed Oxford : Clarendon Press, 1765-1769.

[v] *Sutcliffe v Pressdram* [1991] 1 QB, 153 182

[vi] *Reynolds v. Times Newspapers Ltd* [2001] 2 Appeal Cases 127

[vii] (Application no 35373/97) judgment 17 December 2002

[viii] *Douglas v Hello!* [2001] 2 WLR 992

[ix] *Campbell v MGN* [2004] UKHL 22; [2004] 2 AC 457.

[x] *Jameel (Mohammed) v Wall Street Journal* [2006] UKHL 44; [2006] 3 WLR 642 para. 38.

[xi] *Application no. 59320/00* Judgment 24 June 2004.

[xii] *Ash v McKennit* [2006] EWCA Civ 1714 paras 80, 86.