The practical restriction on so-called 'gold-digging' actions was the power of the jury to award contemptuous damages of a farthing (when that coin was in existence), but the costs involved in defending an action might well lead a defendant to settle out of court for a substantial sum. The position has been modified by the Defamation Act 1996, ss 2–4, which provide for an offer of amends.

It sometimes happens that a whole class of persons is the subject of a defamatory statement. Here a member of the class may only sue if he can show that he himself is the person pointed out by the defamatory statement.

> *Knupffer* v *London Express Newspaper Ltd*, 1944 – A class libel fails (**436**)
> *Schloimovitz* v *Clarendon Press*, 1973 – How 'Jew' was defined (**437**)

Words may, of course, be defamatory of the claimant without his being mentioned by name, if the statement can be shown to apply to him (see *Youssoupoff* v *M-G-M* (1934)).

The defendant's motives are generally immaterial. The most laudable motives will not by themselves prevent a defamatory statement from being actionable. But where the defendant puts his motives in issue, as where he pleads fair comment or qualified privilege, or relies on ss 2–4 of the Defamation Act 1996 (unintentional defamation), the claimant may then prove the malice of the defendant, or improper motive, to rebut the defence.

Defences

There are certain special defences which are peculiar to an action for defamation, but these defences do not preclude a defendant from denying in addition that the words are defamatory, or asserting that they do not refer to the claimant, or that they were not published.

Justification

There is no burden of proof on the claimant to establish that the defendant's statement is untrue; all the claimant has to do is to prove publication plus the defamatory nature of the statement. However, as the essence of defamation is a false statement, a defendant may always plead the truth of the statement as a defence in civil proceedings (but not in an action for criminal libel, where the rule is: 'The greater the truth, the greater the libel', since true libels are more likely to influence passions). If the statement is true, no injury is done to the claimant's reputation; it is simply reduced to its true level. It does not matter that the statement was made maliciously or even that the defendant did not believe it to be true; so long as it is true the defence of justification is complete.

In the defence of justification the defendant asserts that the statements are 'true both in substance and in fact'. He must show not merely that the words are literally true, but also that there are no significant omissions which would affect the truth of the statement taken as a whole. If, however, the statement is essentially true, an incidental inaccuracy will not deprive the defendant of his right to justify.

> *Alexander* v *The North Eastern Railway Co*, 1865 – The defence of justification (**438**)

However, that which is proved to be true must tally with that which the defendant's statement is interpreted to mean. Thus in *Wakley* v *Cooke* (1849) 4 Exch 511 the defendant called the claimant 'a libellous journalist'. The defendant proved that the claimant had had

one judgment against him for libel but the court held that the statement meant that the journalist habitually libelled people and so the defendant had not justified it.

The defence of justification really amounts to a positive charge against the claimant, and if it fails the damages may be increased, since the original wrong has been aggravated. The defendant's honest belief that the statement is true is no justification, though it may reduce damages. Nor is it a justification to prove that a quoted statement was made, if the quotation cannot be proved to be true. Suppose a statement is made: 'Mrs A tells me that Dr B has been committing adultery with a woman patient.' It is no justification to show that Mrs A made the statement to the defendant; he must show that Dr B is actually guilty of the conduct alleged.

In connection with this defence, it is important to note s 5 of the Defamation Act 1952, which provides that in an action for libel and slander in respect of words containing two or more distinct charges against a claimant, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the claimant's reputation having regard to the truth of the remaining charges.

In connection with justification it should be noted that under s 8 of the Rehabilitation of Offenders Act 1974 (see further Chapter 4) a claimant who proves that the defendant has maliciously published details of a spent conviction may recover damages. However, the section does not affect the defences of absolute or qualified privilege and fair comment. Thus an employer will, in the absence of malice, still be protected if he writes a reference which mentions a spent conviction. It was decided in *Herbage* v *Pressdram* [1984] 2 All ER 769 by the Court of Appeal that a rehabilitated offender who seeks an interlocutory injunction to prevent publication of his conviction is in the same position as a person against whom a defence of qualified privilege is raised. An injunction will only be granted if there is overwhelming evidence of malice in the publication or some irrelevant, spiteful or improper motive.

Fair comment on a matter of public interest

Here the defendant must show that the statement alleged to be defamatory is in fact legitimate comment. The defence is designed to cover criticism of matters of public interest in the form of comment upon true, or privileged, statements of fact, such comment being made honestly by a person who did not believe the statements to be untrue and who was not otherwise actuated by malice. The malice element makes the defence similar to that of qualified privilege (see below). The statement must be comment, i.e. the speaker's opinion of a true state of affairs; it must not be an assertion of facts, but a comment on known facts.

London Artists v *Littler*, 1969 – A comment on the wrong facts (**439**)

Comment is the individual reaction to facts, and the court and the jury require to be satisfied only of the defendant's honesty. The test is: 'Would any honest person, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of what is criticised?' If the answer is 'yes', the comment is fair for the purposes of raising this defence.

The matter upon which the comment is made must be one of legitimate public interest such as the conduct of Parliament, the government, local authorities and other public authorities, or the behaviour of a trade union whose actions affect supplies and services to the public. Further, a matter may become the subject of public interest because the claimant has voluntarily submitted himself and his affairs to public criticism. A person who makes a

public speech or publishes a book or presents a play thereby submits the subject matter of such thing for public comment, and cannot complain if the comment is adverse.

It should also be noted that the facts relied on to support a plea of fair comment must be facts existing at the time of the comment and not facts which have occurred some time before the comment was made (*Cohen* v *Daily Telegraph* [1968] 2 All ER 407).

It is important to distinguish fair comment from the defence of justification. In fair comment it is not necessary to prove the truth of the comment but merely that the opinion was honestly held; if justification is pleaded in regard to matters of opinion, the defendant must prove not merely that he honestly held the views expressed but that they were correct views. Thus, if we take the following statement – 'X's speech last night was inconsistent with his profession of Liberalism', in a plea of justification the defendant must prove that it was inconsistent, but in a plea of fair comment the defendant need only show that he honestly held this opinion of X's speech.

Privilege

This defence protects statements made in circumstances where the public interest in securing a free expression of facts or opinion outweighs the private interests of the person about whom the statements are made. Privilege may be absolute – such a statement is never actionable – or qualified, when privilege may be defeated by proof of the defendant's malice.

Absolute privilege

The Bill of Rights 1689 protects statements in both Houses of Parliament. The Parliamentary Papers Act 1840 affords a similar protection to reports, papers, etc., published by order of either House, e.g. *Hansard* and government White Papers. The Defamation Act 1952, s 9 protects verbatim broadcasts and newspaper reports of parliamentary proceedings but Parliament itself can fine or imprison those who abuse this privilege. Members of the European Parliament also have immunity for statements made during sessions of the European Parliament *even if it is not actually sitting* (*Wybot* v *Faure* Case 149/85 [1986] ECR 2391).

Section 13 of the Defamation Act 1996 allows waiver of parliamentary privilege. The matter was raised in *Hamilton* v *Al Fayed* (2000) 26 Sol Jo LB 157. The claimant, a former Member of Parliament, had waived his parliamentary privilege under s 13 and commenced libel proceedings after the defendant had alleged that he had accepted payments as a reward for asking questions in Parliament. The defendant asked for the action to be struck out on the basis that the Committee on Standards and Privileges and the Parliamentary Commissioner for Standards had already investigated the allegations and s 13 did not extend to waive Parliament's exclusive jurisdiction over its internal affairs. The House of Lords ruled that the waiver applied and Mr Hamilton's claim could proceed. The claimant's waiver of his parliamentary protection overrode any privilege belonging to Parliament as a whole and thus allowed the parties to challenge the truthfulness of evidence given to the parliamentary bodies without breaching parliamentary privilege. If that challenge could not have been made by reason of privilege, the trial would have been impossible to pursue.

With regard to the courts, statements by the judge, members of the jury, counsel, and the parties or witnesses are absolutely privileged, as are orders of court. Thus an order of court for divorce, including a finding of adultery against a woman, is not actionable even though reversed on appeal. A statement made by a witness is not actionable even though the judge finds it untrue and malicious. The abuse of the above privilege is checked by (*a*) the law of perjury (in the case of untrue statements by witnesses), (*b*) the power of the judge to report improper behaviour on the part of counsel to the Benchers of his Inn, and (*c*) the judge's power to commit persons to prison for contempt of court.

Communications between senior and responsible public officers in the course of their duty are absolutely privileged. However, the defence of absolute privilege does not apply to information given to a social security adjudication officer by a person applying for benefit, and so allegations made by an employee against a former employer as to the manner of a dismissal could be the subject of an action for libel (see *Purdew* v *Seress-Smith* [1993] IRLR 77).

Where in the course of legal proceedings (as distinct from the giving of legal advice), the solicitor for one party requests the solicitor for the other party for information regarding the case which his client will advance, the answer given is subject to absolute privilege (see *Waple* v *Surrey County Council* [1997] 2 All ER 836).

It was held by the Court of Appeal in *Mahon* v *Rahn (No 2)* [2000] 2 All ER (Comm) 1 that a letter from an informant to a financial services regulator, the Securities Association (a predecessor to the Financial Services Authority), during an investigation into a person's fitness to carry out investment business attracted absolute privilege.

Absolute privilege and human rights

The European Court of Human Rights has ruled that absolute privilege does not infringe Art 6 (right to a fair trial) of the Convention. In *A* v *United Kingdom* (2002) *The Times*, 28 December a young black woman tried to challenge the rule of absolute privilege in circumstances where her MP had named her in a parliamentary debate, gave her full address and made adverse comments concerning her behaviour and that of her children. The court ruled that absolute privilege of parliamentary proceedings did not infringe Art 6. It was very limited and did not impose a disproportionate restriction on an individual's right of access to the courts. The MP was protected by the Bill of Rights Act 1689, Art 9 of the Convention (freedom of thought, conscience and religion) and press reports of the proceedings were protected by qualified privilege.

Qualified privilege

Where such privilege exists, a person is entitled to communicate a defamatory statement so long as he does so honestly and reasonably with regard to the words used and the means of publication, and without malice. Qualified privilege has been held to arise in the following cases:

(a) Common interest, i.e. where a statement is made by a person who is under a legal or moral duty to communicate it to a person who has a similarly legitimate interest in receiving it. This covers testimonials or references to prospective employers, or to trade protection societies whose function it is to investigate the creditworthiness of persons who are the objects of their enquiry.

> *London Association for the Protection of Trade* v *Greenlands*, 1916 – A bad report from a trade association (**440**)

(b) Statements in protection of one's private interests are privileged.

> *Osborn* v *Thos Boulter*, 1930 – An allegation of watering the beer (**441**)

(c) Statements by way of complaint to a proper authority, e.g. petitions to Parliament and complaints to officials of local authorities and professional bodies. It was decided in *Graff* v *Panel on Take-Overs and Mergers* (1980) *Financial Times*, 11 October that the Panel had a moral duty to investigate alleged breaches of the code and that it followed from this that if the

Panel had learned of an alleged breach of the code and had circularised copies of an article – which was the subject of this libel action – in order to establish or to demolish the allegations, the Panel was protected by the defence of qualified privilege.

Beach v *Freeson*, 1971 – An MP's duty (**442**)

(d) Professional confidential communications between solicitor and client on legal advice. As we have seen, correspondence during the course of legal proceedings between solicitors is subject to absolute privilege (*Waple* v *Surrey County Council* [1997] 2 All ER 836).

(e) Newspaper reports on various public matters. The Defamation Act 1996, in s 15 and Sch 1, confers qualified privilege upon fair and accurate newspaper reports of various matters of public interest and importance. The Defamation Act 1996 extends this to fair and accurate reports in *all* publications, provided the publisher has, if asked, published a reasonable letter or statement by way of explanation or contradiction. Failure to do so rules out the defence. These reports are of two classes:

(i) Those which are privileged without any explanation or contradiction being issued, e.g. reports of public proceedings of colonial or dominion legislatures, reports of public proceedings of the United Nations Organisation, of the International Court of Justice, or of British courts martial, and fair and accurate copies of and extracts from British public registers and notices.

(ii) Those which are privileged only if the newspaper concerned is prepared, on the claimant's request, to publish a reasonable letter or statement in explanation or contradiction of the original report, e.g. semi-judicial findings of the governing bodies of learned societies, professional and trade associations, or authorities controlling games and sports. This also applies to fair and accurate reports of public meetings, meetings of local and public authorities, and the meetings of public companies. In this context a press conference can be regarded as within the expression 'public meeting' so that press reports emanating from it can be subject to the defence of qualified privilege (see *McCarten Turkington Breen (a firm)* v *Times Newspapers Ltd* [2000] 4 All ER 913: a ruling of the House of Lords).

(f) Fair and accurate reports of parliamentary proceedings are the subject of qualified privilege whether contained in a newspaper or not.

Cook v *Alexander*, 1973 – Privilege and a parliamentary sketch (**443**)

(g) Fair and accurate reports of public judicial proceedings are privileged. This does not protect reports of proceedings in domestic tribunals, e.g. the Law Society, unless the report is in a newspaper. Such reports will not be privileged if the court has forbidden publication, as is often done in cases affecting children, or if the matter reported is obscene or scandalous. It is also a criminal offence to report indecent matter relating to judicial proceedings (Judicial Proceedings (Regulation of Reports) Act 1926; Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968).

(h) An apology published in connection with defamation is not subject to qualified privilege and if it contains further defamatory material this can be sued upon without the need for proof of malice in the author and publisher (see *Watts* v *Times Newspapers Ltd* [1996] 2 WLR 427).

Qualified privilege may be rebutted by proof of malice or some improper motive, and proof of actual spite or ill will in the publication will defeat it. An improper motive may be inferred from the tone of the statement or from the circumstances attending its publication, and malice may also be inferred from abuse of the privilege, such as the giving of excessive publicity to statements protected by qualified privilege. However, the gross and unreasoning prejudice of the defendant will not defeat the defence of privilege if the defendant honestly believed that what he published was true. But where a person without malice joins with a malicious person in publishing a libel in circumstances of qualified privilege, the person without malice is not liable to the person defamed.

Horrocks v *Low*, 1972 – Malice cannot be inferred (**444**)
Egger v *Viscount Chelmsford*, 1964 – A judge of Alsatian dogs (**445**)

Where there is a pressing obligation to communicate defamatory matter, a person may communicate it, although he does not believe it to be true, and still claim qualified privilege. Thus an accountant who, on going through the books of a firm, finds evidence that the cashier has embezzled money, may communicate that view to authority and still claim qualified privilege, even though the accountant does not believe that the cashier has, in fact, embezzled the money.

The media: qualified privilege: developments

The categories of situations where the defence of qualified privilege is available have tended to expand over the years. In this connection, the Lord Chancellor has power under the Defamation Act 1996 to create new situations of qualified privilege (see Sch 1, para 15 to the Act), though there has as yet been no extension under this power. However, journalists have tried to get the courts to extend the defence to matters of 'political importance'. This trend has been brought to a halt by the decision of the House of Lords in *Reynolds* v *Times Newspapers Ltd* [1999] 3 WLR 1010. The claimant was the former Taoiseach of Ireland. He complained of an article appearing in the *Sunday Times* that gave the impression that he had deliberately and dishonestly misled the Irish Dail. The defence that the article was subject to qualified privilege by reason of being 'political information' was rejected.

An important aspect of the *Reynolds* case is the guidelines laid down by the House of Lords in connection with the acceptance of the defence of qualified privilege when put forward by newspapers and other media. Matters to be taken into account by a court are:

- the seriousness of the allegation;
- the nature of the information and the extent to which the subject matter was a matter of public concern;
- the source of the information;
- the steps taken to verify the information;
- the status of the information;
- the urgency of the matter;
- whether comment had been sought from the claimant;
- whether the article contained the gist of the claimant's side of the story;
- the tone of the article;
- the circumstances of the publication including the timing.

Loutchansky v *Times Newspapers Ltd*, 2002 – The *Reynolds* guidelines applied: limitation and the Internet (**445a**)

Reynolds liberalised

The tests in *Reynolds* were still difficult to pass but in *Jameel* v *Wall Street Journal Europe* [2006] 3 WLR 642 the House of Lords has liberalised the *Reynolds* guidance and heralded a new era for British investigative journalism. The *Jameel* ruling is to the following effect:

- The publishers of an article of undoubted public concern are not to be denied the protection of qualified privilege where, having taken detailed steps to verify its contents, they fail to obtain the claimant's comments before publication.
- The key test is whether a media organisation or newspaper acted fairly and responsibly in gathering and publishing the information. If the reporter and editor did so and the information was of public importance then the fact that it contained relevant but defamatory allegations against prominent people would not allow them to recover libel damages.

The story published by the *Wall Street Journal Europe* said that bank accounts associated with a number of prominent Saudi citizens, including Mr Jameel's family, had been monitored by the Saudi government at the request of the US authorities to ensure that no money was provided intentionally or knowingly to support terrorists. The High Court and the Court of Appeal had not found that the *Reynolds* public interest test applied because, among other things, no comment had been sought from the claimant. The House of Lords, however, allowed the journal's appeal and in doing so further liberalised the public interest test. What the journal had published was clearly in the public interest.

Offer of amends

The Defamation Act 1996 sets out in ss 2–4 a new offer of amends defence. It is described as a 'qualified offer' and is an offer of amends which is limited to a specific defamatory meaning which the defendant who makes the offer accepts that the statement which is complained of conveys. A qualified offer is appropriate:

- where the defendant accepts that his defamatory statement is partially untrue; or
- where the defendant maintains that although the statement is defamatory it is not so in the sense argued by the claimant.

If, for example, an accountant complained that an article in a newspaper relating to a financial scandal in which he was involved accused him of fraud but the newspaper said that in its view the article merely made an allegation of incompetence, the newspaper could make a qualified offer of amends in regard to the less serious meaning and this would be a defence if the offer was refused and the jury accepted that an allegation of incompetence was the true meaning.

It was held in *Watts* v *Times Newspapers Ltd* [1996] 2 WLR 427 that the publication of an apology is not protected by qualified privilege so that if the apology contains further accusations regarding the claimant *or a third party* a claim may be made without the need to prove malice.

The offer may be made before proceedings or after proceedings commence but before submission of defence. Thus, the publisher has under the 1996 Act rather longer than before to investigate and assess his position before deciding whether to run an offer to make amends. The offer is to make a suitable correction and sufficient apology in a reasonable and practicable way and to pay compensation equivalent to defamation damages. However, the major costs of proceeding to trial may be saved. Making such an offer is a defence and, if used must be the *only* defence relied on. It is essential to the defence that the publisher did not know and had no reason to believe that the statement complained of was likely to be understood as referring to the aggrieved party and that it was false and defamatory of him.

Under s 3(5) of the 1996 Act it is up to the court to quantify an unresolved issue as to the amount of the offer. In this connection the defendant who is making the offer may rely on evidence relevant to the claimant's character such as previous convictions for violent offences where the libel related to the claimant's alleged violence on a woman in order to obtain possession of certain tape recordings and recording equipment in her possession (see *Abu* v *MGN Ltd* [2003] 2 All ER 864).

It is well worth a defendant's while to use the offer of amends procedure because a prompt acknowledgement of the defamation together with an unqualified offer of amends and published apologies can reduce the damages significantly as for example in *Nail* v *News Group Newspapers Ltd* [2005] 1 All ER 1040, where they were reduced by 50 per cent.

Consent of the claimant to publication

If the claimant has agreed to publication, he cannot subsequently sue in respect of that statement. Consent may be given in respect of a particular publication or it may be general.

Chapman v *Lord Ellesmere*, 1932 – Where the claimant is a volunteer (**446**)

Theatres Act 1968

Section 4 of the Theatres Act 1968 amends the law of defamation (including the law relating to criminal libel) by providing that the publication of words (including pictures, visual images, gestures, and the like) in the public performance of a play shall be treated as publication in permanent form, i.e. libel. Performances given on a domestic occasion in a private dwelling house are exempt (s 7(1)) and so are rehearsals and performances for broadcast or recording purposes (s 7(2)) provided such rehearsals and performances are attended only by the persons *directly* connected with the giving of them.

Section 5 of the Act creates an offence of incitement to racial hatred by presenting or directing the public performance of a play though, again, rehearsals and performances attended only by persons directly concerned are exempt. Prosecution under s 5 is with the consent of the Attorney-General (s 8).

It is of interest to note also that s 1 of the Act abolishes the power of the Lord Chamberlain to censor plays.

Summary procedure

Summary proceedings are already available under the Civil Procedure Rules 1998 where the claim has no prospect of succeeding or there is no reasonable prospect of defending, though the summary proceedings may reveal that this is not so and a trial will ensue. However, the new machinery under the 1996 Act is now in force. The new machinery is available where the claimant applies for all or any of the following reliefs:

- a declaration (of liability or no liability);
- an order for publication of an apology, or correction;
- damages not exceeding £10,000; and
- an order restraining repetition.

The court is entitled to dismiss the claim if it has no real prospect of success and there is no reason why it should be tried. Additionally, the court may give judgment for the claimant if there is no defence that has a reasonable prospect of success and there is no reason for a trial. A trial may be required where there is a conflict of evidence and the seriousness of the wrong in terms, e.g., of its extensive publication.

Trial may be in the county court if the parties consent.

An example of the use of the summary procedure arose in *Oryx Group* v *BBC* (2002) High Court, 17 July. The Oryx Group is an international corporation with investments and business interests across a range of industries including banking, hotels, automotive, natural resources, food production, construction and marketing. Oryx's claim arose from a BBC broadcast on the 10 o'clock news on 31 October 2001. It was a special report entitled 'The diamonds that pay for Bin Laden's terror'. In the report Oryx was falsely accused of funding Bin Laden and the Al Qaeda network. On 19 November 2001 the BBC broadcast an apology. The BBC did not put forward the defence of justification using instead the defences of qualified privilege and no defamatory meaning. On 10 May 2002 four days before the BBC was required to serve its evidence it abandoned the defence of qualified privilege. Oryx then applied for summary judgment on the basis that the BBC had no credible defence. This was granted and on 17 July 2002 the High Court awarded judgment and costs to Oryx. A fairly speedy conclusion in the circumstances of the case.

It is important to note that the fact that a judge has agreed to a request for summary proceedings does not mean that the defendant is denied a jury trial. There may be an appeal to the Court of Appeal on the issue and the Court of Appeal may require a jury trial where it is of opinion, e.g. that the defendant has a reasonable prospect of success with the defence (see *Safeway Stores plc* v *Tate* [2001] QB 1120).

Limitation period

Section 5 of the Defamation Act 1996 reduces the limitation period from three years to one in actions for libel, slander or malicious falsehood, the reason being that one year is the time within which most actions should be brought if the action is to minimise damage to the claimant's reputation. The court may allow a late claim if it is equitable to do so having regard to prejudice to either party and taking into account, e.g., situations where the claimant was not aware that he had a claim on the first anniversary of the publication of the offending material and provided he has acted reasonably and promptly when he did find out, and the availability of evidence which would have been available during the primary 12-month period – or in other words, is vital evidence still available?

The court has a jurisdiction to extend the one year period but will not normally do so unless there is a satisfactory explanation of the delay (see *Steedman* v *BBC* [2001] Entertainment and Media Law Reports 17: Court of Appeal). The position with regard to online continuous libels has already been considered (see *Dow Jones & Co Inc* v *Gutnick* [2002] HCA 56 at p 588).

Criminal convictions

As regards criminal convictions, such a conviction of the claimant is regarded as conclusive in defamation proceedings so that the possibility of a defamation action being used by a convicted criminal to challenge his conviction is removed. However, a criminal conviction is not conclusive where the defendant is not the criminal concerned. This will enable investigative journalists to defend libellous statements about police irregularities connected with a criminal's case by means of evidence to show that the criminal concerned might not have been guilty (see s 12 of the Defamation Act 1996).

Pre-trial interpretation of relevant material

It should also be noted that following changes to the Rules of Supreme Court judges are now allowed, even before a case has been regarded as suitable for trial, to rule on the interpretation

of words and phrases which are ambiguous before the start of full proceedings. 'Are the words capable of being defamatory?' is the question. This will save time and money where, subject to recommendation by the claimant's advisers, the case does not proceed to full trial where the preliminary ruling is that the words or phrases are not defamatory.

Damages

Although many slanders are actionable only on proof of special damage to the claimant, actual damages awarded by the court will not be confined to the special damage so proved. For example, if as a result of defamation a person loses his or her employment, he or she can prove special damage in this connection, but the actual damages awarded may take in much more than this particular loss. Damages for defamation tend to be high. Juries are often used in such cases, and they are concerned with the quantum of damages. The damages awarded for loss of reputation may often be higher than damages awarded for the loss of life. In this connection, the case of *John* v *Mirror Group Newspapers Ltd* (1995) *The Times*, 14 December is of interest. MGN appealed against a total libel award of £350,000 comprising £75,000 compensatory damages and £275,000 exemplary damages awarded to Elton John in a libel action in respect of an article in the *Daily Mirror*. The Court of Appeal reduced the damages to £75,000 and stated that it was offensive to public opinion that awards for defamation should often well exceed sums awarded for injury cases. There was no reason why counsel or the judge should not indicate to the jury what might be a reasonable sum in a particular case. However, damages should be compensatory and not punitive though they may be *aggravated* by mental suffering arising from the defamation, or *mitigated* by a full apology, provocation by the claimant, or the claimant's bad reputation.

Davis v *Rubin*, 1967 – Where libel damages are excessive (**447**)

Injunctions

Apart from damages, a defamed person may seek an injunction restraining further publication. Such injunctions are of two kinds:

(*a*) ***a perpetual injunction***, which is usually granted at the trial; and
(*b*) ***an interim injunction*** (or interlocutory injunction), which is granted pending the trial, and may be *quia timet*, that is before the wrong is actually done.

However, publication of an article will not be restrained merely because it is defamatory where the defendant says he intends to justify it or make fair comment on a matter of public interest, or claim privilege and the claimant cannot show that the defence(s) concerned will be likely to fail (*Harakas* v *Baltic Mercantile and Shipping Exchange Ltd* [1982] 2 All ER 701).

Before concluding the tort of defamation we should notice also the separate tort of *injurious falsehood*. Just as defamation is an attack on a person's reputation, so injurious falsehood is an attack on his or her goods. To say that A's goods are inferior in quality to B's may be an injurious falsehood. To say that A sells inferior goods as goods of superior quality may, on the other hand, be a defamatory statement.

Reform

The Law Commission has recommended that there should be an urgent review of Internet libel laws. There is evidence that Internet service providers are increasingly shutting down

sites because of defamation allegations even where the information is true or in the public interest. These difficulties are exposed by the cases considered in this chapter.

At the time of writing, no legislation was forthcoming.

The rule in *Rylands* v *Fletcher*

This celebrated rule was stated in the case of *Rylands* v *Fletcher* (1868):

> Where a person for his own purposes brings and keeps on land in his occupation anything likely to do mischief if it escapes, he must keep it in at his peril, and if he fails to do so he is liable for all damage naturally accruing from the escape.

The rule has been held to apply whether the things brought on the land be 'beasts, water, filth or stenches'. The rule also applies to fire. It does not apply to the pollution of beaches by oil because, *inter alia*, the oil does not escape from *land* but from the sea (see *Southport Corporation* v *Esso Petroleum Co* (1954)).

In more recent times an element of foresight of consequences has been imported into the rule so that, although liability does not require negligence and is strict in that sense, it does require foresight of consequences, as where the defendant knew or ought to have known of them, before there can be a liability (see *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* (1994) below).

This decision should be borne in mind when considering earlier case law appearing in this text. It may be that in some of the older cases the defendants escaped liability by showing that they had no foresight of consequences either subjectively (themselves) or objectively (through the rule of the reasonable person). Development along these lines may convert the rule in *Rylands* to an aspect of negligence.

Emanuel v *Greater London Council*, 1970 – An escape of fire (**448**)

In the case which gave rise to the rule, the defendant had constructed a reservoir on his land, employing competent workmen for the purpose. Water escaped from the reservoir and percolated through certain old mine shafts, which had been filled with marl and earth, and eventually flooded the claimant's mine. The defendant was held liable in that he had collected water on his land, the water not being naturally there, and it had escaped and done damage. Since the defendant employed competent workmen, it follows that the liability was absolute and did not depend on negligence, and in any case, the defendant's action was quite innocent as there was no reason why he should know of, or even suspect the existence of, the disused shafts. Thus, even in the leading case, *there was no foresight of consequences*.

In order for the rule to apply, there must be an escape of the thing which inflicts the injury from a place over which the defendant has occupation or control to a place which is outside his occupation or control. It is doubtful to what extent the rule covers personal injury.

Read v *Lyons*, 1947 – There must be an escape (**449**)

The rule is not confined to wrongs between owners of adjacent land and does not depend on ownership of land but the claimant must have some interest in the land. Thus in *McKenna* v *British Aluminium Ltd* (2002) *The Times*, 25 April the High Court dismissed an application to strike out (or bring to an end) claims in strict liability under *Rylands* v *Fletcher* and nuisance.