

HUMAN RIGHTS ACT 1998 AND LIBEL LAW: BRAVE NEW WORLD?

ERIC BARENDT¹

ABSTRACT

[1] The commencement of the *Human Rights Act 1998* (UK), and its incorporation of the European Convention on Human Rights into English law, prompts this article's examination of significant recent libel cases from the European Court of Human Rights. The cases' implications for various defences are considered as well as the relationship between freedom of speech and defamation. Four implications for English libel law are investigated which relate to the concept of the margin of appreciation in Convention law, the presumption defamatory statements are false, the distinction between statements of fact and opinion, and qualified privilege. The most important impact, however, should be on the general common law approach to balancing interests in free speech and reputation.

The impact of incorporation of the European Convention on Human Rights (ECHR) on the protection of privacy has been much discussed both in the press and legal commentary. In particular, the question whether the *Human Rights Act 1998* (HRA) compels recognition of a privacy right against the media has been exhaustively analysed.² This is rather odd, since the European Human Rights Court in Strasbourg has never pronounced on the scope of a privacy right against the media, let alone balanced it against the right to freedom of expression guaranteed by Art 10 of the ECHR. In contrast, the repercussions of incorporation for libel law have largely been ignored, although several major rulings of the Strasbourg [2] Court have concerned defamation. It will be argued in this article that some of them, notably the recent rulings in *Bladet Tromso*³ and in *Bergens Tidende*,⁴ may carry significant implications for libel law. These concern not only the scope of the defences to defamation actions, but more fundamentally may affect the way in which the courts approach the relationship of libel law and freedom of expression.

The first part of this article outlines some leading Strasbourg decisions, concluding with a

¹ Goodman Professor of Media Law, University College London. An expanded version of this paper will appear in the 2001–2002 volume of the *Yearbook of Copyright and Media Law*.

² See, for example, I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 *International and Comparative Law Quarterly* 57; R Singh, 'Privacy and the Media after the Human Rights Act 1998' [1998] *European Human Rights Law Review* 712; G Phillipson and H Fenwick, 'Breach of Confidence in the Human Rights Act Era' (2000) 63 *Modern Law Review* 660.

³ *Bladet Tromso v Norway* (2000) 29 EHRR 125.

summary of the principles which emerge from them. Part 2 explores their implications for English libel law.

Libel Jurisprudence of the European Human Rights Court

General principles

The Convention right to freedom of expression is not absolute. Article 10(2) provides that exercise of the freedom, which includes freedom to receive and impart information, may be subject to a number of restrictions. But such restrictions must be 'prescribed by law' and they must be 'necessary in a democratic society' to satisfy one of the aims listed in the provision. Among those aims are '... the protection of the reputation or rights of others', a clear reference to the goals of defamation laws. These conditions for the legitimacy of restrictions on freedom of expression have not given rise to difficulty. First, the Court has never found a state's defamation law too imprecise or uncertain to satisfy the requirement that it is 'prescribed by law'. Even the broad discretion which members of a jury (used to) enjoy in England in their assessment of libel damages did not fall foul of the condition.⁵

Although in most cases the Court has been concerned with the question whether the employment of a state's libel law was necessary to protect an individual's reputation, states may also attempt to justify its application as necessary to achieve other legitimate ends, in particular 'the prevention of disorder'. In continental European countries, the reputation of politicians, public officials, and indeed of public institutions, is frequently protected by criminal laws serving wider goals than the protection of individual reputation. Thus in *Castells v Spain*⁶ the Court accepted that criminal proceedings had been brought 'for the prevention of disorder', when a Senator had been prosecuted for alleging that the Spanish government had been involved in the assassination of Basque separatists. This point is not, however, of much importance for English law. Criminal proceedings are extremely rare, to some extent because newspaper proprietors, publishers, and editors may only be prosecuted with the leave of a High Court judge. Only serious libels may be prosecuted.⁷ In any case the Strasbourg Court seems always to have been satisfied that the defamation law, or rather its application through criminal or civil proceedings, had the

⁴ Judgement of 2 May 2000.

⁵ See *Tolstoy v United Kingdom* (1995) 20 EHRR 442.

⁶ (1992) 14 EHRR 445.

⁷ See *Gleaves v Insall* [1999] EMLR 779 for discussion of these points.

legitimate aim of protecting the right to reputation. This aspect of its jurisprudence does not call for further discussion.

The crucial question examined by the Court in defamation cases has been whether the interference was *necessary*. Under principles established in early freedom of expression cases (notably *Sunday Times v UK*),⁸ the interference must satisfy a ‘pressing social need’, it must be proportionate to the aim (eg, the protection of reputation) and the reasons given for it must be relevant and sufficient. The European Court recognises that national courts (and other authorities) enjoy a ‘margin of appreciation’ when they consider whether it is right to restrict freedom of expression. But this is limited in libel (and other freedom of expression) cases by ‘a European supervision by the [Strasbourg] Court, whose task it is to give [3] a final ruling on whether a restriction is reconcilable with freedom of expression...’.⁹ In that context the Court takes into account the need in a democracy for the press and media to be able to exercise their vital role as ‘public watchdogs’ in imparting information and ideas on subjects of public interest. Further, journalistic freedom covers a degree of exaggeration and perhaps provocative material.¹⁰

These principles have often been restated by the Court at the outset of its libel judgements. They require it to consider all the relevant factors involved in publication of the defamation, in particular the status of the claimant, the subject-matter of the article, and the classification by the national court of the imputations either as allegations of fact or as value judgements.

Leading libel decisions of the Strasbourg Court

The first decision of the Court in this area, *Lingens v Austria*,¹¹ remains a ruling of seminal importance. A former Chancellor of Austria, Bruno Kreisky, brought private prosecutions for criminal defamation against the editor of a magazine, *Profil*, in respect of its allegations that he had been guilty of opportunism and immoral political conduct in negotiating the formation of a government with the leader of the extreme right-wing Liberal Party, Peter, and in defending Peter against charges of involvement in Nazi atrocities. The Court

⁸ (1979–80) 2 EHRR 245.

⁹ *Bergens Tidende*, judgement of 2 May 2000, para 48.

¹⁰ *Ibid* para 49.

¹¹ (1986) 8 EHRR 407.

unanimously held the conviction incompatible with the ECHR; Austrian law required the defendant to prove the truth of what were clearly value judgements, made in good faith and based on undisputed facts. The Austrian courts in effect required the journalist to discharge an impossible burden in showing that his interpretation of the events was correct.

In one passage the Strasbourg judges emphasised that politicians must tolerate a wider range of criticism than private individuals, although it added that they are entitled to protect their reputation, even when not acting in a private capacity.¹² Understandably this aspect of the ruling has attracted attention, but it may be wrong to exaggerate its importance and to regard the *Lingens* decision as laying down a special rule for politicians (and public officials) similar to those formulated by the United States Supreme Court in *New York Times v Sullivan*¹³ or more recently by the High Court of Australia and the New Zealand Court of Appeal.¹⁴ The European Court does not regard the status of the claimant as decisive; it is a factor to be taken into account with others, a point brought out by some of its later decisions. What was crucial in *Lingens* was the characterisation of the allegations as value judgements.

The approach taken in *Lingens* has been followed in a number of other cases where libel laws have been used to penalise criticism of politicians or government institutions.¹⁵ In the first place, as we have seen, the Court is particularly keen to protect the expression of opinion, which in the nature of things it is impossible to substantiate. So libel laws requiring the defendant to justify such expression are incompatible with the Convention. Secondly, a defendant must be allowed the chance to show the truth of any factual allegations. So the refusal by the Spanish courts to allow a Senator the opportunity to introduce evidence to show the truth of his allegations amounted to an unnecessary interference with his freedom of expression.¹⁶

¹² Ibid para 42

¹³ 376 US 254 (1964).

¹⁴ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Aust HC); *Lange v Atkinson* [1998] 3 NZLR 424 and [2000] 1 NZLR 257 (NZ CA).

¹⁵ *Oberschlick v Austria (No 1)* (1989) 19 EHRR 389; *Castells v Spain* (1992) 14 EHRR 445; *Schwabe v Austria*, Series A, no 242 (1992); *Oberschlick v Austria (No 2)* (1997) 25 EHRR 357.

¹⁶ *Castells v Spain* (1992) 14 EHRR 445.

[4] These decisions would not trouble English libel lawyers. But the Court's general approach might cause more surprise. Consider, for example, its judgment in *Schwabe*, one of five defamation cases to come to it from Austria. Schwabe, an official of the Austrian People's Party (PP), issued a press release attacking the attitude expressed by Wagner, a chairman of a branch of the Socialist Party, to the behaviour of a prominent figure in the PP. Wagner had criticised this person for failing to resign after a traffic accident in which, Wagner alleged, he had left the scene under the influence of alcohol, abandoning the victim. In contrast, it was said, Wagner had supported his deputy, Frühbauer (subsequently a member of Austrian governments), who had been involved in 1966 in a serious road accident with two fatalities after excessive consumption of alcohol. Finally, the press release concluded, Wagner's credibility would be enhanced if he were to apply the same principles of morality to officials within his own party as he had to those of its opponents. The Austrian courts held that Schwabe had not proved the truth of the allegations; further, the press release was misleading insofar as it did not mention that, though the deputy had indeed, to Wagner's knowledge, been convicted of a driving offence in 1966, he had not been convicted of a drink-related driving offence. For the Strasbourg Court this point was immaterial. The reference to the earlier accident was incidental to the main point of the article — the different standards applied by Wagner to the two incidents — a legitimate matter of public interest, as was, for that matter, the previous criminal convictions of a politician. The comparison of the two episodes was treated by the Court as a value judgment; the facts on which it was based were *substantially* correct (my emphasis).¹⁷ The dissenting judgment argued that the press release hardly formed part of a major political debate and had gratuitously involved Frühbauer.

Another significant early decision on the compatibility of defamation laws with freedom of expression was that in *Thorgeirson v Iceland*.¹⁸ The author of several newspaper articles had been convicted of criminal defamation in respect of his allegations that (unnamed) police officers had frequently behaved in a brutal manner. The Court held that these articles dealt with a matter of public concern, the language in them was not excessive, and their purpose was to prompt the institution of an inquiry into police brutality. Moreover,

¹⁷ *Schwabe v Austria*, Series A, no 242 (1992) para 35. In *Oberschlick v Austria (No 2)* (1997) 25 EHRR 357, para 33, the Court said that an opinion would be excessive 'in the absence of any factual basis', an even lighter test.

¹⁸ (1992) 14 EHRR 843.

the allegations had an objective basis; one incident was undisputed, while other allegations were based on widespread rumours and stories. It was not established that these stories were altogether untrue. The applicant was essentially reporting what was being widely said about police brutality. The Court concluded that in these circumstances it was unreasonable to require the author to prove their truth. His conviction was capable of discouraging open discussion of a matter of public concern.

Two points emerge from this case. First, the Court explicitly rejected the existence of a sharp line between political speech and discussion of other matters of public concern. While *Lingens* and later cases suggested that politicians should be expected to be more tolerant of criticism than private individuals, *Thorgeirson* indicates the more important distinction is that between discussion of matters of public concern and private (or trivial) gossip. Obviously allegations of police misconduct fall within the former category. Secondly, there are circumstances where it is unreasonable to require the defendant to prove the truth of the defamatory implications. What is less clear is why the Court held *Thorgeirson* entitled to take advantage of this principle which, of course, runs counter to the presumption of falsity in the common law. Later cases, notably *Bladet Tromso*,¹⁹ show that there are other situations where the Court is prepared to dispense the defendant from the burden of justifying the allegations.

Two decisions have suggested that the Court is sympathetic to use of national libel laws to protect the reputation of members of the judiciary. In *Barford*²⁰ it held, by a majority of six to one, that there was no [5] violation of Art 10, when the applicant was convicted of defamation for suggesting that two part-time lay judges in Greenland had been influenced in their disposition of a tax case by their employment by a local authority. The Court did not think the conviction represented an unnecessary restriction on the applicant's freedom of expression; he was free to criticise the composition of the court, but not to attack the judges personally. Moreover, there was no proof of actual bias. In the second case a closely divided Court (five to four) upheld the conviction of Austrian journalists for publishing allegations of bias and bullying on the part of judges in their conduct of

¹⁹ *Bladet Tromso v Norway* (2000) 29 EHRR 125.

²⁰ *Barford v Denmark* (1989) 13 EHRR 493.

criminal trials.²¹ The majority considered it was for the national courts to classify the statements either as allegations of fact or as value judgments; the Austrian courts had treated them under the former heading and had held there was no evidence to justify them. Interestingly the vigorous dissent of Judge Martens argued the Strasbourg Court should review the classification of the allegations, and questioned whether it was compatible with the Convention to require the defendant to prove the truth of the allegations.

There is one relatively persuasive argument for distinguishing attacks on the judiciary from similar onslaughts on politicians and other public figures: judges are much less free than other victims of newspaper libel to use the media to reply.²² On the other hand, the handling of criminal trials and judicial bias, or its appearance, are arguably as much matters of legitimate public concern as the conduct of politicians and civil servants. The Court appears to have adopted this second perspective in a more recent ruling, *De Haes v Belgium*.²³ An editor and journalist had been ordered to pay damages to judges whom they had accused of bias and ideological prejudice in taking various controversial decisions on the custody of children. The European Human Rights Court held that these awards were incompatible with Art 10. The allegations raised matters of public concern — political bias on the part of the judges. They should be treated as the expression of an opinion, rather than statements of fact. (The Court was prepared to classify the accusations independently of the national courts, which appears to have treated them as allegations of fact.) An expression of opinion may be excessive, and so presumably unprotected, in the absence of *any factual* (my emphasis) basis.²⁴ The implication was that the existence of some factual underpinning for the comment would be enough to provide a basis for its assertion.

Three of the four most recent libel cases have come from Norway.²⁵ In the first, *Bladet Tromsø*,²⁶ a Tromsø newspaper reported in a series of over 20 articles allegations that seal hunters had frequently broken hunting regulations and had engaged in cruel hunting

²¹ *Prager and Oberschlick v Austria* (1995) 21 EHRR 1.

²² The point was made by the Court in *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, para 34.

²³ (1998) 25 EHRR 1.

²⁴ The Court distinguished *Prager and Oberschlick* on the ground that in that case there was no basis of fact for the criticism, though it also seems that in *Prager* it accepted the characterisation of the statements as allegations of fact.

²⁵ The other recent case is *Dalban v Romania*, Judgement of 28 September 1999, where it was held that a journalist's conviction for criminal libel of a politician violated Art 10. The Court pointed out that there was no proof that the story was untrue: see n 38 below and accompanying text.

methods. They had been made by a Mr Lindberg who had successfully applied to become an inspector for the Ministry of Fisheries. At the time of the articles, Lindberg's report had been exempted by the Ministry from publication under a provision enabling reports to be withheld if they alleged the commission of offences. However, many of the more serious allegations were later found inaccurate by a Committee of Inquiry. The Norwegian courts ruled the factual allegations unproven, so the newspaper was liable to pay compensation. The European Court considered the allegations in the context of the considerable public interest in seal hunting issues, stressing that the 'thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals'.²⁷ [6] While in ordinary circumstances the media must prove the truth of allegations of fact, the Court held that normally they should be entitled to rely on the contents of official reports without undertaking independent research. Before the date when the Ministry began to express doubts about the inspector's competence and the quality of his report, it was reasonable for the newspaper to rely on that report without an independent check on its accuracy. Further, it had acted in good faith and had not named anyone accused of the more serious charges (though the names of 10 crew members exonerated by Lindberg were published).

Four judges dissented. They emphasised that the Norwegian courts had reasonably balanced the interests in press freedom and the reputation of the hunters. Further, it was wrong for the newspaper to rely on an inspector's report which was not in the public domain when the key articles were published. It had culpably made no effort to check the story before publication, for instance, by asking crew members to comment; interviews with them were only published after the newspaper had printed Lindberg's report in full. Moreover, the story did not involve any public figure, but rather private individuals who were clearly identifiable.

*Nilsen and Johnsen v Norway*²⁸ is unusual in that it did not involve a media defendant and therefore directly implicate press freedom. Rather it concerned a defamation action by a professor of criminal law against officials of the Norwegian and Bergen Police Associations in respect of their charges that he had deliberately made false accusations of

²⁶ *Bladet Tromsø v Norway* [2000] 29 EHRR 125.

²⁷ *Ibid* para 63.

²⁸ Judgment of 25 November 1999.

police brutality in Bergen. The Norwegian courts characterised their attacks on the professor as serious assertions of fact capable of proof, not shown to be true. As in previous cases, the European Court emphasised that the allegations formed part of a debate on a matter of serious public concern, police violence, particularly in Bergen. They were verbal remarks, reported in the press, so that the police officials had no opportunity to refine or modify them before publication.

The Court distinguished from the other allegations a statement accusing the professor of deliberate lies; it agreed with the Norwegian government that this did amount to an unproven allegation of fact. On the other hand, unlike the national courts, the Court regarded the statements attributing improper motives to the professor as value judgements. While it did not share the Commission's view that the professor should be compared with a politician for the purpose of tolerating criticism; greater weight should have been attached to his involvement in a public controversy than had been done by the national courts. Consequently 'a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern...'.²⁹ There was evidence for the claim by the applicants that false allegations had been made by informers against the police. In these circumstances, the applicants' allegations against the professor did not exceed the bounds of permissible criticism under Art 10 of the ECHR.

The most recent case is *Bergens Tidende v Norway*.³⁰ It concerned an application by a newspaper, its editor, and a journalist in respect of the award to a cosmetic surgeon of damages for libel. In a series of articles the newspaper had reported allegations by a number of women patients that they had been disfigured following treatment by the surgeon; there were also complaints of lack of care from him following the operation. In the same newspaper issues as that containing the first and most lengthy critical article, the *Tidende* also published interviews with the surgeon about whom the complaints were made and another plastic surgeon; both interviews pointed out that cosmetic surgery inevitably involved some risks. The Norwegian Supreme Court, unlike the lower appellate court, interpreted the articles as containing accusations of reckless surgery by the doctor. Those charges were not proven, so the doctor was awarded damages for both pecuniary

²⁹ Ibid para 52.

³⁰ Judgment of 2 May 2000.

and non-pecuniary loss.

[7] As usual the Court in Strasbourg³¹ affirmed the vital role of the press as a 'public watch-dog' in imparting information of serious public concern. Allegations of unacceptable health care at the clinic certainly raised matters of such concern. The article accurately recorded the women's complaints, which so far as the deficiencies in post-operative care were concerned had been found substantially justified. The Court did not consider its function was to resolve the dispute between the national courts on meaning, but to determine whether, considering the allegations in the context of the overall coverage by the newspaper, the Supreme Court's decision was a proportionate restriction on press freedom. The European Court concluded it was not. The newspaper's allegations were neither excessive nor misleading, its reporting was balanced, the surgeon had been given an opportunity to reply to the criticism, and he had been defended in two later issues of the paper. The libel award violated Art 10 of the Convention.

Summary of principles applied in defamation cases

A number of points emerge from these decisions, in the overwhelming majority of which, it may be noted, the Court held national law in violation of the Convention. Some judgments indicate that politicians are expected to tolerate more criticism than private individuals: see *Lingens*, *Castells*, *Schwabe*, and implicitly, *Nilsen and Johnsen*. But it is unclear how much weight was attached to the point. What seems to have been more significant in these and other cases is that the defamatory allegations were made in the course of a discussion of a matter of public concern, although the libel victims were not political figures: see *Thorgeirson*, *Bladet Tromso*, *Nilsen and Johnsen*, *Bergens Tidende*. In these cases the Court was unconcerned with the status of the defamed person. (Another point is that in *De Haes* the Court did not rely on the distinction drawn in the earlier *Barford* and *Präger/Oberschlick* cases between criticism of politicians and of the judiciary.) In short, the jurisprudence of the Court differs from that in the United States, where courts apply one set of constitutional principles to libel actions brought by public officials and public figures and other principles to actions brought by private individuals.³²

³¹ The President of the Chamber in this case was Sir Nicholas Bratza, the British judge on the Court.

³² See *Gertz v Robert Welch* 418 US 323 (1974), discussed by E Barendt, *Freedom of Speech* (1987) 182–4.

The European Court sometimes appears to attach weight to the main purpose or thrust of the articles, and the relative importance (or lack of it) within their overall content of the defamatory allegations. In *Thorgeirson*,³³ for instance, it was emphasised that the purpose of the articles accusing the police of brutality was to persuade the government to set up an inquiry, while in *Schwabe*³⁴ the Court characterised the reference to the incident involving Frühbauer as ‘incidental’ to the main theme of the press release, the different standards applied by Wagner to his political colleagues and opponents. The thrust of the articles on which the action was brought in *Bladet Tromso* was not primarily to accuse individual crew members of cruelty to animals, but to encourage the authorities to use Lindberg’s findings to improve standards in the seal hunting industry.³⁵ Moreover, allegations should be examined in the context of a series of articles discussing a matter of public concern; see *Bladet Tromso* and *Bergens Tidende*.

In many cases the Court has drawn the distinction, familiar to the common law, between factual allegations and value judgments or opinions. The defendant in a libel action cannot be expected to prove the truth of an opinion, but may, compatibly with the ECHR, be required to justify allegations of fact. But the position is more complicated than that distinction suggests. First, it is unclear how far a value judgment must be based on true facts. In *Lingens* the basis of fact for the opinion on Kreisky’s conduct was uncontested. But in other decisions the Court seems to have been satisfied with a lower standard: a sufficient basis in fact for the value judgment (*Schwabe*) or perhaps any factual basis (*De Haes*).

[8] Secondly, it has been held, or suggested, in some cases that the defendant need not prove the truth of the allegations of fact. In *Thorgeirson*,³⁶ allegations based on widespread rumours and ‘stories’ did not have to be justified, while in *Bladet Tromso*³⁷ the Court said the newspaper was not required to show, or even check, the accuracy of allegations made in an official, but unpublished, report. The *Bergens Tidende* decision suggests that it may be enough for a paper to show that it has accurately reported allegations (by the women patients) and that overall its coverage was neither excessive nor unbalanced. Finally, in

³³ *Thorgeirson v Iceland* (1992) 14 EHRR 843, para 66.

³⁴ *Schwabe v Austria*, Series A, no 242 (1992) para 31.

³⁵ *Bladet Tromso v Norway* (2000) 29 EHRR 125, para 63.

³⁶ *Thorgeirson v Iceland* (1992) 14 EHRR 843.

*Dalban*³⁸ the Court observed there was no proof that the articles on which a successful prosecution had been brought in Romania were totally untrue, which could be interpreted as suggesting that (at least in the circumstances of that case) the prosecutor (or claimant) had the burden of proving falsity.

The impact of Strasbourg Decisions on English Libel Law

General: the margin of appreciation

Although not entirely free from argument, there is little doubt that English courts must now ensure that libel law is applied in conformity with the principles developed by the European Court of Human Rights. In the first place, the media may claim the Convention right to freedom of expression.³⁹ Secondly, 'public authorities', including the courts, act unlawfully if they act in any way incompatibly with Convention rights.⁴⁰ It follows that the rulings (and jury directions) of trial judges and appellate decisions on points of libel law should respect the right to freedom of expression. Moreover, English judges are required to take into account decisions and judgments of the Strasbourg court,⁴¹ although they are not bound to follow them.

One general difficulty the English courts will experience in interpreting decisions of the Strasbourg Court in libel (and other) cases is that the latter recognises a 'margin of appreciation' for national legislatures and courts when they determine whether it is necessary to impose a restriction on the media in order to safeguard the right to reputation. It is clear, however, that this doctrine has no place when national courts themselves interpret Convention rights.⁴² National courts must, therefore, read and interpret Strasbourg judgements as if they were written without those passages in which the Court expresses an initial reluctance to question the exercise of discretion by national authorities (albeit one which is frequently overcome in practice).

It is unclear what the implication of this point will be. Arguably, it means that English judges should treat the Strasbourg jurisprudence as laying down only a *minimum* level of

³⁷ *Bladet Tromso v Norway* (2000) 29 EHRR 125.

³⁸ *Dalban v Romania*, Judgement of 28 September 1999, para 50.

³⁹ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 recognised that the press are covered by Art 10.

⁴⁰ HRA 1998 s 6.

⁴¹ *Ibid* s 2(1).

⁴² See *R. v DPP, ex parte Kebiline* [1999] 4 All ER 801, 843–4 (Lord Hope) (HL).

protection for freedom of expression in relationship to the restrictions imposed by defamation law. Indeed, they should be willing, where appropriate, to give the freedom wider scope, given that they must take account of the Strasbourg jurisprudence minus the qualifications expressed under the margin of appreciation. But even if English judges remain intellectually wedded to the common law's traditional view of the right to reputation as a right of equal importance to freedom of speech,⁴³ for prudential reasons they may be expected at least to follow the path laid down by the Strasbourg Court. The point is simply this. If they do not adopt this course, disappointed litigants, notably the press, will ask the European Court to find that United Kingdom law violates Art 10.

[9] *Presumption of falsity*

Under the common law defamatory statements are presumed to be false; it is for the defendant to show that they are true or amount to fair comment.⁴⁴ Perhaps this presumption could be challenged under the HRA? Admittedly, the Strasbourg Court has often said that it is legitimate to expect a defendant to prove the truth of allegations of fact. But in two cases it has ruled in effect that a newspaper may publish defamatory factual allegations without substantiating them.⁴⁵ The decision in *Thorgeirson* that the writer could not be required to substantiate widespread rumours concerning police brutality might even give rise to a challenge to the common law 'repetition' rule.⁴⁶ Further, the statement in *Bergens Tidende* that journalists must act 'in good faith to provide accurate and reliable information in accordance with the ethics of journalism' may suggest a more relaxed standard than the common law requirement on the defendant to prove the gist of his defamatory allegations.⁴⁷

It would be surprising if incorporation of the ECHR required total reversal of a well-established common law principle. Rather, it is suggested its application may be open to challenge in circumstances similar to those in *Thorgeirson*, or in *Bladet Tromso* where the newspaper relied on an unpublished official report. In other words, where the media have good grounds for believing a story to be true, they should not necessarily be required

⁴³ See *Kiam v Neil (No 2)* [1996] EMLR 493, 507 (Beldam LJ).

⁴⁴ P Milmo and W V H Rogers (eds), *Gatley on Libel and Slander* (9th ed, 1998) para 11.3.

⁴⁵ *Thorgeirson v Iceland* (1992) 14 EHRR 843; *Bladet Tromso v Norway* (2000) 29 EHRR 125.

⁴⁶ Milmo and Rogers, *Gatley*, above n 44, para 11.4, discussing among other cases *Stern v Piper* [1996] 3 All ER 385 (CA).

⁴⁷ *Bergens Tidende*, judgement of 2 May 2000, para 53.

to establish its accuracy. Of course, this point may have academic value; in many situations where it is difficult to justify defamatory allegations, the media may now prefer to rely on the expanded common law qualified privilege defence.⁴⁸

Distinction between statements of fact and opinion

English common law distinguishes allegations of fact, the substance of which must be justified, from the expression of opinion protected as fair comment, provided the facts on which it is based are true. *Gatley* observes that there may be difficulty in distinguishing comment and fact.⁴⁹ The statement — 'Jones has abused his office' — may be regarded as a comment on facts about Jones's official conduct which are explicitly set out or referred to in an article; on the other hand, it would probably be treated as an allegation of fact if it were stated baldly without supporting detail.⁵⁰ It is unclear whether imputations of dishonesty or bad motives should *necessarily* be treated as allegations of fact or as capable of amounting to comment as an opinion on or inferences from the facts.⁵¹

Future decisions in this complex area must now be taken in the light of the Strasbourg jurisprudence. The Human Rights Court draws a distinction between facts and value judgments. The existence of facts can be shown, but the latter are not 'susceptible of proof'.⁵² Indeed, the difficulty of showing a statement to be true, perhaps because the criteria for verifiability are themselves contestable, may itself lead to its classification by the Court as a value judgment.⁵³ In the *Nilsen* case⁵⁴ the Court rejected the characterisation [10] by the Norwegian courts of four statements imputing improper motives to the law professor (among them, a charge that the investigations were made by 'dilettantes and intended to fabricate allegations of police brutality ...') as allegations of fact. The Court held that, from their wording and context, 'they were intended to convey the applicant's own opinions and were thus rather akin to value judgments.'⁵⁵

⁴⁸ See below, text accompanying n 58 and following.

⁴⁹ Paras 12.6–12.13.

⁵⁰ See the classic judgement of Lord Porter in *Kemsley v Foot* [1952] AC 345, 357–8.

⁵¹ For a full discussion of the authorities, see Sir Brian Neill and R Rampton (eds) *Duncan and Neill on Defamation* (2nd ed, 1983), paras 12.19–12.30, which prefers the second view.

⁵² *Lingens v Austria*, (1986) 8 EHRR 407, para 46.

⁵³ A L Young, 'Fact, Opinion, and the Human Rights Act 1998: Does English Law Need to Modify its Definition of "Statements of Opinion" to Ensure Compliance with Article 10 of the European Convention of Human Rights?' (2000) 20 *Oxford Journal of Legal Studies* 89, 95–7.

⁵⁴ *Nilsen and Johnsen v Norway* Judgement of 25 November 1999, para 50.

⁵⁵ Also see *De Haes v Belgium* (1998) 25 EHRR 1, where the Court treated allegations that Belgian judges

The European approach has two related implications for English law in this context. First, the Court is prepared to characterise as value judgments statements which might well be regarded by an English court as an allegation of fact, or at least as a statement which a jury could properly hold to be a factual allegation. The courts here have generally declined to treat imputations of corrupt or disreputable conduct as comment.⁵⁶ They should now take into account the approach of the Strasbourg Court, which seems more inclined to treat such imputations as value judgments, the expression of which cannot be restricted by libel law. Secondly, English courts must bear in mind that the European Court is prepared to place its own interpretation on the allegations and will not necessarily accept the classification adopted by the national court.

It must also be questionable whether the decision of the Lords in *Telnikoff v Matusevitch*⁵⁷ would survive scrutiny under the *Human Rights Act*. A majority of the House held that the question whether defamatory words in a letter, written in reply to an article published in the paper a few days previously, amounted to comment or statements of fact should be determined by the jury by reference to the terms of the letter alone. In the leading speech, Lord Keith said that a substantial proportion of readers of the letter might not have read the earlier article and so might have read the terms of the letter as statements of fact about the contents of the article rather than as comments on them. It is the responsibility of writers of letters to the press to take care that they are commenting on events or previous material and not making misrepresentations with regard to the matter on which they are commenting. It is unlikely that the European Court would adopt this strict approach. In *Nilsen* emphasis was placed on the applicants' intention to express their own opinion on the attitude of the professor. Their replies to his attacks on the police were, therefore, similar to value judgments, contributing to a public debate largely initiated by the professor. On this perspective English courts would probably decline to follow *Telnikoff*.

Qualified privilege: Lord Nicholls' 'checklist'

In *Reynolds* the House of Lords rejected a generic qualified privilege which would have given the media a defence to a libel action whenever it communicated political

had been motivated by bias and political prejudice as a value judgment, although national courts had classified them as allegations of fact.

⁵⁶ In particular, see *Campbell v Spottiswoode* (1863) 32 LJ QB 185, and *Hunt v Star Newspaper* [1908] 2 KB 309.

information to the public.⁵⁸ Instead, it held the common law recognised a privilege for media communications to the general public when this was appropriate, taking into account a range of factors. As a result, whenever a newspaper is tempted to print defamatory allegations, concerning a politician or other public figure, it must predict whether the court will decide that overall it was in the public interest for the information to be published. (It is assumed that the newspaper believes the allegations are accurate, but is unsure whether a defence of justification would be successful.) In practice, the media must assess how a judge will apply Lord Nicholls' guidelines for determining whether a privilege should be recognised. Among the relevant factors itemised by Lord Nicholls are the seriousness of the allegations, the urgency of their publication, the tone of the story, reliability of the sources for the story, and whether the media gave the claimant an opportunity to comment before publication.⁵⁹

[11] As pointed out earlier, the European Court has not formulated any special rule for political speech, though politicians are expected to tolerate criticism more readily than private persons. So the common law's rejection of a generic privilege for political expression should survive incorporation of the ECHR. The question is whether the criteria for invoking the common law privilege formulated in *Reynolds*, or their application in a particular case, would satisfy scrutiny in Strasbourg and now, of course, under the HRA in the English courts. Lord Nicholls, after referring to leading Strasbourg judgements including *Bladet Tromso*, concluded that the common law satisfied human rights jurisprudence. However, it may be somewhat stricter. On the check-list drawn-up by Lord Nicholls, it is doubtful whether a privilege defence would have succeeded in *Bladet Tromso* itself. The paper had made no effort to check the story with members of the crew of the ship before publication, while the tone of the story was sensational. Further, it knew that the report on which it relied was exempt from the normal publication requirement, because it contained defamatory allegations. In these circumstances, it is likely that an English court would have denied a privilege claim. But the majority of the Court held the application of Norwegian libel law was a disproportionate restriction on the newspaper's freedom of expression.

⁵⁷ [1992] 2 AC 343.

⁵⁸ [1999] 4 All ER 609.

⁵⁹ Ibid 626.

General approach to libel restraints

However, far more important than these particular points is the impact incorporation of the ECHR may, and indeed should, have on the common law's general approach to libel actions. For English lawyers their disposition may depend on balancing two rights, or interests, presumed in principle to be of equal value: the right to reputation and the right to freedom of expression (and associated press and media freedom). In practice, questions of meaning are frequently paramount. The defendant must prove the truth of the words in the meaning which the jury find them to bear, or show that they amount to fair comment. Or a media defendant may rely on the expanded defence of qualified privilege, though (as we have seen) it is unpredictable whether this will be upheld.

In contrast, the European Court emphasises the context in which the allegations were made, in particular whether they were made in the course of media treatment (perhaps in a series of articles) of a topic of public interest. The Court is less concerned with the impact of an individual article, let alone the meaning of the particular allegation on which proceedings (civil or criminal) had been brought in the national court. Indeed, defamatory imputations may be treated as incidental to the main theme of the publication, with the implication that to allow a libel action to succeed would be to impose a disproportionate restriction on freedom of expression.⁶⁰ Secondly, the articles may be considered as a whole to see whether overall they are fair and balanced in their treatment of the libel claimant. In that context it may be important that he has been allowed space to reply to the criticism in respect of which he has initiated legal proceedings.

These approaches are radically different. The common law of defamation is preoccupied with questions of meaning. Freedom of expression is only relevant in the context of the defences which the media may offer to what would otherwise be a successful libel action. The HRA requires courts to give priority to the Convention right to freedom of expression. They must no longer allow libel law to inhibit its exercise, if, say, the defamation is incidental to, or a minor part of, a good faith discussion on a topic of public concern, or the claimant has been given fair coverage by the newspaper or broadcaster. With priority

⁶⁰ See *Schwabe v Austria*, Series A, no 242 (1992). The approach is similar to that required by *Contempt of Court Act 1981* s 5, providing that it is not a contempt of court if the risk of prejudice to legal proceedings is

given to freedom of speech, it is surely hard to justify principles such as the presumption of falsity or particular decisions such as that in *Telnikoff*.