HELENIC AUSTRALIAN LAWYERS ASSOCIATION:  
Contemporary Legal Issues and the Influence of Hellenism  

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FREEDOM OF EXPRESSION:

(1) Desmond Browne QC: JUST HOW FREE IS OUR FREEDOM OF EXPRESSION?  
(2) Professor Paul Cartledge: WOULD THE GREEKS HAVE THOUGHT US FREE?

1. In 2000, the year in which the UK’s Human Rights Act 1998 came into force, Lord Slynn put at the top of his list of what he called “first-order constitutional principles” that “for the individual citizen everything which is not forbidden is allowed”: Judicial Review in International Perspective: Kluwer (2000), p256. Lord Slynn may or may not have had at the back of his mind T.H.White’s mockery of totalitarianism in The Once and Future King: The Sword in the Stone: “Everything which is not forbidden is compulsory”. White was writing in 1938 on the eve of a war which at its end left Europe determined that human rights should never be trampled upon in the same way again. So in 1945 thoughts began to turn to a Convention to protect human rights, and it is to Article 10 of that Convention, as much as to the common law, that English lawyers now turn when seeking to uphold freedom of expression. It is in the domestic law that we find the restrictions on speech: in contrast, the Convention sets out positive rights, albeit they are sometimes qualified, as in Article 10.

2. In Reg. v. Home Secretary, Ex p. Simms (2000) 2 AC 115, 125G, Lord Steyn described freedom of expression as “the primary right” in a democracy – “without it an effective rule of law is not possible”. On that account members of the House of Lords have more than once expressed the opinion that when it comes to freedom of speech, there is “in principle no difference between English law on the subject and article 10”: per Lord Goff in the Spycatcher case, AG v. Guardian Newspapers Ltd. (No.2) 109, 283-4. In 1993 when the House concluded that a local government authority lacked the capacity to sue for libel, Lord Keith observed how satisfactory it was “to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty”: Derbyshire CC v. Times Newspapers Ltd. (1993) AC 534, 551G. Nonetheless he noted that the jurisprudence of the European Court of Human Rights treated the words “necessary in a democratic society” as requiring the existence of a pressing social need and that the restrictions imposed should be no more than is proportionate to the legitimate aim pursued.
3. More often than not these days when freedom of expression is discussed, it is in the context of the freedom of the media. As Lord Bingham pointed out in *McCartan Turkington Breen v. Times Newspapers Ltd* (2001) 2 AC 277, 290-291, this is not because the media enjoy any greater freedom than anyone else. It is because:

"The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

*The slow impact of the European Convention:*

4. English lawyers sometimes need to pinch themselves to remind them that the UK ratified the *Convention for the Protection of Human Rights and Fundamental Freedoms* as long ago as March 1951. Indeed we were the first member of the Council of Europe to do so. The Lord Chancellor of the day, Lord Jowitt was far from happy. He told his Cabinet colleagues that he “could not view with equanimity an appeal to a secret court, composed of persons of no legal training, possessing the unfettered rights to expound the meaning of 17 Articles, which may mean anything, or as I hope, nothing”: *AWB Simpson: Human Rights and the End of Empire: OUP* (2001).

5. For quite a number of years Lord Jowitt’s attitude appeared to have infected both Bar and Bench: for example, as late as 1976 when I was trying to resist an application by Sir James Goldsmith for leave to prosecute the magazine *Private Eye* for criminal libel, it did not occur to me (or anyone else) to invoke Article 10 of the Convention, though today it is there that we first look for our right to freedom of expression. Four years previously when no less than seven Law Lords sat to consider the anomalous civil law remedy of punitive (or exemplary) damages, it is remarkable that only one of their number made even a passing reference to the Convention: see Lord Kilbrandon: *Broome v. Cassell* (1972) AC 1027.

6. Article 10 is, of course, a qualified right, as is shown by *Article 10(2):*

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of
information received in confidence, or for maintaining the authority and impartiality of the judiciary.” [emphasis added]

7. In the Goldsmith case the Judge pondered what the public interest required and ultimately concluded that criminal proceedings were necessary: Goldsmith v. Pressdram Ltd. (1977) 1 QB 83. He did not consider the proportionality of the step when Sir James was also suing some sixty of the magazine’s secondary distributors. Not until three years later did Lord Diplock point out that the requirement that the accused should have to prove that publication was for the public benefit was “to turn Article 10 of the Convention on its head”: Gleaves v. Deakin (1980) AC 477, 483E-F.

Some differences between English law and Australian:

8. There are enough significant differences (more than I initially realised) between English and Australian law when it comes to the protection of free speech to refute Lionel Murphy’s jibe that Australia had a tendency of obedience to English law “eminently suitable for a nation overwhelmingly populated by sheep”: The Responsibility of Judges, First National Conference of Labor Lawyers: 29 June 1979.

(1) English law originally recognised no less than four types of libel: blasphemous, seditious, defamatory and obscene. The first was abolished in July 2008 by the Criminal Justice and Immigration Act of that year; there is no longer reason to fear prosecution for “impiety”, followed by a draught of hemlock. The remaining three types of libel disappeared in January 2010 when s.73 Coroners and Justice Act 2009 took effect. Yet criminal defamation still remains on the statute book in a number of Australian states. In 2009 there was a rare successful prosecution in South Australia of a teenager for libelling a country police officer on Facebook, and a recent review by a Queensland academic concluded that the disturbing rise in so-called “hate speech” on social networks and the seeming inability to regulate it meant that criminal defamation might still have a valuable role to play. His argument was that although civil law remedies, such as ordering websites to take down material and rights of reply had a place, they did not adequately address the extremely serious defamation published with malicious intent: Burgess: Criminal Defamation in Australia: (2013) 20 Murdoch University Law Review.

(2) In June 2013 the form of contempt of court known as “scandalising judges” was also abolished in England. English judges had long been reluctant to resort to this remedy to defend their dignity from media criticism, and it was dealt the death by s.33 Crime and Courts Act 2013. When dismissing an application to commit the future Lord Chancellor, Lord
Hailsham, Lord Denning MR stated: “We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.”: R. v. Commissioner of Police, ex p. Blackburn (1968) 2 QB 150, 155B. Edmund Davies LJ reminded himself that for judges “silence was always an option”. How different in Melbourne: but it was, of course, in London that Justice Heydon chose to lambast the Victorian Court of Appeal for treating as potential contempt (if not actual contempt) the criticism by three federal ministers of Victorian sentencing for terrorism offences. Leaving aside the comment that “some judges would wear as a badge of pride the title ‘hard-left activist’”, an English audience would surely sympathise with his concern that “if contempt is to be found in a statement creating a risk that confidence in the administration of justice will be lost, it is no defence that the statement happens to be true.”: The Australian, 21 March 2018.

(3) The approach of the English courts to the defence of a libel based on the public interest is also different. The defence, which used to be called Reynolds privilege following the decision of the House of Lords in 1999, Reynolds v. Times Newspapers Ltd (2001) 2 AC 127, was technically abolished but effectively codified by s.4 Defamation Act 2013. The law laid down in Lange v. ABC (1997) 189 CLR 529 bears some resemblance to English law as regards what it requires by way of reasonable steps before publication, but it is narrower than English law which is triggered by matters of public concern, not merely by political matters: Gatley, Libel & Slander, 12th ed. (2013), p675. In Flood v. Times Newspapers Ltd (2012) 2 AC 273, [113, 184], Lord Brown and Lord Clarke said there was a single question to be answered:

“Could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?”

Prior restraint:

9. Another intriguing difference between English and Australian law relates to the criterion for the grant of interlocutory injunctions for libel. The principle derived from Bonnard v. Perryman (1891) 2 Ch 269 is that the court will not restrain publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. The absolute rule is so well established that it has been held to be in no way affected by the Human Rights Act, s.12: see Greene v. Associated Newspapers (2005) QB 972. In Australia, so it appears, the principle of free speech has not been converted into such a rigid and inflexible maxim. In what the authors of Gatley, Libel & Slander, 12th
Edn. (2013), para.25.7, p956, call “a powerful and polemical dissenting judgment”, Heydon J argued for the abandonment of the rule, pointing out that in Queen Victoria’s time when the rule was laid down the judiciary “had just finished living through an era when the leading political journalists were Robert Cecil and Walter Bagehot... [and] the name of Harmsworth was unknown”: ABC v. O’Neill (2006) 229 ALR 457.

10. Heydon J’s argument was that in the modern era the mass media were able to inflict harm which was not only grave but irreparable, and thus it ought to be less difficult for claimants to obtain urgent interlocutory relief to prevent such harm. There is an echo of this approach in the field of privacy: in Douglas v. Hello Ltd & Others (No.3) (2006) QB 125, [259] a formidable Court of Appeal consisting of Lord Phillips MR, Clarke and Neuberger LJJ decided that another division of the Court had previously erred in refusing the Douglasses an interlocutory injunction. They pointed out that the award of damages made to the Douglasses at the trial, although unassailable in principle, was not at a level which, when measured against the effect of refusing them an interlocutory injunction, could fairly be characterised as adequate or satisfactory: “Only by the grant of an interlocutory injunction could the Douglasses’ rights have been satisfactorily protected.”

11. Although the English courts are quick to detect what are essentially defamation claims being dressed up as other causes of action, there are ways of preventing publication in advance, but s.12(3) Human Rights Act 1998 requires the court to be satisfied that the applicant is likely to establish at trial that publication should not be allowed. “Likely” in this context means “more likely than not”: Cream Holdings v. Banerjee (2005) 1 AC 253.

(1) In Gulf Oil v. Page (1987) Ch 327, where the defendant had flown a plane over a racecourse towing a defamatory, but true, sign, the plaintiff succeeded with a claim for damages for conspiracy to injure based on the defendant’s sole or dominant purpose being to cause injury.

(2) The Protection from Harassment Act 1997 has been held by the Supreme Court to apply to campaigns of harassment by publication: Hayes v. Willoughby (2013) 1 WLR 935. In Howlett v. Holding (2006) EWHC 41 (QB) an injunction was granted where the defendant had dropped leaflets from an aircraft with the intention of making the claimant’s life “a living hell”. The Act has also been used by employers to protect their employees from harassment by members of the public: Cheshire West Council v. Pickthall (2015) EWHC 2141 (QB).
(3) In April 2018 Warby J relied on a combination of the Rehabilitation of Offenders Act 1974 and the Data Protection Act 1998 to grant a claimant an injunction against Google publishing details of a business-related criminal conviction of many years before. The claim was based on the so-called “right to be forgotten” which emerged from the decision of the Court of Justice of the European Union (the Luxembourg court, not that in Strasbourg) in Google Spain (2014) QB 1022. In granting the injunction Warby J took into account the claimant’s limited public role, the lack of relevance of the offence to anything today, the sensitivity of the information, the prejudice experienced by the claimant in private and family life, and the policy of rehabilitation.

The protection of private and family life:

12. One of the “rights of others” mentioned in Article 10(2) is to be found in Article 8(1): the right of everyone to respect for their private and family life, home and correspondence. Since about 2004 the Strasbourg court has been ever firmer in treating the Article 8 right as embracing the right to reputation as well as what is generally understood as privacy: “a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity...”: Pfeifer v. Austria (2007) 48 EHRR 175, 183, para.35. The criterion for the engagement of Article 8 appears to be whether the attack on reputation so seriously interferes with the claimant’s private life as to undermine his or her personal integrity: see Lord Rodger in Re Guardian News and Media (2010) 2 AC 697, [42].

13. Invasion of privacy is not a modern phenomenon. In their famous paper in the Harvard Law Review in 1890: 4 HLR 193, Samuel Warren and Louis Brandeis complained:

“The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade.... To satisfy a prurient taste the details of sexual relations are broadcast in the columns of daily newspapers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle.....”.

14. In 1982 Murphy J observed that unjustified invasion of privacy was one of the developing torts: Church of Scientology v. Woodward (1982) 154 CLR 25, 68, but it had not developed all that far by 2001 when Callinan J observed in ABC v. Lenah Game Meats (2001) 208 CLR 199, [335] that the time was ripe for consideration whether Australia should recognise a tort of invasion of privacy. In Lenah Game Meats, [39] Gleeceon CJ thought that if the killing of possums at the plaintiff’s abattoir was private, the law of confidentiality was sufficient to
cover the case, but the plaintiff had conceded that the information was not confidential.

15. I have to confess to not being sure to this day whether Australia has a tort of privacy: at one stage it looked as though Gina Rinehart might be the trail-blazer but then her litigation was settled. In 2003 and 2007 respectively there were first-instance decisions pointing to a possible right to privacy in Queensland (Grosse v. Purvis: [2003] QDC 151, spying and entering the claimant’s home) and Victoria (Jane Doe v. ABC [2007] VCC 281, identification of a rape victim). In Giller v. Procopets: [2008] VSCA 236 (a case involving the covert filming of sexual acts between the parties), the Victorian Court of Appeal flirted with the possibility of a privacy law, but then decided (like Eady J in the Max Mosley case: [2008] EMLR 20) that the old law of confidence was sufficient to provide redress.

16. Recommendations by the Australian Law Reform Commission seem to have been controversial – not least their proposal that the Court should be able to order an apology. No such remedy has ever been available in England on the principle that an insincere apology is worse than none at all. In a libel action against Private Eye in 1987, its editor Richard Ingrams, was cross-examined by counsel for Robert Maxwell to suggest that the magazine knowingly published falsehoods. “Only our apologies”, he replied.

17. If there are contentious issues in England such as arose in the Supreme Court in the case anonymised by the initials “PJS”, I suspect that for an Australian audience it is the perception that by advancing from an old-fashioned equitable right (used by Prince Albert) to protect confidences to a law protecting privacy, we have gone too far in protecting rights under Article 8 and sacrificed too much of the freedom of expression under Article 10: PJS v. News Group Newspapers Ltd. (2016) AC 1081. The mistake which the Supreme Court held the Court of Appeal to have made in PJS was to treat s.12 Human Rights Act 1998 as having given Article 10 presumptive precedence over Article 8. The case law, both European and domestic, shows that neither the right to privacy nor that to freedom of expression are pre- eminent over the other. There are no trump-cards – the balance is struck after what the late Lord Steyn called “an intense focus” on the facts and applying the European doctrine of proportionality: In re S (A Child) (2005) 1 AC 593, [17].

18. PJS never went to trial; it was settled shortly afterwards. The defendants’ position was hopeless once Lord Mance had ruled that the legal position was clear and that there was “on present evidence no public interest in any legal sense in the story” – in other words, there was nothing which could engage Article 10: ibid, [44]. On that account some have treated the case as the death-knell of the “kiss-n-tell” story, a result which would have gladdened the hearts of
The right to privacy – the emergence of a new tort:

19. Looking back to 2004 it can be seen that the clash of interests which arose in Naomi Campbell v. MGN (2004) 2 AC 457 were both interests which, viewed broadly, would have been recognised in ancient Greece: on the one hand, the public interest in revealing the claimant’s false public denials (that she had taken drugs), and on the other, Ms Campbell’s right to what Strasbourg has called “physical and psychological integrity”: Pretty v UK [2002] 35 EHRR 719, [61]. Adriaan Lanni tells us that Athenian law only regulated private conduct if it was perceived directly to affect the public life of the city: Law and Order in Ancient Athens: CUP (2016).

20. In resolving the clash of rights in the Campbell case, the House of Lords marched the equitable tort of confidentiality into the new world of privacy. It is doubtful that this could ever have occurred without a leg-up from the Human Rights Act and the Convention, under which there is a positive treaty obligation on states to have in place adequate domestic laws to protect privacy. Germany learnt that lesson in the first of the Von Hannover cases: Von Hannover v. Germany (No.1) (2005) 40 EHRR 1. In the UK Parliament funked the job because it was too difficult, and governments funked it because they feared alienating the media. The press were repeatedly warned they were drinking in the last-chance saloon. It was a six o’clock swill on which time was never called. So the task was left to the judiciary, who inevitably attracted the opprobrium of the media when they applied s.6 Human Rights Act, which obliged the Court as “a public authority” to act consistently with the Convention and the Strasbourg case-law.

21. The Judges’ task was not made any easier for the fact that the common law had never recognised a free-standing right of privacy. This had been emphasised by the Lords in Wainwright v. Home Office (2004) 2 AC 406, a case involving a breach of physical integrity by a humiliating body-search of visitors to a prison. But in the Campbell case by an awkward process later aptly called by Lord Phillips “shoe-horning”, the Convention right to privacy was grafted onto the long-standing law of confidence. (The analysis which follows comes from the man who lost 3 to 2 in the House of Lords the case he had won 3-nil in the Court of Appeal.)

22. Lord Hoffmann, in the minority with Lord Nicholls in wishing to uphold the Court of Appeal tried to paper over the division of opinion in the House by saying that the difference related to the unusual facts of the case: (2004) 2 AC 457, [36]. That is debatable – on one view the difference was fundamental and it related to the Mirror having covertly taken photographs of
Ms Campbell when leaving her Narcotics Anonymous meeting in the King’s Road. It is a good question why the majority regarded this as so significant, when there was an acknowledged public interest in exposing her public lies about not taking drugs, and the photos contained no information which was not apparent from the permissible text.

23. Lord Hope, 
ibid [121], regarded the publication of the photographs as swinging the balance against the newspaper because, he said, when linked with the text they added greatly overall to the intrusion the article as a whole made into Ms Campbell’s private life. Lady Hale, ibid [155] also concentrated on the intrusive effect: she thought that the publication of the photograph harmed Ms Campbell by making her think she was being followed or had been betrayed. Thus a new tort was called into existence to redress the balance of the old – no longer an informational tort, but one now based on intrusion. The upshot is that the English courts now regard a breach of privacy in the very wide sense defined by Lord Mustill in 2001 as “an affront to the personality, which is violated both by the violation and by the demonstration that personal space is not inviolate”: R. v. Broadcasting Standards Commission, Exp. BBC (2001) QB 885, 900.

24. Where a breach of privacy is established, there may well be an entitlement to an injunction where the tort of confidentiality will not avail because the secret is out. The identity of PJS was widely known and easily accessible through the Internet; to make matters worse, the substance of the information had entered the public domain, but the Supreme Court by 4 to 1 continued the injunction – a decision which emphasised that the tort is not concerned with the secrecy of information, but with intrusion into private and family life: PJS v. News Group Newspapers (2016) AC 1081. Particularly important was the welfare of the children of the family. Lady Hale, ibid [72], pointed out that not only were their interests likely to be affected by a breach of the privacy interests of their parents, but they had independent privacy interests of their own. It was for the parents in due time to determine the least harmful way of telling them of the events underlying the injunction.

25. For Australians the situation in PJS may prompt memories of the Spycatcher litigation: AG v. Guardian Newspapers (No.2) (1990) 1 AC 109. But there the situation was different because national security interests were in play, and once the contents of Peter Wright’s book were known, no further damage could be done to the state. A better analogy is the case of the adulterous footballer once known as CTB [2011] EWHC 1334, but later exposed on the floor of the Commons by his real name. Tugendhat J acknowledged that an injunction would have failed in its purpose if that purpose was to preserve a secret, but the naming in Parliament seemed to increase, not diminish the strength of the claimant’s case that he and his family needed
protection against intrusion.

26. All of this still leaves open the question how far does intrusion go? It certainly protects very small children from photography in the street even without harm to their welfare. One two-year-old got damages of £15,000 for photos published in the Daily Mail: AAA v. Associated Newspapers [2013] EWCA Civ 554. But was Lady Hale right in her famous comment that there was nothing that could be expected to damage Ms Campbell’s private life in publishing a photograph of her popping out to the shops for a bottle of milk: "Readers would obviously be interested to see how she looks": ibid, [154]. However, would it make a difference if she had recently had chemotherapy and lost much weight and all her hair?

Section 18C Racial Discrimination Act 1975:

27. When the Australian Bar Association met in London last year, they set about debating section 18C, and invited a comparison with the English legislation, s. 18 Public Order Act 1986:

- In section 18C the prohibited act is one “reasonably likely, in all the circumstances to offend, insult, humiliate, or intimidate....”.

- In contrast, s.18 Public Order Act 1986 seems to have the same objective, and comes under a heading “Acts intended or likely to stir up racial hatred”. The criminal act prohibited by s.18 is the use of words or behaviour which are “threatening, abusive, or insulting....”.

28. “Insult” is common to both provisions, and intimidation and threats are similar concepts. Thus it is giving offence which is the most striking difference between the two statutes. In Creek v. Cairns Post Pty (2001) FCA 1007 Kiefel J was faced with an article about the future of a 2-year-old aboriginal girl whom the authorities had decided to take from foster-care with a white family and place with the applicant, an aboriginal relative looking after the girl’s two brothers. The article was illustrated with a photograph of the white couple in their living room with a comfortable chair, photographs and books. This was juxtaposed with a photograph of the applicant in a bush-camp with an open fire. The Judge observed that the test whether the article was reasonably likely to offend or humiliate someone in the applicant’s position was “necessarily objective”, [12]. In dismissing the application, she observed that the words of the statute envisaged “profound and serious effects, not to be likened to mere slights”: [16].

29. A simplistic view is that “offend and insult” sets the bar too low and that if one is concerned with preventing racial hatred, it is intimidation and probably also humiliation for which
one should be looking. French CJ in his Birkenhead Lecture delivered in Gray’s Inn in November 2015 said that “in the end the law cannot save us from being offended. Nor can it save us from the social disharmony which some kinds of offensive expression can cause.” In December 2012 former Chief Justice of NSW, Jim Spigelman opined that “the freedom to offend is an integral component of freedom of speech. There is no right not to be offended.”: **Hate Speech and Free Speech: Drawing the Line, Human Rights Day Oration.**

30. These extra-judicial dicta of Australian judges seem almost to echo those of Sedley LJ in 2000:

> “Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative... Freedom only to speak inoffensively is not worth having”: Redmond-Bate v. DPP [2000] HRLR 249, [20].

31. Turning to the section 18D defence, it seems too obviously and too inappropriately borrowed from the law of defamation – the common law defence misleadingly called fair comment. In England it is now a statutory defence under s.3 Defamation Act 2013, and has been given the more fitting name of honest opinion. The problem is that section 18D glosses the common law defence with the introductory words that section 18C “does not render unlawful anything said or done reasonably and in good faith”. Of course, many are the common law authorities reminding us that fair comment does not have to be reasonable, or even fair: in Reynolds v. Times Newspapers Ltd (2001) 2 AC 127, 193, Lord Nicholls pointed out that the epithet “fair” is now meaningless and misleading: “...the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury.” Today in England, our new s. 3 Defamation Act 2013 does not even require the opinion to be on a matter of public interest.

32. It was the narrowness of the available defence which appears to have led to the ruling against Andrew Bolt in the controversial Eatock case in 2011: **(2011) FCA 1103.** What Mr Bolt wrote, offensive though it may have been, appeared to be an expression of his opinion about fair-skinned Aboriginal people.

33. Reverting to the law of privacy, we again see the concept of offensiveness treated as controversial. The recommendation of the Australian Law Reform Commission, basing itself on the judgment of Gleeson CJ in **Lenah Game Meats, ibid, [42]** is that a claimant should be required to prove both (1) a reasonable expectation of privacy, and (2) that the act or conduct complained of was highly offensive to a person of ordinary sensibilities. But in **Campbell** the
House was unanimous in adopting exclusively the reasonable expectation test. Lord Nicholls, *ibid*, [22] regarded the Australian test as a recipe for potential confusion. Firstly, because it was “suggestive of a stricter test of private information than a reasonable expectation of privacy”, and secondly, because it tended to bring into account considerations which went more appropriately to issues of proportionality, such as the degree of intrusion and the extent to which the publication was a matter of proper public concern.

**The English Defamation Act 2013:**

34. A recent article in *The Times*: **23 April 2018** reported that the number of defamation cases had fallen to a record low: only 49, compared with 86 three years before. The journalist attributed this to the reforms in the **Defamation Act 2013**, particularly s.1(1) which treats a statement as not defamatory “unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.” As often happens with reforming legislation, it led initially to a flurry of litigation, and to differences between judges. For example, was the issue of serious harm to be judged as at the date of publication, the date of the issue of proceedings or the date when the matter fell to be decided by the Court? Was it appropriate to hold preliminary issues (sometimes lasting 2 or 3 days) to examine the consequences flowing from publication of the libel? In September 2017 (after a 9-month delay) the Court of Appeal answered these questions in *Lachaux v. AOL (UK) Ltd.* (2018) 2 WLR 387.

35. Davis LJ held, *ibid*, [82(3)] that the new legislation left much of the common law untouched, including:

   (1) the presumption as to damage in cases of libel,
   (2) the principle that the cause of action accrues on the date of publication, and
   (3) the objective single-meaning rule (whereby the Court finds only one defamatory meaning, notwithstanding that reasonable readers might take a different view).

36. The Court of Appeal went out of its way to discourage preliminary issues, saying that if the meaning is evaluated as seriously defamatory, “it will ordinarily then be proper to draw an inference of serious reputational harm”. When that threshold is reached, further evidence will be likely to be more relevant to quantum and should be left to the trial.

37. The survival of the presumption of damage is justified by what Lord Phillips MR once called “strong pragmatic reasons” – the avoidance of “opening the door to the claimant and the defendant each marshalling witnesses to say that, respectively, they did or did not consider that the article damaged the claimant’s reputation”: *Jameel v. Dow Jones & Co.* (2005) QB 946, [31]. That presumption which might be said to be integral to the common law has been held not
to be incompatible with Article 10 ECHR.

38. **Section 1 Defamation Act 2013** was designed to weed out trivial libel cases before trial, and even after Lachaux it will still have that effect. NSW District Court Judge Judith Gibson is only the latest Australian judge to have called for an effective defence of triviality so that a case never gets to trial such as that of the man who sued his former son-in-law for comparing him to the bumbling lawyer in *The Castle* in an email about arrangements for children’s visits: *The Australian: 9 April 2018*. Even before the new Act the Court of Appeal had held that in cases where it was apparent that the publication had caused little or no damage to the claimant’s reputation, the action could be struck out as an abuse of process as not constituting “*a real and substantial tort***”: *Jameel v. Dow Jones & Co Inc (2005) QB 946*.

**Jury trial:**

39. In comparing freedom of expression under the common law with that in ancient Greece, one needs to consider the role of the jury in determining the parameters of free speech or *parrhesia*. In his recent oration in Melbourne in August 2017 Nettle J listed Hellenic legal procedure, including the concept of trial by jury, as one of five particularly significant contributions to our legal system. His Honour pointed out that the *dikastai* decided questions of law, as well as questions of fact, albeit the distinction was not as rigid as it is to us today. Athenians, he said, thought of law and the administration of justice as being so closely related that both were determined by reference to public opinion and the community’s standards of morality and common sense. In civil actions the number of jurors (inevitably male) was not less than 201, and for higher level claims 401 (thereby avoiding the possibility of a tied result and too big to be bribable). At the trial of Socrates there were 501.

40. Though 501 jurors is a large number to get under a palm tree, Athenians seemed less concerned with legal certainty than with a broad sense of justice in the particular case. According to Nettle J, the large number was thought justified to ensure impartiality and the dilution of extreme opinions. Even so it is hard to grasp how it came about that a larger number of jurors voted for Socrates to suffer the death penalty than had voted for his conviction: see *Cartledge: Democracy (2016)*, p178-9. Thirty votes going the other way would have seen him acquitted.

41. In the latter part of the 20th century what now seems a somewhat unrealistic, if not positively sentimental, view was taken of juries as bastions protecting free speech. An example can be found in the libel action brought by Lord Rothermere against *The Times* in 1973. The notoriously acerbic columnist, Bernard Levin, had attacked the Rothermere companies for closing down a newspaper for bogus reasons of economy in order to make unconscionable profits, thereby
causing acute hardship to their loyal staff. The editor of *The Times* and Mr Levin went to the Court of Appeal to secure the right to jury trial, and succeeded two to one. Lord Denning MR looked back to the trial of the Seven Bishops in 1688 and to Fox’s Libel Act in 1792 to demonstrate how precious to journalists was the right to jury trial. He referred to the mystique of the law of libel: “*But a jury look at a case more broadly. They give weight to factors which impress the lay mind more strongly than the legal*”: *Rothermere v. Times Newspapers Ltd.* (1973) 1 WLR 448, 454D,

42. Two hundred years after Fox’s Libel Act it still seemed to hold sway. In *Sutcliffe v. Pressdram Ltd.* (1991) 1 QB 153, 182E-F, Nourse LJ said its justification was as valid as ever: “*The question whether someone’s reputation has or has not been falsely discredited ought to be tried by other ordinary men and women and, as Lord Camden said, it is the jury who are the people of England*”. The citizens of Athens would doubtless have endorsed such an approach, but unreasoned awards by juries of huge damages led to the demise of jury trial, and the media ever ready to decry what they perceive as a threat to freedom of expression have shed no tears. In his speech in *Reynolds* delivered at the very end of the 20th century, Lord Cooke referred to the difficulty that defamation cases presented for juries and to “*the drastic judicial surgery that has had to be undertaken to curb extravagant awards of damages*”: *Reynolds v. Times Newspapers* (2001) 2 AC 127, 226. He regarded it as “*over-romantic to conceive of juries as champions of freedom of speech as in the days of Penn and Mead’s case (1670) 6 St TR 951.*”

43. *S.11 Defamation Act 2013* seems effectively to have put an end to trial by jury. Theoretically there is still room for jury trial in an exceptional case, but the Government declined to specify what those cases might be. They were afraid that detailed provisions spelling out when jury trial might be appropriate could have a counter-productive effect, working against their view that it should be exceptional. A plausible exception might be where a judge was a claimant in a libel action; it is not easy to think of others.

44. It is hard for the modern-day lawyer to read Plato’s account of the noble death of Socrates or to view David’s painting in the Metropolitan in New York without feeling some of the concern that motivated Parliament to pass *s.11*. Today we expect precise definition of our rights and their enforcement without regard to emotion or irrelevance. But for the jury in 399 BC considering the charge of impiety aggravated by corruption of youth, one can understand how they might have been influenced by a belief that the offence caused to the gods was such as to have caused the plague of 430, the defeat by Sparta in 404 and the civil war the following year: see *Cartledge: Democracy: OUP (2016), p176*. We believe ourselves to be free because our rights are precisely defined (even if only by reference to what is unlawful) and on account of that
precision the enforcement of those rights by trained judges is, or any rate should be, predictable.

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