DEFAMATION, FAIR COMMENT AND PUBLIC CONCERNS

WHILE defamation law is centrally concerned with protecting reputation, English judges have sought, for nearly two decades, to ensure that this branch of tort more adequately protects free expression. The House of Lords made apparent its increasing concern with free expression in *Derbyshire County Council* v. *Times Newspapers Ltd.* [1993] A.C. 534 by holding that local authorities could not sue to vindicate their "governing reputation". In *Reynolds* v. *Times Newspapers Ltd.* [2001] 2 A.C. 127, their Lordships expanded the defence of qualified privilege (to embrace responsible misreporting of facts on matters of political significance). In taking this step, they sought to promote the public interest in open and informed political debate and to ensure that domestic law meets the requirements of Article 10 of the European Convention on Human Rights. In *British Chiropractic Association* v. *Singh* [2010] EWCA 350, the Court of Appeal has underscored the importance of free expression on matters of public concern by placing an expansive gloss on the defence of fair comment.

The claim in this case arose when Singh, a scientist, published an article in the *Guardian's* "Comment and Debate" section based on "available epidemiological evidence" in which he was critical of chiropractors. He described them as possessing "some quite wacky ideas". He also stated that some of those in this group "argue that they can cure anything" and described the British Chiropractic Association (BCA) as a body that "happily promotes bogus treatments". Having declined the *Guardian's* offer to publish a critique of the original article, the BCA sued Singh. He responded by pleading fair comment (which protects honest expressions of opinion on matters of public concern). Settled authority has also required those invoking this defence to establish that their views are founded on "a sufficient substratum of fact" (*Kemsley* v. *Foot* [1952] A.C. 345, 356, *per* Lord Porter).

At trial, Eady J. concluded that Singh could not rely on fair comment since he had not expressed opinions but had, rather, made assertions of fact. This meant that Singh had to prove the truth of his statements or lose. However, the Court of Appeal concluded that Singh could rely on fair comment. Judge L.C.J. justified this decision by reference to the public interest. He made this apparent by stating that the BCA's action "has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices" about chiropractic services. Judge L.C.J. also drew attention to a difficulty that arose from Eady J.'s decision to confine Singh to the defence of truth. To adopt this approach would be to assume that judges are in a position to make authoritative determinations

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on "unresolved" matters. Consequently courts would become an "Orwellian Ministry of Truth".

While talk of an "Orwellian Ministry of Truth" is rather heavy-handed, a passage towards the end of the Lord Chief Justice's judgment is more subtle. Judge L.C.J. found support for his decision in a response made by a prominent American judge to a libel action over a scientific controversy. In *Underwager* v. *Salter* 22 Fed. 3d 730 (1994), Easterbrook J. concluded that "scientific controversies must be settled by the methods of science rather than by the methods of litigation …. More papers, more discussion, better data, and more satisfactory models". On Easterbrook J.'s analysis, this approach "mark[s] the path towards superior understanding of the world around us".

By endorsing this position, Judge L.C.J. reveals himself to be a proponent of what Americans call "the marketplace of ideas". This "marketplace" is a legal framework within which debate unfolds with few restrictions and in ways that benefit the public since stronger arguments win adherents and drive out weaker ones (see *Abrams* v *U.S.* 250 U.S. 616, 630–631 (1919), *per* Holmes J. (dissenting)). Moreover, the judges who have popularised this approach to free expression have taken the view that people embrace those ideas that enable them to implement their plans. These judges have been pragmatic in outlook – concluding that we should test ideas by reference to the simple question "what works?" This question is plainly in Judge L.C.J.'s mind when he contemplates members of the public having access to information that will enable them to make informed choices concerning health care.

Both Judge L.C.J.'s pragmatism and his emphasis on the public interest have implications for the distinction between "principle" and "policy" often drawn by commentators on tort. Those who distinguish these ideas typically identify "principle" as composed of doctrinal considerations (causes of action and defences) that enable judges to pursue corrective justice, and thereby right wrongs (see, for example, Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale L.J. 949, 1006–1007). "Policy", by contrast, has to do with matters of broad public concern: *e.g.*, the question of whether an expansion or restriction in the scope of tort liability will serve the public interest. *Singh* (in common with *Derbyshire County Council* and *Reynolds*) is a case in which we are able to see that matters are more complex. For policy shapes principle. We can press this analysis further by recognising that *Singh*, *Derbyshire County Council* and *Reynolds* reveal a strengthening commitment in defamation law to a large public concern. This is the ideal of distributive justice which specifies that public institutions (such as defamation law) should defensibly

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accommodate the interests of all those affected by their operations. This ideal of justice provides a basis on which to explain why judges have attached increasing importance to freedom of expression in the last two decades.

There is much in this state of affairs that is murky. For judges have not, while altering the contours of defamation law, dwelt on the relationship between corrective and distributive justice. This is unsurprising. Substantive and procedural complexities abound in defamation law. A further layer of complexity will have little appeal to judges dealing with cases such as *Singh*. But a failure fully to explain the character of the changes that have occurred in the last two decades is itself a matter of public concern.

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CONSEQUENTIAL ECONOMIC LOSS AND THE TRUST BENEFICIARY

THE biggest peacetime explosion in Europe occurred when a petroleum vapour cloud created by the leakage of 250,000 litres of petroleum ignited one Sunday morning in December 2005. The explosion, which occurred at a fuel depot in Buncefield, Hertfordshire, registered 2.4 on the Richter scale. Remarkably no one was killed. But people were injured, nearby homes damaged, and local businesses and property values harmed. Five companies involved in operating the site were later convicted of safety and environmental offences, and civil litigation arose. As between two of the companies, Shell and Total, a novel question of negligence and trust law arose. Fuel pipelines had been held on trust by UKOP and WLPS for Shell, Total and others. Total conceded that the damage which occurred to the pipelines was a reasonably foreseeable consequence of its negligence. Was Total liable to compensate Shell for the consequential economic loss it thereby suffered as a trust beneficiary?

In *Shell UK Ltd.* v. *Total UK Ltd.* [2010] EWCA Civ 180, [2010] 3 All E.R. 793 the Court of Appeal answered with a confident "yes", holding (at [142]):

> that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property) by a defendant, such as Total, who can reasonably foresee that his negligent actions will damage that property. If, therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs. Provided that the beneficial owner can join the legal owner

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