Communication Law Review
Volume 21, Issue 1

Defamation, Trial by Jury, and Internet Libel: Comparing Online Libel Law in the United Kingdom and the United States

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The Defamation Act 2013 has raised the issue of libel trials that favoured the claimant and led to forum shopping in the UK. The media was disadvantaged in defending their right of freedom of expression protected under European Convention of Human Rights (ECHR), Article 10. The changing landscape of libel law in the UK has also meant the discarding of the trial by jury on the assumption that judges can case manage trials and keep damages to a reasonable level. The issue is if this reform has met its objective in the protection of free speech and which leads to fewer defamation claims. The issue is of particular relevance in social media trials where the judges have to be conscious of the 'dictionary' in libel allegations because of trends in communication. It needs a comparative analysis with the US defamation law whose origins are on the same common law principles but under the First Amendment the freedom of speech is protected, and the print and electronic media have been able to enact a successful defence more often in libel proceedings. This leads to an enquiry whether the jury is better informed in delivering a verdict when libel is on the internet by taking into consideration the approaches of the English and American courts which have preserved jury trial in order to determine how the interests of the defendant and claimants can be balanced.

Keywords: Defamation Act 2013, Section 11, freedom of expression, jury trial, civil procedure, online libel, Communications Decency Act 1996, Section 230

A statement is defamatory if it brings someone into disrepute or causes them to be exposed to "hatred, ridicule or contempt by the right thinking members of society."[2] This is the principle that underlies the need to try those making the disparaging

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[2] A. L. Armitage, 'Libel. Innuendo. Justification. Damages.' The Cambridge Law Journal, Vol. 20, No. 2 (Nov. 1962), pp. 158-160.

statement by direct accusation or by innuendo which is based on extrinsic facts known to the recipients.[3] The Defamation Act 2013 has set in motion the reform of English law that takes into consideration a more stringent test for libel, the abolition of juries based on streamlining damages awards, and making it possible for defendants to succeed on grounds of freedom of expression. The issue that needs examination is if the right to jury trial that has been abolished in the UK, but still practiced in libel cases in the US provides a better guarantee for the defence and if it also leads to more balanced outcomes in online defamation claims than if a judge was ruling in a case.

The Defamation Act 2013 Section 1 establishes a "serious harm" threshold and test for bringing a defamation claim in any statement that by "its publication has caused or is likely to cause 'serious harm' to [his/her] reputation." A claimant will need to satisfy the court that the defamation is sufficiently serious and that the imputation, extent and/or nature of the words published are such that real reputational damage has been suffered.[4] There is a single publication rule under Section 8 which is potentially of great significance to online publication. This changes the approach to online material which will be deemed "published once when originally posted (not each and every time it is accessed by readers), the effect being that the 1-year limitation period now runs from the date of that first posting."[5] An additional test applies to a body trading for profit, namely a requirement to show that a statement has caused, or is likely to cause, serious financial loss.[6]

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[3] Grubb v. Bristol United Press Scot Ltd (1962) WLR 25 (CA).

[4] This section builds on the jurisprudence of Jameel v. Dow Jones & Co Inc [2005] EWCA Civ 75 and Thornton v. Telegraph Media Group [2010] EWHC 1414 (QB) and is intended to deter trivial claims. Defamation Act 2013. Explanatory Notes. ttps://www.legislation.gov.uk/ukpga/2013/26/notes/division/5?view=plain.

[5] Defamation Act Commentary on Sections Chapter 26, Section 8. https://www.legislation.gov.uk/ukpga/2013/26/section/8/notes.

[6] Under Section 1 (2) companies which trade for profit will have to establish that the defamatory statement has caused or is likely to cause the company serious financial loss in order to bring successful proceedings. The officers of the company can bring an action if they can establish that the statement reflects on them personally.

The test of sufficient harm is a condition precedent for the claims to proceed to trial. The judge acting in an inquisitorial manner rejects claims that are vexatious and will decide whether to become involved in a detailed assessment of evidence at an early stage in the proceedings.[7] There are provisions of the Defamation Act 1996 that remain intact and apply in parallel with the 2013 legislation. Section 1 of the 1996 Act provides a defence from liability for secondary publishers if they were not the 'author', 'editor' or 'publisher.'[8] In order to escape liability the owner of the website who is hosting user-generated material that is libellous can seek protection under Sections 1(3)(c) and (1)(3)(e) of the Act.

The Defamation Act 2013, Section 11 has abolished the right to jury trial except on the judge's discretion. The issue is if this adversely impacts on media defendants and if the social media needs a jury or if the judge is better placed to decide because of terminologies used that are distinct to online libel. This can be considered with a comparative approach that deals with the English and the US law where online defamation has grown exponentially.

The impact of abolishing jury trial under the Defamation Act 2013 amends s.69 (1) of Senior Courts Act 1981 by annulling the procedure for jury trial in libel "unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury." The concept of jury trials was weakened by the arguments based on freedom of expression enshrined in the European Convention of Human Rights (ECHR). The courts were not persuaded by previous jury awards and held that common law required the courts to subject large awards of damages to a more searching enquiry than had been customary in the past. That test was founded on

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[7] Part 53- CPR 4 Media and Communications Claims, Ministry of Justice, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part53#4.

[8] Section 1 (2) of the Defamation Act 1996 defines these terms as follows: "An 'author' means the originator of the statement, but does not include a person who did not intend that his statement be published at all; 'editor' means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and 'publisher' means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business."

Article 10.2 of the ECHR, and the requirement that any restriction on freedom of expression was necessary in a democratic society.[9] There was also the issue of libel tourism and the notion that jury trials awarded higher damages in England and made it a favoured destination for lawsuits from plaintiffs abroad.

In the US the common law definitions of libel and slander in a cause of action are similar to the English courts and defamatory statements are defined "as those that tend to harm the reputation of [the victim so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[10] The definition of libel "consists of the publication of defamatory matter by written or printed words, by its embodiment in physical or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words. (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1)."[11]

The jury in libel cases is still preserved in the US because there is a presumption that an impediment on the character of a person is best judged by his peers. The US courts in media trials are less claimant friendly and they have decided in a wide range of cases involving matters of public interest that free expression and vigorous public debate are often more important than compensating plaintiffs for harm to reputation caused by defamatory falsehood.

This article concerns the English law of defamation and evaluates the recent changes in its framework by comparing the values underlying the laws that result in different outcomes to similar cases in the US. There is an examination of the online libel law and how this is evaluated in the UK courts and compares it to Section 230 of the Communication Decency Act 1996 in the US where it concerns liability of Internet Service Providers (ISP)s. The methodology focuses on how the solving of problems by eliminating juries to prevent forum shopping and exorbitant awards in the UK has led

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[9] Rantzen v. Mirror Group of Newspapers Ltd. EWCA Civ 16, [1993] at 693.

[10] See RESTATEMENT, SECOND, OF TORTS § 559 (AM.LAW INST. 1977).

[11] Ibid.

to judges ruling with their interpretative practices. This requires contextualisation and standardization which has caused difficulties given how internet communication works and the jury is better placed to make a finding given the evolving nature of online libel.

Abolishing the Jury Trial in Libel

The removal of jury trial at the instigation of parties was premised in the Defamation Act 2013 when the UK government decided that England will not become the centre for libel tourism. The Act has the objective to prevent forum shopping and it is for this reason that the test has been raised from 'substantial harm' to 'serious harm' as a test of libel.[12] It has granted the judge more powers for making decisions that are important for the conduct of the case, such as when foreign defendants are being sued before the English courts in relation to publications that have originated outside England, and which are also disseminated outside the country.

The courts will not decline jurisdiction "where it can be demonstrated that the claimant would not avail justice if denied access to the English courts." Under the revised test introduced by the Defamation Act 2013 no cases can be brought against a person who is not domiciled in the UK, or in an EU Member State, or a state which is a party to the Lugano Convention.[13] This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters).[14] The court must even where there is another clearly more appropriate forum, or further where it "does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."[15] The court will consider

[12] Trevor Hartley, 'Libel Tourism and Conflict of Laws' (2010) 59 ICLQ 25.

[13] Defamation Act 2013 Explanatory Notes, Para 65, https://www.legislation.gov.uk/ukpga/2013/26/ notes/ division/5/9.

[14] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[15] Defamation Act 2013 Explanatory Notes, Para 66, https://www.legislation.gov.uk/ukpga/2013/26/notes/ division/5/9.

various factors including the extent of any publication in the jurisdiction (contrasted against any publication outside of the jurisdiction) and whether there has been any substantial damage to the claimant's reputation within the jurisdiction.[16] This section is aimed at preventing libel tourism whereby foreign claimants choose to sue in England (instead of the most logical jurisdiction) to take advantage of what they perceive to be more claimant friendly libel laws.

This has reformed the exercise of jurisdictional discretion under English law known as forum non convenes. Under this test, the courts have traditionally exercised jurisdiction based on the defendant's presence in the territory or for some connection between the dispute and the territory (such as the claim being based on a tort committed in the territory) unless there is another more appropriate forum.[17] The revised test enables the court to take into account other publications of the material, even if they do not form the basis of the claim. In the previous test an 'abuse of process' threshold existed, requiring a 'real and substantial' tort (meaning more than an insignificant amount of publication or reputation to protect) in England, but this was a minimal requirement, and did not require comparing the significance of an English publication with publication elsewhere.[18]

Alex Mills argues that "at a general level, it concerns choice of law in defamation, which has proven a particularly challenging subject in practice and in proposed law reforms—at present it remains excluded from both UK and EU statutory rules concerning choice of law in tort. More specifically, it concerns defamation online, a context which might be grounds for suggesting that a further specialised rule is required—a view taken by the ECJ in relation to jurisdiction over online defamation. And finally, it concerns defamation online on social media, which raises challenging issues in terms of adapting the law to new media contexts, as well as identifying the

[16] Brett Wilson, 'Defamation Act 2013—A Summary of the Act,' 12 January 2014, https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-of-the-act/.

[17] see MGN v. UK [2008] ECHR 1255.

[18] see Jameel v. Dow Jones and Co [2005] QB 946; Cairns v. Modi [2012] EWHC 756 (QB).

relevant 'public' within which a reputation is established. These are not just difficult practical questions, arising with increasing frequency in litigation, but also problems of principle which have broader implications."[19]

The courts are keen on making defamation litigation quicker, cheaper, and fairer. This is an area of law that has been prohibitively expensive for many claimants and is associated with claims being issued by the wealthy rather than ordinary individuals. All of this may be set to change in an era where defamatory meanings are being decided on a preliminary and cost-effective basis. The procedure has been transformed for a trial to be conducted by the judge and for the exclusion of the jury. This could lead to an increase in the volume of defamation court claims which are then dealt with in preliminary trials on meaning, or even as paper exercises. Until 2017 the Jury list was managed by the judge who was head of the Queens Bench Division acting under powers granted by Section 69 of the Senior Courts Act. The purpose of the new list, created in March 2017 is to enable cases to be managed and assigned by judges and the court has power to move cases out of the list on application or its own motion. The overall aims of managing the list were "to resolve disputes fairly, promptly, and at reasonable cost." [20] The argument is that jury trials have been abrogated because "without a jury, it was now possible for many more cases to reach a final resolution more economically by early judicial decisions on key issues of fact, or mixed issues of law and fact."[21]

Mullin and Scott assert that this reform may engender "a 'profound impact' on the management of English cases. It can be expected that applications for the early determination of the actual meaning of the words complained of will become commonplace. In turn, this will allow counsel to dispense with the need to prepare alternative arguments to accommodate the fact that a jury may select one meaning over

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[19] Alex Mills,""The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?','Journal of Media Law, 7(2015): 1-35, https://doi.org/10.1080/ 17577632.2015.1055942.

[20] Paul Magrath, "Media Litigation: A new approach". Incorporated Council for Legal Reporting". 4/12/17 https://www.iclr.co.uk/blog/legal-profession/media-litigation-a-new-approach/

[21] Ibid

another only at the end of the trial.... All told, the preliminary skirmishes in libel actions can be expected often to become decisive, as questions of seriousness of harm, meaning, fact or opinion fall to be determined earlier than has been common."[22]

The defamatory meanings can be determined on the papers and in the foreseeable future, the value of having an oral hearing on meaning may be deemed to be found only in cases where the context or other circumstances are such that written submissions are inadequate or inappropriate, such as where one or more of the parties is not legally represented. In the less complex cases, the benefits in terms of costs and time of determining meaning as a paper exercise for inviting a jury may also be disadvantageous. Under Part 26 of the Civil Procedure Rules (CPR) (1) an application for a claim, other than a claim for libel and slander, to be tried with a jury must be made within 28 days of service of the defence; (2) A claim for libel or slander must be tried by Judge alone, unless at the first case management conference a party applies for trial with a jury and the court makes an order to that effect.[23]

The trial by jury is a matter of discretion for the judge based on the decision in Tim Yeo MP v. Times Newspapers[24] which engaged Section 11 of the Defamation Act 2013. In this case Mr. Justice Warby refused an application made by the defendant, Times Newspapers, to proceed with trial by jury. Warby J examined the backdrop to the new legislation and rejected the defendant's application for trial by jury. The Times Newspapers had argued that, since the subject matter of the case involved issues of public interest concerning the reputation of a senior Member of Parliament and the newspaper's freedom of expression, it should be heard with a jury.

In his judgment Warby J decided that principles identified in pre-amendment authorities can no longer be considered valid and this was based on the effect of "the

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[22] Allistair Mullis & Andrew Scott,'"Tilting at Windmills: The Defamation Act 2013', 77(1) *Modern Law Review* 87(2014): 106-107.

[23] Part 26 Case Management at Preliminary Stage in the direction under trial with a jury in 26.11, (1) A Ministry of Justice Civil Procedure Rules. 10.1.19. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part26.

[24] [2014] EWHC 2853 (QB).

unequivocal expression of Parliament's intention to remove any right to trial by jury in defamation cases, leaving only a discretion to be exercised by a judge, with a presumption against jury trial."[25] The determination will be met by a high standard of judicial impartiality and there should be no grounds for concern that a judge might show "involuntary bias" towards one or other of the parties because "a judge might not appear to be as impartial as a jury."[26] The factors such as the prominence of the claimant or the public interest in the subject matter will now be of "no greater intrinsic weight in a defamation case than they would be in any other class of case that enjoys no right to trial by jury."[27]

Warby J stated that the facts of the case resembled "the Aitken v. Preston[28] case where the subject-matter is political" and it is "especially desirable that the court's judgment explains what conclusions it has reached and why" and as in "the present case, the subject-matter is political it is especially desirable that the court's judgment explains what conclusions it has reached and why."[29] This was based on "Tugendhat J ruling in Lewis v. Commissioner of Metropolitan Police[30] that the 'significant national interest' in that case, which concerned the phone hacking scandal, made it all the more important that there should be a reasoned judgment."[31]

There were also Human Rights Act considerations and these had to balance the freedom of expression requirement with them being construed as either "fact or comment in the light of the Strasbourg jurisprudence."[32] This gave it further incentive for a reasoned judgment that is "preferable to a jury verdict or verdicts based on

[25] Para 44.

[26] Para 48.

[27] Ibid.

[28] (1997) HMLR 415.

[29] Yeo MP v. Times Newspapers at Para 61.

[30] (2012) EWHC 1391 (QB).

[31] Para 29(iii).

[32] Yeo MP v. Times Newspapers, Para 65.

directions which, if held wrong on appeal, could be corrected only by a re-trial."[33] The Reynolds defence can lead to "case management challenges if there is a jury."[34] The issues raised involved the new statutory defences under the 2013 Act that were persuasive in reaching a balanced judgment and those case management directions were "in favour of non-jury trial have been reinforced by the amendment made to the definition of the overriding objective in 2013 when the words 'and at proportionate cost' were added."[35]

In the court's opinion the case management was an important factor by suggesting that not withstanding the "issues of meaning, justification and fair comment the public interest defences under Reynolds and s4 of the 2013 Act raise different considerations."[36] The judge can arrive at an objective conclusion and such a "defence will always be the subject of a reasoned decision by a judge. If there is a jury it may be required to return special verdicts on specific issues of fact but it will not return a verdict on whether the defence is made out."[37]

The Court found the defendant's arguments as to the specific considerations in this case favouring trial by jury unpersuasive, particularly when viewed against three factors which strongly favour trial by judge alone: the advantage of a reasoned judgment, proportionality, and case management.[38] This also provides that in foreseeable future, it will only be in the most exceptional cases that the often critical determination of meaning will have to be held over to be decided by a jury at trial.

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[33] Ibid.

[34] Para 71.

[35] Ibid 75.

[36] Ibid 76.

[37] Ibid.

[38] Carter- Ruck Solicitors.'"Trial by Jury: To be a rare exception'. 5/9/14. https://www.carter-ruck.com/?/blog/read/trial-by-jury-to-be-a-rare-exception. Accessed 15/9/16.

Protections in the US Legal Framework

While the common law definition corresponds to the same cause of action as in the English courts lay juries contribute to libel trials in the US and they determine the meaning of allegedly defamatory statements. They decide whether the statement referred to the plaintiff or if it was meant generally for the society at large.[39] There are also issues at stake such as the freedoms allowed under the free speech doctrine of the First Amendment that offers protection to publishers and internet service providers.
The threshold of defamation in England is based on "[a] statement that would tend to lower [the claimant] in the estimation of right- thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally."[40] In contrast, in the US, a plaintiff may recover for a harm caused by a statement that would be regarded as defamatory by a "considerable and respectable class of the community to which the statement was addressed."[41] It is not obligatory to show that right-thinking persons would have thought less of the plaintiff because of the statement.

The jury trial is also considered a matter of constitutional right because the First Amendment protects the right to free speech, and this can often be invoked by the media defendant.[42] It is considered as two distinct freedoms which are the right to trial by jury and the right to free speech and the press. These two "individual liberties" frequently intersect in "defamation cases tried by jury who are allowed to vindicate free speech and private rights" in a libel case but when the verdict is for the plaintiff, the judges are constitutionally compelled to intervene and "independently" review "the

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[39] Diaz v. NBC Universal, Inc., 337 F. App'x94, 96 (2dCir. 2009): "[A]ppellants' claims incapable of supporting a jury's finding that the allegedly libelous statements refer to them as individuals."; In Cullum v. White, 399 S.W. 3d 173,183 (Tex. App. 2011): "Cullum attempted to explain his comments as merely referring to a fictional book he was writing, but ...[t]he jury could infer from Cullum's reference to the website in the Ragline mail that it referred to White and the Ranch."

[40] Skuse v. Granada Television, (1996) EMLR 278, at 286.

[41] Damon v. Moore, (1st Cir. 2008) 520 F.3d 98, at 104.

[42] First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

evidence" and if found deficient "vacate the jury verdict."[43] This ensures this broad discussion will "not be imperiled and chilled."[44] These principles have been framed in the courts where the rulings have endorsed jury trial.

There is a retention of jury trial in the US even though criminal libel has been abolished in both jurisdictions and can only be re-enacted by statute.[45] The burden of proof rests on the claimant because of the protection of free speech enshrined in the First Amendment and he must prove the libellous statement was untrue. In bringing a cause of action in libel and slander, "[d]ozens of rules conspire to favor defamation defendants . . . [which] means that victims of false and defamatory statements are often left without effective remedies."[46] It has also been determined that "[i]n the United States, reputation is not one of the fundamental rights protected by the Fourteenth Amendment to the Constitution."[47] This is despite the fact that in England and the US there is consensus that a plaintiff cannot succeed in a libel or slander action if the defence is based on an expressed or implied statement that is "true or substantially true."[48]

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[43] Charles L. Babcock, 'The Role of the Court and Jury in Libel Cases', 47 S. Texas Law Review 325 (2005-2006).

[44] Bose Corporation v. Consumers Union of US., Inc 46 US 485, 508 (1984) NY Times Co v. Sullivan, 376 US 254, 285-286 (1964).

[45] The Criminal libel was abolished in Ashton v. Kentucky 384 U.S. 195 (1966), which held that Kentucky's unwritten, common law crime of libel was too indefinite and uncertain to be prosecuted. It does not place limits on truth as a defence (cannot require "good motives and justifiable ends" to use truth as a defence) and requires "actual malice" for conviction for statements regarding public officials. At 200-201.

[46] VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 163(2d ed. 2014).

[47] Kyu Ho Youm, 'Liberalizing British Defamation Law: A Case of Importing the First Amendment?' 13 COMM. L. & POL'Y 415, 421(2008) 420.

[48] The test of substantial harm in the Defamation as set out in the Defamation Act 2013, c.26 §2(1) (U.K.) is mirrored in the US case of Nicholsa v. Moore, 477 F. 3d 396, 399 (6th Cir. 2007) where the Court stated that "If the gist, the sting, of the article is substantially true, the defendant is not liable." Quoting Fisherv, Detroit Free Press, Inc. N.W. 2d 765, 767-68 (1987); Neely v. Wilson,418 S.W. 3d 52, 63-64 (Tex. 2013): "A broadcast with specific statements that err in the details but that correctly convey the gist of a story is substantially true" and is therefore not actionable.

The US courts have refused to enforce English judgments arising from claims for libel and slander.[49] This is because the American federal and state law "is much more plaintiff friendly and protective of free speech than is English law."[50] The US has also enacted legislation that prevents 'libel tourism' by preventing litigants from suing media defendants in England and other countries where they can avoid American constitutional protections for free speech and free press.[51] This is by adoption of the "SPEECH Act"[52] that prohibits American courts from recognizing or enforcing foreign judgments for libel under jurisdictions that do not provide as much protection for freedom of expression as guaranteed by the First Amendment of the federal Constitution and by the laws of the state where enforcement is sought.[53]

The jury is intrinsic to the manner in which the courts uphold the principle of freedom of expression. This is because in the US courts malice needs to be proven by the plaintiff in a libel litigation to substantiate the falsity of the statement. In New York Times v. Sullivan[54] the Supreme Court held that it was necessary for a claimant/plaintiff to prove actual malice before press reports about public figures can be considered to be libellous. In upholding this requirement the Court acknowledged that the defendant had a "right to information" and not just a "right to discussion."[55] The ruling stated

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[49] See Abdullah v. Sheridan SquarePress, Inc., No. 93 CIV. 2515 (LLS), 1994 WL 419847, at *1. S.D.N.Y. May 4, 1994: "Since establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants...the second cause of action . . . is dismissed."

[50] Michael Socha, "Double Standard: A Comparison of British and American Defamation Law", 23 PENN ST. INT'L L. REV. 471 (2004). Available at: http://elibrary.law.psu.edu/psilr/vol23/iss2/9.

[51] See Bruce D. Brown & Clarissa Pintado, "Foreign libel plaintiffs... circumvent 'actual malice' rules ... and other substantive First Amendment rights...[and] English courts were willing to assert personal jurisdiction over a defendant publisher who was not deliberately targeting a British audience." "'The Small Steps of the SPEECH Act", 54 VA. J. INT'L L. DIG. 1, 2 (2014)

[52] SECURING THE PROTECTION OF OUR ENDURING AND ESTABLISHED CONSTITUTIONAL HERITAGE (SPEECH) ACT, Pub. L. No. 111-223,124STAT. 2380 (2010) (codifiedat28U.S.C.§§4101-05).

[53] 28 U.S.C.§ 4102(a)(1)(A).

[54] 376 US 254 (1964).

[55] Para 35.

there was a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[56]

The media defendants are protected under the constitutional principle of the freedom of expression, however, the Supreme Court has held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[57] Vincent R. Johnson has argued that unlike English law which is favorable to plaintiffs because libel and slander as "defamatory statements are presumed to be false, but defendants are held strictly liable, if no affirmative defense is established" the reverse is true in the US.[58] In the US it is necessary for a plaintiff to prove that the defendant "knew that the defamatory statement was false or even acted recklessly or negligently with respect to truth or falsity."[59] The jury is considered to be better placed than a judge to determine that it does not have 'chilling effect' on free speech.

There is a requirement of malice for the plaintiff to prove and that they are litigating on a matter of public concern. There is a requirement that a defamation plaintiff prove actual malice or negligence that "has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff."[60] This can arise if a public official sues a media organisation for libel in which case they

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[56] Para 68.

[57] See Philadelphia Newspapers, Inc. v. Hepps, 475 U. S. 767, 777 (1986).

[58] Vincent R. Johnson, 'Comparative Defamation Law: England and the United States, 24 U. Miami Int'l & Comp. L. Rev. 1 (2017) p 27 Available at: https://repository.law.miami.edu/umiclr/vol24/iss1/3.

[59] See Elizabeth Samson, 'The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day", 20 CARDOZOJ. INT'L & COMP. L. 771, 771 (2012).

[60] RESTATEMENT (SECOND) OF TORTS § 613cmt. J (AM. LAW INST. 1977).

would have to prove actual malice by the defendant.[61] The existence of malice needs to be shown to be "subjective" and not only "objective" on the part of the defendant[62] and the issue for determination is not what a reasonable person would have done but whether in publishing the "statement, displayed conscious disregard for the probable falsity of the defamatory statement."[63]

The libel needs a high threshold of proof because of the constitutional defence of free speech and the actual malice in its commission has to be proven by "clear and convincing evidence."[64] This requirement is necessary not only at the jury stage, but also on motions for summary judgment.[65] The jury is integral because the Supreme Court has made clear that "actual malice" entails an inquiry into the defendant's state of mind "about the truth or falsity of the statement, not merely an inquiry into the defendant's motives."[66] This has led to the courts establishing the principle that the evidence of the term "express malice" or "common law malice" implies personal vendetta and does not prove the "actual malice" will circumvent the free speech or press freedom of the First Amendment.[67]

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[61] See e.g., WFAA-TV, Inc. v. McLemore, 978 S.W. 2d 568, 571 (Tex.1998) holding a private individual suing a media defendant must prove that the defendant was negligent regarding the truth of the statement.

[61] See Curtis Pub. Co. v. Butts, 388 U.S. 130, 153 (1967) indicating that public officials are permitted to recover in libel only when they can "prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."

[62] See Curtis Pub. Co. v. Butts, 388 U.S.130, 153 (1967) indicating that public officials are permitted to recover in libel only when they can "prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."

[63] See Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989): "[A] public figure plaintiff must prove more than an extreme departure from professional standards."

[64] Ibid at 661 n.2.

[65] See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56 (1986).

[66] See Freedom Newspapers of Texas v. Cantu, 168 S.W. 3d 847, 858 (Tex. 2005): "'[A]ctual malice concerns the defendant's attitude toward the truth, not toward the plaintiff.' While a personal vendetta demonstrated by a history of false allegations may provide some evidence of malice, free-floating ill will does not."

[67] See Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989): "[A] newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice."; See also Garrison v. State of La., 379 U.S. 64, 73 (1964) stating,

The First Amendment rights enable the protection of the media by implementing these "interpretive and procedural aspects of the American 'actual malice' standard to do more to protect defendants from liability" than the standards of the "fault requirements of the actual malice standard itself."[68] These provisions offer the immense space "for political discussion in a democracy, while at the same time articulating clear standards for imposition of liability in the most egregious cases; such as where the media fabricates a story or seriously distorts information."[69] The enforcement of the principle of "strict liability and presumed falsity principles of English law threaten to ensnare, with civil liability, persons whose statements may have been inaccurate, but were in no real sense highly blameworthy."[70]

In Milkovich v. Lorain Journal Co.[71] the appellant, Michael Milkovich, a local high school wrestling coach, was accused of perjury about an incident involving him and his team which occurred at a wrestling match. This was in an Ohio newspaper by J. Theodore Diadiun who had authored the article. The petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This ruling was based in part on the grounds that the article constituted an 'opinion' protected from being libel by the First Amendment.

The Supreme Court had to decide if opinions are constitutionally protected from defamation suits when they are sufficiently factual. Justice Rehnquist ruled "The principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact. Further, the assertion that the Petitioner committed perjury is sufficiently factual to be susceptible of being proven true or false, because one can look

in a criminal defamation case, that "[u]nder a rule ... permitting a finding of [actual] malice based on an intent merely to inflict harm, rather than to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.'"

[68] Vincent R. Johnson, supra 58 at 36.

[69] Ibid.

[70] Ibid.

[71] 497 U.S. 1, U S. Ct.

at his testimony to determine that. There are important social values that underlie the law of defamation that they court has acknowledged but this case holds the balance between that and allowing for free speech."[72]

The Court had also made the point "to expect that the opinions expressed may rest on passion rather than factual foundation."[73] This gave the Court wide latitude in order to distinguish opinion from a factual comment. The framework of the libel trial in the US incorporates the right of "fair comment" and provides an affirmative defense to an action for defamation.[74] The Supreme Court has also declared that an industrial trademark could not be refused registration if it disparaged any living or dead person and such a ground was declared unconstitutional as opinion based discrimination.[75]

This principle is designed to be more sympathetic to the defendant because of the right to free speech and it raises the presumption that the statement was truthful and any falsity is a matter for the plaintiff's evidence and the determination that it was based on fact is left to the jury. This allows the defendants to be protected unless they display actual malice. The burden is upon the plaintiff which invites the jury to determine if the intention of the defendant was to libel but this is dependent upon a subjective assessment that can be undertaken by jury rather than judge at trial.

Social Media Libel and Excluding Juries

The exclusion of juries in English law has been felt by the proliferation of social media that has become an issue as platforms hosting online material increase their

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[72] Para 44.

[73] Para 33.

[74] In Iancu v. Brunetti, 139 S. Ct. 2294 (2019) the fashion designer Erik Brunetti brought the challenge after his application to register the trademark FUCT was denied. The Supreme Court reasoned that the Act allowed trademarks that aligned with current social mores but rejected those that defied "society's sense of decency or propriety." The Court affirmed an appeals court ruling that the prohibition of "immoral" or "scandalous" trademarks under the Lanham Act (Act) §1052(a), constituted viewpoint discrimination in violation of the First Amendment. Justice Kagan (ruling for the majority) page 11.

[75] In Matal v. Tam, 582 U.S. (2017) the judges agreed on two propositions: (1) if a trademark registration bar is viewpoint-based, it is unconstitutional; and (2) the disparagement bar was viewpoint-based. The viewpoint-based discrimination is a form of content discrimination, in which a particular opinion on a subject matter is singled out. (Opinion of ALITO, J.) (slip op., at 4).

transnational range and ability to communicate digitally. There is also a focus on the ability to discredit individuals and social groups without them being able to detect that they are being libelled as they would be if it was conducted on electronic and print media. This is a problem that the UK government has understood because internet platforms have the ability to put people on trial by pronouncing on their culpability and on this basis they are presumed guilty.[76]

In 2017 the Attorney General issued a consultation or 'Call to evidence' to amend the current law relating to jury access to social media taking into account the impact of fair trial and to ensure that there is no interference in their deliberations leading up to their verdict.[77] The government's findings two years later revealed that social media does not currently pose a "serious threat" for any amendments to be made in the law on contempt of court.[78] The feedback showed that the new

> "juror notice suggested that jurors' understanding of their legal responsibilities increased substantially in every category as a result. In particular, analysis from the pilot suggested that the new juror notice achieved almost 100% understanding by jurors, including in relation to prohibitions on use of social media, researching the defendant, and discussing the case with family and friends."[79]

The English Courts have adopted a firm principle in excluding jury trials in defamation cases in accordance with Section 11 of the Defamation Act 2013. The courts have now stipulated that there will only occasionally be libel trials with jury as the tribunal of fact in the proceedings. It has been established that the mode of trial will be

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[76] Trial by Google? Juries, social media and the internet. Attorney General Dominic Grieve QC MP speaks of the challenge to jury trial posed by the internet'. 6 February 2013, https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet.

[77] Attorney General seeks evidence on the impact of social media on criminal trials, Judges, solicitors and victims' groups are being asked to submit evidence about the impact of social media on criminal trials. 17/9/17, https://www.gov.uk/government/news/attorney-general-seeks-evidence-on-the-impact-of-social-media-on-criminal-trials.

[78] Response to Call for Evidence on the impact of Social Media on the Administration of Justice, March 2019. Attorney General's Office. March 2019. https://www.gov.uk/government/publications/response-to-call-for-evidence-on-the-impact-of-social-media-on-the-administration-of-justice.

[79] Para 2.6, Page 5.

before a sitting judge and the courts will only on rare occasions exercise their residual discretion to order a trial by jury. The social media has brought into focus the ability of the court to balance freedom of expression with the right to privacy.

In Stocker v. Stocker[80] the Claimant, Ronald Stocker, and Defendant, Nicola Stocker, were husband and wife who divorced in 2012 and the termination of their marriage was very acrimonious. On 23 December 2012 an exchange took place on Facebook between Mrs. Stocker and Mr. Stocker's new partner Deborah Bligh in which Mrs. Stocker made a number of allegations, including that he had tried to strangle her, that he had also his former wife, had been arrested on three occasions, and had breached a non-molestation order. The allegations were visible to 21 individuals with authorised access to the Facebook page, in addition to 110 of Ms. Bligh's friends and to their Facebook acquaintances.

Mr. Stocker sued for libel based on the notion that the words published meant that he had tried to murder Mrs. Stocker and that he was a dangerous man. Mitting J, at first instance, gave the ruling for Mr. Stocker by preferring in his judgment the literal meaning and held "The impression given by the postings to the ordinary reader was a significant and distorting overstatement of what had in fact occurred."[81] He concluded that Mr. Stocker's reputation had been damaged and, although there were only a small number of recipients of the publication, he was entitled to damages of £5,000 (which Mr. Stocker chose to waive). Mitting J held that the other allegations, that the claimant had committed a common assault and "had been arrested three times and had been made subject to a non-molestation order were broadly accurate. but were not enough to justify the allegation that the claimant was a dangerous man."[82]

[80] (2019) UKSC 17.

[81] Para 14 at 36.

[82] Para 21 at 54.

At the Court of Appeal the appellant focused on these inferences and Sharp LLJ, McFarlane LJ and Sir John Laws gave the judgment for the respondent.[83] Sharp LLJ remarked, "the use of dictionaries does not form part of the process of determining the natural and ordinary meaning of words, because what matters is the impression conveyed by the words to the ordinary reader when they are read, and it is this that the judge must identify. As it happens however no harm was done in this case."[84]

Mrs. Stocker then appealed to the Supreme Court which concerned the meaning (or imputation) of words in a libel action. Lord Reed, Lord Kerr, Lady Black, Lord Briggs and Lord Kitchin overturned the previous ruling by unanimously finding in favour of Mrs. Stocker. Lord Kerr delivered the judgment of the Court and held that the use of a dictionary was "impermissible" and that, further still, this step had caused the judge to limit the likely "meaning of the statement to two possible alternatives and that the fact that Mrs. Stocker had stated that her husband had 'tried' to strangle her precluded the possibility of this statement being taken to mean that he had constricted her neck painfully."[85]

In his judgment Lord Kerr SCJ summarised the 'single meaning rule' which a Court must determine noting that it had been criticised by some "for its artificiality where there was possibly more than one meaning to the words complained of, but that it provided a practical, workable solution in defamation claims."[86] His Lordship then established how the Court should approach its interpretation by referring to the caveat that Sharp J had added to the second criteria in Elliott v. Rufus [2015] EWCA Civ 121:

> "To this I would only add that the words 'should not select one bad meaning where other non-defamatory meanings are available' are apt to be misleading without fuller explanation. They obviously do not mean in a case such as this one, where it is open to a defendant to contend either on a capability application

[83] (2018) EWCA Civ 170.

[84] Stocker v. Stocker (2019) UKSC 17, Para 22 at 11.

[85] Para 33.

[86] Para 34.

> or indeed at trial that the words complained of are not defamatory of the claimant, that the tribunal adjudicating on the question must then select the non-defamatory meaning for which the defendant contends. Instead, those words are 'part of the description of the hypothetical reasonable reader, rather than (as) a prescription of how such a reader should attribute meanings to words complained of as defamatory.'"[87]

Lord Kerr SCJ then applied context as to its impact on social media and held, "And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made."[88]

His Lordship held that it was imprudent to search a Facebook post for its literal or implicit meaning and the search for this should reflect the fact that social media is a "casual medium" in the manner of speech rather than an elaborate method of delivery.[89] The observations of Warby and Nicklin JJs in Monroe v. Hopkins [2017] EWHC 433 (QB) and Monir v. Wood [2018] EWHC 3525 (QB) were relevant because these were "both "twibel" cases, and it required an "impressionistic approach" when determining the meaning of tweets. There was also cognisance in the Kerr L ruling by Eady J in Smith v. ADVFN Plc & Ors [2008] EWHC 1797 (QB) which concerned the publication of allegations of internet bulletin boards:

> "Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject-matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take.' ... People do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it."[90]

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[87] Para 36 at 11.

[88] Para 38.

[89] Para 43.

[90] At 14, 16.

Lord Kerr distinguished a reasonable reader from the casual reader on social media as follows:

> "The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read."[91]

These inferences had to be taken into account in attributing meaning to the words used and the Supreme Court held that the ordinary reader of the post would have interpreted the text complained of as meaning that "Mr. Stocker had grasped Mrs. Stocker by the throat and applied force to her neck."[92] The Court was satisfied that this new meaning reflected the true facts and the appeal was allowed and the original claim was rejected by their Lordships.

Iain Wilson has observed in the Media blog that the significance of this ruling is that it has enabled legal practitioners, social media users and prospective litigants with vital information and resources "for careful thought and may offer considerable assistance to those accused of online defamation. The Supreme Court's remarks regarding context might seem obvious but cannot be overstated."[93] The impact is that the claim will depend on "the meaning that must be shown to be true. It is nearly always in a claimant's interests to try and establish the highest possible meaning, making it harder for a defendant to succeed with a defence of truth."[94]

Wilson attributes the "lesson for claimants is to be realistic about meaning at the outset, or at least be confident that the defendant will not be able to justify a lesser meaning." This is important in terms of the defence and it is critical "in social media defamation cases (although of course there will continue to be cases where seriously

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[91] Para 41.

[92] Para 47.

[93] Iain Wilson, 'Supreme Court considers social media defamation: context is everything'. International Forum for Responsible Media Blog, 11/4/19. https://inforrm.org/2019/04/11/supreme-court-considers-social-media-defamation-context-is-everything-iain-wilson/.

[94] Ibid.

defamatory allegations on social media are found to have been taken at face value)." In terms of excluding the jury the beneficial aspect is that the findings are an "advert for an early determination on meaning. Deferring this issue to trial, or worse still an appellate court, can incur considerable expense that one or both parties will have to incur. The advantage of a reasonable early determination on meaning can often lead to productive settlement discussions."[95]

The argument goes further as the issue of context that is equally applicable to the question of whether a particular publication on social media has caused serious harm to reputation or its likelihood to meet the requirement of a defamation claim under section (1) of the Defamation Act 2013 but the Court's ruling makes obvious that "allegations made on social media will often not be taken as seriously as, say, those made in a newspaper. It follows that the harm suffered will often be less serious" and this may imply that the "threshold may not be met."[96]

Oliver Cox in a legal commentary has argued that the judgment implies that there is a "regime of 'disciplined restraint'" and that "a meaning appeal that sits right on the line is now more likely to be decided in the appellant's favour." The case does not eliminate the prospect that "dictionaries have no place in libel proceedings" but that "Lord Kerr's point is that, particularly in social media libels, they are the wrong starting place. Context is everything—and that now means both the surrounding words and the medium used." This means that in practice this "decision is no carte blanche for online allegations" and while "Social media user reactions are 'impressionistic,'" they do have defamatory meaning. In the libel allegation "the less harmful meaning requires excluding context, and it follows that the more harmful meaning should be preferred."[97]

It can be argued that rather than a 'subcategory' of a reasonable reader in the age of digital media who appreciates the context of words and the effect of encouraging

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[95] Ibid.

[96] Ibid.

[97] Oliver Cox, 'Guidance on libel for the Social Media Age', Law Society Gazette, 20 May 2019, https://www.lawgazette.co.uk/legal-updates/guidance-on-libel-for-the-social-media-age/5070307.article.

further challenges to meaning the issue that has come to the surface is that juries might be more familiar than judges in interpreting words. This may also apply to dictionaries where the jury may better determine what the reasonable reader would understand the words to mean after drawing the meaning from its literal definition. The principle that context is required to evaluate the real meaning and its application is particularly necessary for the online world, where the social media is also being accessed by the population that includes jury members who understand the implications of comments in the virtual world.

Media Defendants and Internet Liability

In the US the social media has also brought another dimension to global communications by increasing the scope for on-line defamation and the juries have the responsibility for issuing the verdict as to their defamatory meaning. This form of libel has become more common, allowing the claimants to litigate against publishers in the courts which is a factor that the judge and the juries have to consider as distinct from libel in the print and in the electronic media. The plaintiffs who have suffered online defamation cannot initiate litigation against the Internet Service Provider (ISP) or the website that hosts the defamatory content at issue, such as Facebook or Google or Instagram. This is not a legal option because the Congress enacted the Communications Decency Act in 1996, which protects ISPs, social media platforms and website hosts from defamation claims. Section 230 states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[98]

In Zeran v. America Online (AOL),[99] the claimant Zeran had sued AOL for defamation in not deleting defamatory messages about him after he had notified them six days after the bombing of the Oklahoma City federal building. There was an anonymously posted message on a bulletin board that had used his number 'Ken ZZ03,' for phone orders that offered products that partially glorified the bombing. He

[98] 47 U.S.C. § 230.

[99] (1997) 129 F. 3d 327.

began receiving threatening messages and Zeran notified AOL of the postings and asked the company to delete them and take steps to prevent his phone number from appearing in future postings. AOL declined to help, and the postings remained for more than a week.

The court found that Zeran was not actually defamed because his reputation did not suffer and despite the immunity provision, it would have been immaterial if his reputation had suffered. The ISP would not be liable even if they knew that the statement was false and "no negligence cause of action" arose against them. The Zeran rule means that ISPs in the US have no responsibility whatsoever for third-party content. The court stated the principle as follows:

> "By its plain language, Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[100]

The exclusion of liability has been elucidated in Blumenthal v. Drudge and AOL[101] where the defendant published a website known as the Drudge Report online. The co-Defendant internet service provider (AOL) also maintained its own website and AOL and user Drudge entered an agreement that made its content available to all members of AOL's service for a period of one year. The transaction included the user Drudge receiving a flat monthly 'royalty payment' of $3,000 from AOL. The Drudge Report published a column, posted by AOL, with the defamatory headline that plaintiff (Blumenthal, who had been hired as the President's assistant) had assaulted his wife, also a White House employee. The Plaintiffs brought a defamation suit against defendants which was met by AOL filing a motion for summary judgment and Dredge filing a motion for lack of personal jurisdiction.

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[100] At 330.

[101] 992 F. Supp. 44 (D.D.C. 1998).

The Court held § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing obscene or defamatory material written or prepared by others."[102] It has been argued that

> "No country has followed the US approach of granting a blanket civil immunity to content hosts. Section 230 may be perceived as favoring the service provider at the expense of the individual. Far from encouraging any kind of regulation, self or otherwise, it, in fact, discourages anyone from being a good Samaritan."[103]

The internet publishers are granted broad protection for publishing the third party content and for the Court the only question is whether the author intended the email to be forwarded.[104] Section 230 created a broad protection that has allowed innovation and free speech online to flourish which "also offers its legal shield to bloggers who act as intermediaries by hosting comments on their blogs."[105] The Plaintiffs who have been defamed online need to litigate against the person or entity that actually made the defamatory statement.

In English law the liability of third-party publishers is also excluded by the Defamation Act 2013 Section 10, which states:

> "a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher."

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[102] At 49.

[103] Jackie Hallifax,'AOL Immune from Porn Lawsuit, Florida High Court Rules,' Nandotimes, 2001. http://www.nandotimes.com/technology/story/0,1643,500461435-500703332-503838001-0,00.html (accessed March 12, 2001). See also B.J. Waldman, 'A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach,' *Richmond Journal of Law & Technology* 9 (1999). http://www.richmond.edu/jolt/vbi2/note1.html (accessed April 29, 2021).

[104] In Batzel v. Smith 333 F.3 D 1018, 1033 (9th Circuit. 2003), the distributor of an electronic newsletter was a publisher for the purposes of CDA § 230 when he forwarded a third party's email to the newsletter list serve with only minor edits.

[105] CDA 230 Electronic Frontier Foundation (EFF) eff.org/issues/cda230.

The first English case on ISP liability Laurence Godfrey v. Demon Internet[106] in which on January 13, 1997, someone posted a derogatory message on the alt.soc.culture.thai Usenet discussion group hosted by Demon Internet. The message was posted by an anonymous impostor of Dr. Laurence Godfrey, who was a science professor based in London. Four days later when Dr. Godfrey became aware of the posting, he sent the managing director of Demon Internet a fax denying his authorship, stating that the post was a forgery, and asked that the message be deleted because it was libel. The defendant could have deleted the message, but took no action until January 27, 1997, when the material on the server expired and was routinely deleted.

The course of action that Demon could have taken when faced with a defamation notice was to take down the notice but in this case the author was disclaiming authorship. The Court followed the reasoning in the US case of Cubby v. CompuServe, that stated: "[T]he appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory...statements."[107] Since CompuServe had no editorial control, it was held to be merely a distributor and, therefore, not liable for the defamation. The judge in Godfrey ruled that because Demon Internet had not posted the defamatory message, it was not its "author, editor or publisher" and therefore the defense succeeded under the Defamation Act 1996, Section 1(1) "Responsibility for Publication":

> "In defamation proceedings a person has a defence if he shows that he was not the author, editor or publisher of the statement complained of, he took reasonable care in relation to its publication, and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. Points (a) and (b) and (c) must be proved for the defense to succeed. After the matter had been brought to the attention of Demon, it could not succeed with its claims under (b) and (c).[108]

This implies that the legal liability may be established with regard to blogging via the Internet, such as material which has been suspended on social networking sites such

[106] (1999) 4 EMLR 542.

[107] 776 F. Supp. 135 (SDNY 1991).

[108] At 142.

as Facebook. The usage makes it compatible with the formalities of what is published in the traditional press. Ahran Park argues

> "Bloggers, as website operators, could be immunized even when they exercised the "traditional editorial functions" unlike the traditional journalists. By contrast, ISPs in the United Kingdom could not enjoy such absolute immunity. Following the U.K. tradition of plaintiff-friendly libel law, the Defamation Act 1996 did not adopt any separate provision for ISP liability. Under Section 1, ISPs in England are subject to liability for defamation by third parties if they are notified of harmful online contents but fail to remove the postings promptly. Meanwhile, the new Defamation Act 2013 provides a separate provision for ISP liability. Section 5 is novel because ISP liability hinges on whether the original speaker is identifiable."[109]

Park suggests that "CDA Section 230 should be revised. One possible way of revising Section 230 is borrowing from the U.K. Defamation Act 2013. But such adoption is not compellingly urgent. It needs time to see what impact the new U.K. defamation law will have on freedom of speech. Regardless, the U.K. experience with ISP liability will provide a useful comparative framework to rebalance free speech with reputation on the Internet."[110]

It has been perceived that the law in the US has not progressed contemporaneously with the advent of digital media and its potential to cause defamation and there has been lack of anticipatory legislation. This has meant that the courts have struggled to decide whether the standards and rules applied in traditional defamation cases also apply in an online context. The simple assumption that anything "posted with social media amounts to a 'nonactionable opinion' is conclusory and blatantly ignores the impact that social media has had on the reporting of news and sharing of information."[111]

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[109] Ahran Park, 'Internet Service Provider. Liability for Defamation: UK and US Compared'. 18-8-18. University of Oregon, Scholar's Bank. https://scholarsbank.uoregon.edu/xmlui/handle/1794/19210.

[110] Ibid.

[111] Crystal Revilla, 'As Social Media Continues to Evolve, Online Defamation Laws Remain Stagnant'. 17/4/17 https://law.fiu.edu/2017/04/17/social-media-continues-evolve-online-defamation-laws-remain-stagnant/.

This issue has arisen primarily because the courts have had to apply the concept of print journalism to determine "whether the actual malice standard required for defamation of public figures still apply to celebrities in online defamation actions, which has led to online defamation suits being brought by celebrities and public figures to be more defense-friendly."[112] The outcome is the greater scope available for the defence to challenge the existence of malice that is necessary for a defamation law suit to succeed in the courts.

The balancing exercise for the courts requires a subjective analyses and the jury has to infer "how the context of social media and online blog platforms may affect whether (1) a reader believes an allegedly defamatory statement to be a fact or opinion; and (2) there exists an expectation of truth at al."[113] The issue that the courts will face when determining how traditional defamation laws should be applied will focus on the question of whether the context of social media may affect a reader's expectation or interpretation of allegedly defamatory statements. This is to separate the statement as an opinion rather than as fact in order to escape liability.

The role of the jury would be to determine the context to take into account the particular social conventions of the internet forum at issue in its evaluation. The Courts have stated a general principle whether an online posting is a statement of opinion or fact. In Global Telemedia International, Inc. v. Doe 1[114] there was a post on a financial bulletin that contorted the information that could have been interpreted as fact. The verdict was as follows:

> "Here, the general tenor, the setting and the format of [the] statements strongly suggest that the postings are opinion. The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about [the particular company]. The postings at

[112] Victoria Cippettini, 'Modern Difficulties in Resolving Old Problems: Does The Actual Malice Standard Apply to Celebrity Gossip Blogs', 19 Seton Hall J. Sports & Ent. L. 221 (2009).

[113] Shari Claire Lewis, 'Online and Social Media Defamation in Today's Age', N.Y. L.J., (Feb. 17, 2017), http://www.newyorklawjournal.com/id=1202779335224/Online-and-Social-Media-Defamation-in-Todays-Age?mcode=0&curindex=0&curpage=ALL.

[114] 132 F. Supp. 2d 1261, 1267 (C.D. Cal., 2001).

> issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about [the particular company] and its turbulent history.... Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings. The general tone and context of these messages strongly suggest that they are the opinions of the posters."[115]

The intent of the communication is the basis upon which the jury will determine if there was malice in the publication by the social media provider. In Jacobus v. Trump, a well-known political commentator, Cheryl Jacobus, sued Donald Trump and his campaign for defamation.[116] The defendant tweeted in response to one of Jacobus's appearances on CNN that he had "begged us for a job. We said no and she went hostile. A real dummy!" Subsequently, he later tweeted the following: "Really dumb @CherJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!"[117]

In bringing the cause of action in libel Jacobus alleged that Trump's tweets had injured her reputation and resulted in the loss of future professional opportunities.[118] The court in granting the defendants' motion to dismiss stated that the tweets amounted to "nonactionable opinion."[119] The judgment referred to numerous New York cases where the courts had ruled that statements made on social media forums, and blogs were less credible than those made in print and therefore less capable to being defamatory.[120] This is because "so-called social media such as

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[115] At 1267.

[116] Jacobus v. Trump, No. 153252/16, 2017 WL 160316, at *2 (Sup. Ct. N.Y. Cty. Jan. 9, 2017).

[117] Ibid. at 2.

[118] Ibid.

[119] Ibid at 12.

[120] Ibid. at 6, quoting Sandals Resorts Int'l Ltd. v. Google, Inc., 925 N.Y.S. 2d 407 (N.Y. App. Div. 2011): "[T]he culture of Internet communications, is distinct from that of print media such as newspapers and magazines and has been characterized as encouraging a 'freewheeling, anything-goes writing style.'"

Facebook and Twitter, is increasingly deemed to attract less credence to allegedly defamatory remarks than other contexts."[121]

In Unsworth v. Musk[122] the plaintiff Unsworth was a British diver who gained fame for his leading role in coordinating the successful rescue of 12 boys and their soccer coach from a flooded cave in Thailand in July 2018. Unsworth had ridiculed Musk in a CNN interview for delivering a mini submarine, which was never used, to the site of the area of the rescue and called it a "Public Relations" stunt and stated the high-tech entrepreneur should "stick his submarine where it hurts." Musk published three tweets which included "Sorry pedo guy, you really did ask for it ... Bet ya a signed dollar it's true."[123] Unsworth sued him for $190 million for libel. The defence argument was that the tweets in question amounted to an off-hand insult during an argument, which no one could be expected to take seriously, and the defendant had failed to demonstrate any harm.

The issue in the case for the jury was if the determination was based on whether a "reasonable reader would believe Musk possessed private facts implicating Unsworth as a pedophile."[124] The defence argument stated "Musk's statements—all made online through Twitter and e-mail—receive a presumption of First Amendment protection. Internet speech is unique. Unlike many traditional media, there are no controls on [internet] postings.[125] The low barrier to speaking online allows anyone with an Internet connection to publish his thoughts, free from the editorial constraints that serve as gatekeepers for most traditional media of disseminating information"[126]

Musk's Twitter statements relied on the assertion "Even if context here is not dispositive on its own, Musk's statements constitute nonactionable opinion because

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[121] Id., quoting Sandals Resorts, 925 N.Y.S. 2d at 407.

[122] Case no. 2: 18-cv-08048-suw-JC (1/4/19).

[123] Complaint, Ex B, P 28 Id. ¶ 76.

[124] At 16.

[125] Global Telemedia Intern., Inc. v. Doe 1, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) at 1264.

[126] Sandals Resorts Int'l Ltd. v. Google, Inc., 925 N.Y.S.2d 407 (2011) at 19.

they are not 'sufficiently factual to be susceptible of being proved true or false.'"[127] The determination of whether a statement can be "proved true or false" must account for the context in which the statement is made; "the fact that [a] literal interpretation could be proven true or false is immaterial."[128]

The jury delivered a unanimous verdict that there was no defamation. The dissenting legal experts estimate that despite the rhetoric and hyperbolic speech the "jury of eight people had erred in assuming that the tweet would have to identify Unsworth by name in order to be defamatory. The Plaintiff was clearly identifiable in the offending tweet," and a "judge sitting without a jury, as is the norm in England and Wales defamation cases, would not have made that mistake."[129]

This indicates that the social media libel actions draw the jury's focus to the context and social conventions and that by itself limits the scope in finding that the statement amounted to a fact based assertion. There is also the issue of the trivialisation of comments that the social media generates that militates against the comments being truth of the facts being stated. The publications do not amount to the litmus test of a considered statement that would require a jury to undertake a guilty verdict given the rest is subjective of the defendant's state of mind when he committed the alleged libel.

Conclusion

The jury has been abolished in libel trials in England and Wales, firstly, because the jury trials were expensive, and secondly, the juries awarded punitive damages in excess of the real worth of the loss to reputation of the claimant; their deliberations required judicial intervention when the issue was complicated; and, thirdly, the advent of social media has led to the juries being influenced by the terminology of the defamatory statement which requires contextualisation where they are not suitably qualified to make the assessment.

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[127] Underwager v. Channel 9 Australia, 69 F. 3d (1995) at 366.

[128] At 35.

[129] Michael Cross, "Elon Musk defamation jury 'wrong in law'". Comments, Law Society Gazette. 9/12/19 https://www.lawgazette.co.uk/law/elon-musk-defamation-jury-wrong-in-law/5102441.article.

The issue of libel tourism was a factor that has also dissuaded the courts from investing the jury trials in defamation because they served to encourage litigation in the English courts. The Defamation Act 2013 sets out that no cases can be brought against a person who is not domiciled in the UK, or in an EU Member State, or a state which is a party to the Lugano Convention to limit the range of claimants who can bring libel claims. The civil procedure rules under s.69 (1) of Senior Courts Act 1981 are amended and to exclude jury trial unless there are compelling reasons and allows the case management by the judges who can set their own deadlines.

In the social media libel proceedings, the judgment in Stocker v. Stocker by the Supreme Court establishes there is focus on the interpretation by the judge in the context of the circumstances in which the words were and the veracity of the defendant to determine if there was defamation. This is an exercise where the judges in cases of online defamation will resort to the dictionary meaning of the words used and place them into context before deciding if they amount to libel.

The US has a legal framework that originally borrowed from the principles of the English common law, but which has separated in two important aspects. This is firstly the First Amendment which protects the right to free speech and freedom of the press, and secondly, the right to jury trial because they are deemed as the tribunal of fact which will draw the appropriate conclusion in the case. The plaintiff has the burden of proof and the need for evidence to prove actual malice on the part of the defendant and that is mandatory if the issue relates to a matter of public interest or libel is against a public official.

The social media defamation presents new challenges to the legal framework and this medium of communication is treated differently in both the frameworks. The English law provides defences to website operators, and they are comprehensive in its range of options for the claimant under Section 5 of the Defamation Act to bring a lawsuit. Contrastingly, in the US the statutory regime is strict in preventing the ISPs being found liable and it is more arduous for the plaintiff to prove defamation. The media in the US is more favoured in the legal system whereas in England there is more

scrutiny and oversight by judges to determine if the published statement that has led to serious harm to a person's reputation.