

Volume 56, Issue 1 (Fall 2018))

*Special Issue: Reforming Defamation Law in the Age of
the Internet*

Article 6

Guest editor: Jamie Cameron

“O! they have lived long on the alms-basket of words”: Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes

Andrew Scott

London School of Economics and Political Science

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Scott, Andrew. “O! they have lived long on the alms-basket of words”: Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes.” *Osgoode Hall Law Journal* 56.1 (2019) : 80-111.

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

“O! they have lived long on the alms-basket of words”: Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes

Abstract

To triangulate the individual and social interests in reputation and free speech, the common law has generated an unwieldy corpus of technical rules and counterfactual assumptions. This complexity entails enormous cost and opportunities for game-playing by astute, well-resourced litigants. Neither reputation nor free speech is well-served by reform initiatives that focus mainly on amending the substantive law. This paper offers a critical assessment of a proposal that might better address complexity and cost. This comprises the inextricable combination of two initiatives: repeal of the ‘single meaning rule’ which promises to simplify the court’s task, but instead generates complexity in defiance of common sense; and a bar to claims should a publisher correct unintended meanings promptly and prominently. This combination would eliminate the ‘semantic’ dimension of claims; deliver adequate redress for many publication harms; see only intractable disputes reach the court; and leave defamation law more comprehensible to the wider public.

“O! they have lived long on the alms-basket of words”: Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes

ANDREW SCOTT*

To triangulate the individual and social interests in reputation and free speech, the common law has generated an unwieldy corpus of technical rules and counterfactual assumptions. This complexity entails enormous cost and opportunities for game-playing by astute, well-resourced litigants. Neither reputation nor free speech is well-served by reform initiatives that focus mainly on amending the substantive law. This paper offers a critical assessment of a proposal that might better address complexity and cost. This comprises the inextricable combination of two initiatives: repeal of the ‘single meaning rule’ which promises to simplify the court’s task, but instead generates complexity in defiance of common sense; and a bar to claims should a publisher correct unintended meanings promptly and prominently. This combination would eliminate the ‘semantic’ dimension of claims; deliver adequate redress for many publication harms; see only intractable disputes reach the court; and leave defamation law more comprehensible to the wider public.

* Department of Law, London School of Economics and Political Science. *Love’s Labour’s Lost*—from which the title of this article is drawn (V.I)—features the longest scene (V.II), the longest single word (“honorificabilitudinitatibus” at V.I.39-40), and—depending on editorial choices—the longest speech (IV.III.284-361) in all of Shakespeare’s plays.

I.	A BIPARTITE REFORM PROPOSAL	85
	A. Withdrawal of the Single Meaning Rule.....	86
	B. Corrections, Retractions, and the Jurisdictional Bar.....	93
II.	POSSIBLE CRITICISM OF THE REFORM PROPOSAL.....	100
	A. Superfluity	101
	B. Gaming the System: Defendants.....	103
	C. Gaming the System: Plaintiffs.....	104
	D. Jurisprudential Concerns: Preclusion of Access to Justice.....	106
	E. Practical Reservations: Uncertainty over Promptness and Prominence.....	107
	F. Practical Reservations: Over-burdening Publishers.....	109
	G. Practical Reservations: Difficulty in the Assessment of Damages	110
III.	CONCLUDING REFLECTIONS	110

WORDS CAN CAUSE PROFOUND INJURY TO REPUTATION. They can do so in myriad ways. The principal function of defamation law is to protect reputations but to do so by adequately triangulating the individual and the social interests in reputation and free speech. This is an unforgiving task. To understand and address injuries caused by the use of language, the common law has generated an unwieldy corpus of highly technical rules that rests upon a broad sweep of counterfactual assumptions. The core problem with defamation law is attendant upon this juridification and over-complication of public sphere disputes. It is the sheer cost of embroilment in legal proceedings for both plaintiffs and defendants, and the opportunities that this creates for game playing by astute and relatively well-resourced litigants.

The chilling effect of defamation law is well-attested.¹ During parliamentary debate on what became the *Defamation Act 2013* in England and Wales,² Lord May—a former Chief Scientific Adviser to the UK Government and President of the Royal Society—described his own challenging experience of being threatened with a libel action. He reflected on the real dilemma he felt between raising concerns regarding a matter of public importance and facing court proceedings or censoring himself and thereby allowing such concerns to persist.³ A corresponding,

-
1. In the mid-1990s, research undertaken by Barendt et al evidenced the existence of this chilling effect of defamation law on the full array of British media publishers. The chill might impact “directly” on the decision as to whether specific material would be published or broadcast, or structurally, to demarcate subjects that are simply never written about because of the inevitability of legal suit. See Eric Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford: Clarendon Press, 1997). See also Frederick Schauer, “Fear, Risk and the First Amendment: Unraveling the ‘Chilling Effect’” (1978) 58 BUL Rev 685.
 2. *Defamation Act 2013* (UK), c 26.
 3. UK, HL Deb (17 December 2012), vol 741, col GC420 (Lord May of Oxford) [December 17 Debates].

albeit much less recognized, concern is that in many jurisdictions, access to justice for relatively impecunious plaintiffs has become illusory. Neither reputation nor free speech is well-served by the modern law of defamation.

These may simply be intractable problems. They can also be viewed as concerns that might be raised in respect of any area of the civil law. When a body of law is unnecessarily technical, however, it can actively encourage practitioners to pursue complicating and expense-inducing tactics. In such circumstances, reconsideration seems both necessary and appropriate. Such reconsideration, responding to the problems of defamation chill and access to justice, accelerated in importance by the advent of social media and the democratization of speech that they allow, has been happening in many jurisdictions.⁴ There has been a general appreciation that defamation laws in the common law world are not fit for purpose in modern public spheres.⁵

Much of the recent effort expended in revising the law has focused on the possible revision of the substantive law. The *Defamation Act 2013* passed in England and Wales included a broad range of such changes,⁶ but much of

-
4. The significant momentum for reform has been evidenced in many jurisdictions throughout the latter part of the twentieth century, beginning with the decision by the US Supreme Court. See *New York Times Co v Sullivan*, 376 US 254 (1964) [*Sullivan*]. Acheson and Wohlschlegel noted and detailed the fact that “[t]he recognition that defamation law can have a chilling effect on important expression has been influential in the development of the tort across the common law world.” David J Acheson & Ansgar Wohlschlegel, “The Economics of Weaponized Defamation Lawsuits” (2018) 47 Sw L Rev 335 at 337. See also, Alastair Mullis & Andrew Scott, “The swing of the pendulum: reputation, expression and the re-centring of English libel law” (2012) 63 N Ir Leg Q 27 at 28-34. Arguably, if taken too far, the desire to privilege freedom of speech—as in *Sullivan*—can create its own set of pathological consequences not just for the protection of reputation but also in terms of the expenditure of effort on verification and ultimately the social value of expression. See Acheson & Wohlschlegel, *supra* note 4 at 351-54.
 5. Studies have been conducted in England and Wales, Northern Ireland, and Scotland. Additionally, studies are currently ongoing in Ontario and have been mooted in New South Wales.
 6. *Defamation Act 2013*, *supra* note 2. The *Defamation Act 2013* reemphasized that defamatory statements must cause “serious harm” if they are to be actionable; placed the main common law defences onto a statutory footing while revising them in small ways; updated and extended qualified privileges; introduced new defences for website operators; ensured that the limitation period for claims runs from the date of “first publication”; compelled courts to refuse jurisdiction if England and Wales were not “clearly the most appropriate place” for the action to be brought; ended the presumption of trial by jury, and provided for the court to order publication of summaries of judgments and to compel the “take-down” of impugned publications (*ibid*, ss 1-5, 7-9, 11-13). For general review and criticism of the *Defamation Act 2013*, see Alastair Mullis & Andrew Scott, “Tilting at Windmills: the Defamation Act 2013”

this industry can be considered little more than tinkering at the edges. It tends to address only the symptoms of the underlying problems. Indeed, since the *Defamation Act 2013* came into force, the English courts have been required to deal with protracted litigation over elements of the new law—often reinvigorating the ghosts of erstwhile common law rules while handing down their statutory interpretations—in a manner that can only be disturbing to the progenitors of the *Defamation Act 2013*.⁷

Lord May was prescient when warning of the dangers of focusing only on the minutiae of the law when contemplating possible reforms, advising the following:

[A]s we look at this, we should not look ... through a purely legalistic prism. We should try to see a way forward to have sensible legislation that means that if you criticise on valid scientific grounds the chimerical claims of someone ... you will not be confronted with the dilemma of principle that people are being confronted with now. ... [T]he issues raised by the legalistic arguments that are not sensitive to the underlying facts are substantial and difficult to solve but need to be confronted.⁸

After proposals had been aired in the Parliamentary debate, Lord May's frustration and disappointment were both palpable and portentous: "[W]hat is being described ... [is] not easily going to be translated into anything that is not almost as expensive as what is currently being used as a weapon ... [when most disputes] could have been settled by a judge in half an hour..."⁹ It is the broader appreciation of this reality that has encouraged consideration of alternative forms of dispute resolution in the defamation context.¹⁰

(2014) 77 Mod L Rev 87; Gavin Phillipson, "The 'global pariah', the Defamation Bill and the Human Rights Act" (2012) 63 N Ir Leg Q 149.

7. This has included protracted litigation through the appellate courts on the content of the s 1 serious harm test and of the s 4 defence of publication on a matter of public interest. For the s 1 serious harm test, see *Lachaux v Independent Print Ltd*, [2017] EWCA Civ 1334 [*Lachaux*]. It was heard by the Supreme Court in Autumn 2018. For the section 4 defence of publication on a matter of public interest, see *Economou v de Freitas*, [2016] EWHC 1853 (QB), aff'd in [2018] EWCA Civ 2591.
8. December 17 Debates, *supra* note 3 (Lord May of Oxford).
9. *Ibid.* Lord May was referring specifically to the rule in clause 1 of the Bill (what became the s 1 "serious harm" test), but might easily have been speaking more generally.
10. See e.g. Emily Laidlaw, "Are we asking too much from defamation law? Reputation systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform" (2017) Law Commission of Ontario commissioned Papers on Defamation Law in the Internet Age; David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harv CR-CLL Rev 261; Alastair Mullis & Andrew Scott, "Reframing libel: taking (all) rights seriously and where it leads" (2012) 63 N Ir Leg Q 5.

The aim of this article is to explain, criticize, and ultimately to promote a reform option that might achieve Lord May's goal of a more sensible regime design. Specifically, this option comprises the inextricable combination of two reforms; first, and perhaps counterintuitively, the withdrawal of the single meaning rule that common law courts deploy to simplify the range of legal questions that must be addressed in particular disputes; and secondly, the introduction of a bar to bringing claims where a publisher has made a correction or retraction promptly and prominently. This proposal was first floated in the consultation report published by the Northern Ireland Law Commission as part of its consideration of whether provisions equivalent to those of the *Defamation Act 2013* should be introduced into Northern Irish law.¹¹

The basic thinking underpinning the interlinked proposal can be briefly stated. In essence, it would extract the semantic dimension of defamation proceedings out of the legal context. The single meaning rule is intended to simplify the court's task when resolving defamation claims. Its practical effect, however, is to see defamation claims often become highly technical, protracted, and costly exercises. As noted, it is the prospect of becoming embroiled in such a costly legal dispute that encapsulates the central problem of defamation law. The primary goal pursued by most bona fide plaintiffs is a prompt correction of falsehoods to vindicate their reputations. The second part of the proposed reform then would do much to afford suitable remedies to people who have seen their reputations sullied by inaccurate statements published by other parties. Importantly, it would do this before lawyers need become substantively involved. This should not create problems for responsible publishers, many of whom are committed to correcting inaccuracies when they are identified.¹² Defendant publishers might be expected more often to publish corrections or retractions whenever appropriate and without recourse to formal systems of dispute resolution, and at the same time become willing and able to defend actions vigorously in court if they are convinced of the truth of what has been published.

-
11. In the midst of its study on defamation, the Northern Ireland Law Commission was closed. The consideration of reform continued under a project overseen by the responsible Department of the Northern Ireland Executive. See UK, Department of Finance, *Reform of defamation law in Northern Ireland*, by Andrew Scott (Belfast: Crown copyright, 2016).
 12. For an example of such a commitment, see Independent Press Standards Organisation, *Editors' Code of Practice*, London: Independent Press Standards Organisation, 2016, s 1.

Importantly, the recommended reform would also see defamation law become more comprehensible to the wider public.¹³

In the paragraphs that follow, this article describes and explains the two elements of the reform proposal. This involves consideration of, first, the single meaning rule, and, secondly, the proposed jurisdictional bar on claims where a publisher has made a correction or retraction promptly and prominently. Thereafter, consideration is given to a range of objections that have been raised over time to proposals of this nature, and specifically to the combined proposal mooted by the Northern Ireland Law Commission. The article concludes with reflections on the ramifications of the introduction of a proposal of the type considered, and the shift in context for the resolution of defamation disputes that this would entail.

I. A BIPARTITE REFORM PROPOSAL

If revisions to the basic parameters of the cause of action in defamation or to the available defences are unlikely properly to balance expression and reputation, then a more sensible and effective—although perhaps counter-intuitive—target for reform may be the longstanding ‘single meaning rule.’ This would be in conjunction with the introduction of a jurisdictional bar on claims based on meanings of publications that had been corrected or retracted promptly and prominently. Neither of these reforms is a panacea on its own. Indeed, instituted independently, the former might well generate chaos in legal proceedings. Any withdrawal of the single meaning rule that was not also coupled with further measures protective of the position of defendants would be a profound error. At present, the opportunity to give discursive remedies is often simply honoured in the breach. Through their combined adoption, however, it may be possible significantly to reduce the chilling effect of libel threats on people who seek to discover and disclose corruption and malpractice and to criticize the powerful; to ensure access to justice and incentivize the provision of adequate redress to people who have seen their reputations sullied by false or ambiguous statements made by others, and to diminish the costly involvement of law, lawyers, and the courts in many disputes.

13. The late Lord Bingham emphasized, as the first precept underpinning the rule of law, that “the law must be accessible and so far as possible intelligible, clear and predictable.” See Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at 37. See also Lord Bingham, “The Rule of Law” (2007) 66 Cambridge LJ 67 at 69.

A. WITHDRAWAL OF THE SINGLE MEANING RULE

In most common law jurisdictions, “[w]hen a dispute is transposed from the public sphere to the courtroom, the ‘single meaning rule’ dictates that each set of ‘words complained of’ must be understood to hold one meaning only.”¹⁴ In *Lait v Evening Standard Ltd*, the English and Wales Court of Appeal traced the origins of the rule back to the late nineteenth century.¹⁵ It was affirmed by the UK Parliament’s House of Lords in *Charleston v News Group Newspapers Ltd* as being “too well established to require citation of authority,”¹⁶ while it was reaffirmed following the passing of the *Defamation Act 2013* in *Lachaux*.¹⁷ Canadian courts have also acknowledged its applicability.¹⁸ Notwithstanding its unquestioned status, justifications for the rule have seldom been articulated by the courts.¹⁹

The rule entails that where the language of an impugned publication is ambiguous or uncertain, a single interpretation must be selected from among all those that can conceivably be inferred from what has been published. The aim is to make the court’s task more manageable; naturally, “dealing with one meaning only promises to make the task of the court more straightforward.”²⁰ Yet, this is

-
14. UK, Northern Ireland Law Commission, *Consultation Paper Defamation Law in Northern Ireland* (Belfast: Northern Ireland Law Commission, 2014) at para 5.03 [Northern Ireland Law Commission]. The exception is to be found in US jurisdictions. Little time tends to be spent on this issue in US litigation. One explanation may be that because in the United States the burden of proof lies on the plaintiff and the standard of proof required is higher, there is an incentive for plaintiffs to present only obviously sustainable meanings to the court. The plaintiff “sets the stage” for the litigation with the meanings that are pleaded.
 15. [2011] EWCA Civ 859 at para 31, citing *Merivale v Carson*, (1887) 20 QBD 275 at 279-82.
 16. [1995] 2 AC 5 (HL (Eng)) at 71, [1995] 2 WLR 450, Bridge LJ [*Charleston*]. Its use was described as “unexceptionable.” See *Bonnick v Morris & Ors (Jamaica)*, [2002] UKPC 31 at para 21 [*Bonnick*].
 17. *Lachaux*, *supra* note 7 at 82.
 18. It was noted that, as with the equivalent English defence and unlike the standard situation, the defence of responsible communication does not require preliminary rulings from the jury on primary meaning since it does not depend on the supposition of a single meaning. See *Grant v Torstar Corp*, 2009 SCC 61 at paras 124, 130. See also *Hansen v Harder*, 2010 BCCA 482. In an anti-SLAPP motion, the court noted a range of possible meanings of the allegation that members of the Whitchurch-Stouffville Town Council were “in the pocket” of the plaintiff. See *United Soils Management Ltd v Barclay*, 2018 ONSC 1372 at paras 67, 68, 70.
 19. An exception to this was a concurring judgment offered by Lord Neuberger in the Hong Kong Final Court of Appeal. See *e.g. Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd*, [2012] Hong Kong Court of Final Appeal 59 at paras 138-46 [*Oriental Daily*]. For key elements of Lord Neuberger’s justification, see notes 42-43, 45-46, and accompanying text.
 20. Northern Ireland Law Commission, *supra* note 14 at para 5.04.

akin to mining for fool's gold. Much of the technical complexity of defamation law can be located in the process of semantic parsing through which the single meaning is determined. As a result, the transposition of a dispute from the public sphere to the legal forum generates opportunities for costly game-playing by parties and their lawyers. The attempt to simplify matters by way of the single meaning rule is damagingly iatrogenic. It allows relatively wealthy litigants to outgun their opponents financially, irrespective of the merits of the case.

As the law stands, the argument over the meaning to be attributed to words is often a key element of a defamation action; determination of meaning is "very often if not always the most important issue."²¹ Where the meaning can be determined at an early stage in proceedings, it is highly likely that the dispute will be settled. Neither the publisher's intended meaning nor the actual inferences drawn by the audience for a given publication are important to the court's function. Determination of meaning is not an empirical exercise.²² The test deployed by the court is that of how the words would have been understood by the ordinary, reasonable recipient of the publication in question. It is to be supposed that only a single interpretation would have been inferred by all ordinary, reasonable members of the audience of the publication. Once the court has selected this one meaning from all those available, the disposal of (that element of) the case will rest upon that choice.

Plainly, the single meaning rule involves a legal abstraction from reality. This abstraction is often explicitly recognized by the courts. In *Slim v Daily Telegraph*, for instance, Lord Justice Diplock acknowledged:

Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. ... Where ... words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings.²³

21. UK, HL & HC, *Joint Committee on the Draft Defamation Bill Oral and associated written evidence*, vol II, HL Paper 203 & HC 903-II (London: Joint Committee, 6 July 2011) at 466.

22. *Hough v London Express Newspapers, Ltd*, [1940] 2 KB 507 at 515. The exception is with "legal innuendo" cases. See Richard Parkes & Alastair Mullis, eds, *Gatley on Libel and Slander*, 2nd supplement, 12th ed (London: Sweet & Maxwell, 2017) at para 26.23.

23. [1968] 2 QB 157 at 171-73 [*Slim*].

Lord Nicholls made a similar point in *Bonnick*:

Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration.²⁴

Indeed, some recipients of a publication will appreciate where its meaning is ambiguous and that competing interpretations are possible. They may reach no firm conclusion on the question of what the publisher was intending to convey. Language is complicated; communication often imprecise.

Of course, in simple cases, there may be little complexity involved. A publication may comprise an unambiguous allegation that is susceptible to only one possible interpretation. Alternatively, it may couple an anodyne, literal assertion with an essentially obvious second meaning that can be inferred from the words themselves. Such *double entendres* are referred to in law as ‘false’ or ‘popular’ innuendo. Equally straightforward are those cases in which what has been published consists of an assemblage of distinct defamatory imputations. Each such imputation will be independently actionable and, in principle, must be separately defended should a plaintiff decide to bring proceedings thereon.²⁵ In any such scenario, the outcome of the case will be straightforward in concept. Each imputation is either substantially true or not, and the dispute will be determined by reference to the evidence that each party adduces.

Beyond such simple scenarios, however, the requirement that a single meaning of impugned words be identified has obliged the courts to develop highly complicated semantic tools with which to perform their interpretative function.²⁶ The range of complicating dimensions that might make the determination of meaning more difficult is broad. For instance, a number of apparently separate and distinct imputations might be interpreted as variations on the same general,

24. *Bonnick*, *supra* note 16 at para 20.

25. A plaintiff accused of being a thief and an adulterer, for instance, might choose to sue on the accusation of adultery only, in which case the defendant cannot then seek to justify the charge of theft. “It is no defence to a charge that, ‘You called me A’ to say, ‘Yes, but I also called you B on the same occasion, and that was true.’” See *Cruise v Express Newspapers plc*, [1998] EWCA Civ 1269 at 954. See also *Warren v The Random House Group Ltd*, [2008] EWCA Civ 834.

26. For an overview, and a recent illustration of the complexity of the determination of meaning by a court, see *Shakil-Ur-Rahman v Ary Network Ltd*, [2015] EWHC 2917 (QB). See also Parkes & Mullis, *supra* note 22, ch 11.

singular imputation,²⁷ such that the seemingly separate allegations can read instead as involving a “common sting.”²⁸ Another complication occurs where a set of words is capable of bearing a number of slightly differing, and progressively more serious, interpretations or “shades of meaning.”²⁹ Similarly, an allegation might be interpreted as possessing a greater or lesser degree of certitude; in English law, these degrees are known as the “*Chase*-levels” of meaning.³⁰ In addition, some members of the audience for a seemingly anodyne publication may possess some special, extraneous knowledge that informs their interpretation of what has been published in a manner unbeknown to the uninitiated. Such words are then said to bear a “legal innuendo” meaning for that particular segment of the audience.³¹ In all of these scenarios, the insistence that the law identifies a single meaning of the words that have been published is highly problematic.

-
27. This is not the same as the circumstance in which a defendant relies *in court* on evidence of other examples of poor conduct, which were not alluded to in the publication, in order to prove a general imputation of which the specific published allegation is said to be illustrative. See *e.g.* *Williams v Reason* (1983), [1988] 1 WLR 96.
28. This is known as the *Polly Peck* justification defence. See *Polly Peck (Holdings) Plc v Trelford* (1985), [1986] QB 1000 at 1032. For example, failure to prove one specific allegation of adultery on which the plaintiff sued did not undermine a defence of truth when other instances of adultery were proven. The “common sting” of the allegations—that of adulterous promiscuity—was substantiated, notwithstanding the specific error. The defence of truth or justification does not require every detail of an allegation to be proven so long as it can be shown to be “substantially true.” See *Khashoggi v IPC Magazines Ltd*, [1986] 1 WLR 1412 (CA).
29. In such a case, the defendant will naturally seek to persuade the court to select a less serious but nonetheless available meaning as the basis on which the case should be determined. They will do this through a “*Lucas-Box*” pleading, which sets out the defence’s more conducive meaning for the court. See *Lucas-Box v News Group Newspapers Ltd* (1985), [1986] 1 WLR 147 (CA) [*Lucas-Box*]. A helpful example was included in the Northern Ireland Law Commission’s consultation paper, “the statement ‘X is helping police with their inquiries into a murder’ could be taken to mean any or all of the following: that X murdered someone else, that they were complicit in the murder, that they knew about the murder, that the police believe that they might know something about the murder or about its surrounding circumstances, or that they were a forensic psychologist involved in suspect profiling.” See UK, Northern Ireland Law Commission, *supra* note 14, n 303.
30. *Chase v News Group Newspapers Ltd*, [2002] EWCA Civ 1772 at para 45. These “*Chase*-levels” of allegation are: (i) that the plaintiff is guilty of X; (ii) that there are grounds to suspect that the plaintiff is guilty of X; and (iii) that there are grounds for investigating whether the plaintiff is guilty of X.
31. This is the only scenario in which the purportedly defamatory meaning of a libel must be empirically supported by adduced evidence as to what additional knowledge the particular segment of the audience had to handle, and hence how the published words would have been understood by them.

Given that the court is tasked with selecting only one from among the array of possible meanings available in what has been published, complex rules and practice as to how the pleading of meanings should proceed have also developed in most common law jurisdictions. Early in the litigation, the plaintiff must specify the defamatory meaning that they believe the contested words hold. This tends to involve the pleading of only a narrow range of ‘serious’ meanings. It may also see the plaintiff offer different interpretations in the alternative. The plaintiff’s pleaded meaning does not bind the court.³² In response to the plaintiff’s case, the defendant will generally offer a lesser meaning.³³ The plaintiff is then free to offer additional arguments related to meanings raised in the defence.

Together, the complexity of language and the rules on pleading meanings entail that both sides in litigation are incentivized poorly by the existing law. The context created by the single meaning rule is such that parties are encouraged to enter into a semantic game. Obfuscation and complication become a worthwhile exercise. Plaintiffs are encouraged to ‘plead high’ on meanings. The insight, once afforded by an interviewee to Professor Andrew Kenyon, is almost certainly generalizable to all defamation practitioners:

[W]hen I get a claim, I would have a look at that article and do two things. One is I would form my own view [about its meaning], as any person in the world would. ... And the second thing I’d do is [ask] what meaning can I extract out of it which is most helpful to my clients. The two things are often quite different.³⁴

Defendants are discouraged from addressing concerns raised and from mollifying complainants quickly and effectively should a grievance prove justified. Thus, much argument between parties is focused on meaning. Each litigant fights for the prize that the court will select a meaning that is favourable to their side. The tenor of defamation proceedings becomes one of strategy and semantics, rather

32. See *Lucas-Box*, *supra* note 29 at 153, Ackner LJ. English courts will not, however, find that the words bear a meaning more serious than that contended for. See *Cook v Telegraph Media Group Ltd*, [2011] EWHC 1134 (QB) at para 11. See generally Andrew T Kenyon, *Defamation: Comparative Law and Practice* (London: UCL Press, 2006) at 54-60 (which includes a comparison with the position in Australia) [Kenyon, *Defamation*]. A caveat exists in relation to pleaded legal innuendo meanings (*ibid* at 54).

33. This must be done with sufficient particularity to allow the plaintiff to understand the case that is faced. See *e.g. Lord Ashcroft v Foley*, [2011] EWHC 292 (QB).

34. See Kenyon, *Defamation*, *supra* note 32 at 119-20 (citing a private interview). Furthermore, on the strength of interviewees’ comments, Kenyon notes that the meanings pleaded by defendants are often verbose and general, not because the lawyers wish to establish those meanings per se, but rather because the general meaning provides a wider gateway to evidence (*ibid* at 120).

than the attempt to address any core dispute. Costs are significantly increased. Yet, in the absence of the single meaning rule, the determination of meaning issue and the complicated associated rules on pleading would effectively disappear.

Outside of those cases in which the meaning of an imputation is unambiguous, application of the single meaning rule will involve not only an abstraction from reality and an opportunity for game-playing, but also some measure of injustice. This fact was highlighted by the English Court of Appeal in *Ajinomoto Sweeteners*:

If the single meaning rule does achieve a fair balance in defamation law between the parties' competing interests, that would appear to be the result of luck rather than judgment The application of the rule can also be said to carry with it the potential for swinging the balance unfairly against one party [or] the other, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others.³⁵

A similar point has been made in the South Australian Supreme Court: “[T]o insist upon an innocent interpretation where any reasonable person could, and many reasonable people would, understand a sinister meaning is to refuse reparation for a wrong that has in fact been committed.”³⁶ As indicated by the English Court of Appeal in *Ajinomoto*, the converse also applies.

It is perhaps unsurprising, then, that in answering the question of whether the single meaning rule should be extended to the tort of malicious falsehood, the unanimous English Court of Appeal in *Ajinomoto* offered an excoriating critique.³⁷ In the course of the judgment, Lord Justice Rimer reflected that “if the single meaning rule did not exist, I doubt if any modern court would invent it, either for defamation or any other tort.”³⁸ Lord Justice Sedley described it as “anomalous, frequently otiose and, where not otiose, unjust.”³⁹ Even in *Slim*, a case which is invariably cited as an affirmation of the single meaning rule, Lord

35. *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd*, [2010] EWCA Civ 609 (QB) at para 43, Rimer LJ [*Ajinomoto*].

36. *Entienne Pty Ltd and Cosenza v Festival City Broadcasters Pty Ltd*, [2001] SASC 60 at para 41.

37. *Ajinomoto*, *supra* note 35.

38. *Ibid* at para 43.

39. *Ibid* at para 31. The single meaning rule has also been rejected in the context of European trademark law in respect of the issue of whether there might be confusion between commercial signs or symbols among consumers. In debunking the proposition that such a rule should be applied, Justice Arnold noted that he was “not aware of any textbook or academic commentary which supports the existence of a single meaning rule in trade mark law. Nor am I aware of any authority from the superior courts of the other member states to support the existence of such a rule.” See *Interflora Inc v Marks & Spencer plc*, [2013] EWHC 1291 (Ch) at para 221. Moreover, Justice Arnold added that “the single meaning rule which exists in English defamation law is widely regarded as anomalous” (*ibid* at para 224).

Justice Diplock described the law of defamation as “artificial and archaic” in this respect.⁴⁰ Commentators have described it as a legal fiction the existence of which “owes much to accidents of history rather than legal principle or policy.”⁴¹

In the face of this analysis, the reasons why the law has embraced a rule that generates a focus on counterfactual artifice instead of plain fact must be powerful. In *Oriental Daily*, Lord Neuberger articulated the counter-argument. He maintained that any simple jettisoning of the single meaning rule would generate turmoil in defamation proceedings; withdrawal of the rule would “self-evidently lead to chaos and uncertainty in many cases.”⁴² His motivation in delivering what was merely a concurring judgment was to reassert that the single meaning rule is an “essential” feature of defamation law that “makes obvious good sense.”⁴³ In *Lait v Evening Standard Ltd*, Lord Justice Laws concurred, unapologetically describing the rule as “a fiction adopted by the law for practical reasons.”⁴⁴

Lord Neuberger strongly favoured retention of the extant rule. A pragmatic concern was that the rule’s removal would “lead to greater uncertainty in outcome ... [as] [i]nstead of a statement with two possible meanings giving rise to a problem requiring a binary resolution, it would give rise to a problem which had a multiplicity of potential answers, along what might be seen as a continuous spectrum.”⁴⁵ The judge warned that the abolition of the rule would “lead to the dispiriting, expensive, and time-consuming prospect of many witnesses being called by each party, to explain how they understood the statement in question.”⁴⁶ Thus, Lord Neuberger considered that removing the single meaning rule would see the determination of disputes become by degrees more complex and costly than at present.

It is difficult to contest the charge that any retention of numerous meanings in defamation actions would become cumbersome and unfair. This would be particularly the case in circumstances where a publisher simply did not intend

40. *Slim*, *supra* note 23 at 171.

41. Alistair Mullis & Cameron Doley, eds, *Carter-Ruck on Libel and Privacy*, 6th ed (London: LexisNexis, 2010) at 80.

42. *Oriental Daily*, *supra* note 19 at para 141.

43. *Ibid.* This was presumably done in response to the decision of the England and Wales Court of Appeal in *Ajinomoto*. See *Ajinomoto*, *supra* note 35.

44. [2011] EWCA Civ 859 at para 19.

45. *Oriental Daily*, *supra* note 19 at para 142.

46. *Ibid.* For a similar point made in another judgement, see *Charleston*, *supra* note 16 at 71.

the more damaging interpretations.⁴⁷ Publishers would be forced to placate plaintiffs swiftly with obsequious settlements, corrections, and apologies, where unintended or multiple meanings could be inferred, or both. This would clearly give plaintiffs an undeserved whip-hand.

While this is a serious concern, two points can be posited in response. First, and somewhat tritely, Lord Neuberger's argument ignores the convoluting manner in which pleading and argument over meaning in libel cases is undertaken at present. The more important response is that it may be possible to ensure that only contested meanings—interpretations that the defendant asserts positively to be true which the plaintiff insists is false—are ever considered by the court. By way of pragmatic intervention, other meanings might be effectively excluded in advance of proceedings. Disputes generated by loose language or misinterpretation might be quickly resolved. Thus, Lord Neuberger's concerns need not be a reason to retain the counterfactual single meaning rule.⁴⁸

Coupling the removal of the single meaning rule with the introduction of appropriate discursive remedies and a jurisdictional bar would give swift access to justice for plaintiffs while providing an attractive “way out” for defendants. That is, the law would recognize, applaud, and promote moves by publishers to present discursive solutions to disputes triggered by their publications. A large proportion of disputes might be eliminated from the legal forum. Cases that involved some fundamental dispute of fact would still go to court, but the time and cost normally expended on determining meaning would be saved, and the dispute processed more efficiently. Engagement in the public sphere, and not bowdlerizing legal chill, might become the normal process through which disputes would be resolved. Lord Neuberger's nightmare vision of horrifically complex litigation would simply not arise.

B. CORRECTIONS, RETRACTIONS, AND THE JURISDICTIONAL BAR

A primary goal pursued by plaintiffs when undertaking actions in defamation is to “set the record straight”; plaintiffs often wish most acutely to obtain a swift

47. Anecdotally, this was the experience in New South Wales prior to the *Defamation Act 2005*. See *Defamation Act 2005* (NSW), 2005/77. As the cause of action rested upon possible imputations, publishers were sometimes left to defend meanings that they had never contemplated when publishing the impugned words.

48. Insofar as Lord Neuberger's concerns related specifically to whether removal of the rule would complicate the determination of appropriate damages awards, they are considered below.

correction of any inaccurate allegations regarding themselves.⁴⁹ The general preference for a discursive remedy is also recognized in the English *Pre-Action Protocol for Defamation* which states that “almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.”⁵⁰ Yet, in defamation law, the primary mechanism available to achieve vindication of a sullied reputation is an award of damages often made at the end of lengthy litigation. In *Cassell & Co Ltd v Broome*, Lord Hailsham justified this approach to vindication as being necessary lest “the libel, driven underground, emerges from its lurking place at some future date [The damages award would allow the claimant] to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.”⁵¹ While the symbolic value of damages can no doubt be deployed to serve this function, it seems hardly to represent the best means of achieving vindication.

Damages are a poor means of securing vindication for two reasons.⁵² First, the award of damages will not of itself highlight the errors that have been published. When claims are settled, the damages afforded are invariably coupled with some other mechanism—such as the publication of a correction and/or an apology or the making of a public “statement in open court”—that is designed to enhance the extent of vindication achieved.⁵³ The efficacy of damages as a means of securing vindication is also undermined by the fact that, when a case progresses to a court judgment, there will generally have been a substantial time-lag of several months—if not years—between the original publication and the award of damages. If the truth can be aired and misrepresentations corrected swiftly and publicly, this will plainly be a more effective way of achieving vindication for the person whose reputation has been unfairly traduced.

49. This fact was regularly asserted by plaintiffs’ lawyers during the debates on libel reform that culminated in the *Defamation Act 2013* in England and Wales. Plaintiffs’ preference for correction over some financial windfall was also a core finding of the Iowa Libel Research project. See Randall P Bezanson, Gilbert Cranberg & John Soloski, “Libel Law and the Press: Setting the Record Straight” (1985) 71 Iowa L Rev 215; Randall P Bezanson, “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get” (1986) 74 Cal L Rev 789.

50. UK, Ministry of Justice, *Pre-action Protocol for Defamation*, online: <www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def> [perma.cc/8XKH-GM6U], at para 1.4.

51. [1972] AC 1027 (HL (Eng)) at 1071.

52. Damages also serve to compensate for hassle and injury to feelings, for the unquantifiable harm to reputation, and potentially for any attributable special losses.

53. Section 1(v) of the *Editors’ Code of Practice* overseen by the IPSO—the UK press self-regulator—provides similarly that “[a] publication must report fairly and accurately the outcome of an action for defamation to which it has been a party.” See Independent Press Standards Organisation, *supra* note 12, s 1(v).

Reliance on damages as a means of obtaining vindication is also highly problematic on account of the sheer cost to plaintiffs of pursuing that device. The average prospective plaintiff is likely excluded altogether from access to justice in this respect. For those who can afford to sue, there is always the risk that the claim will be unsuccessful and that the plaintiff must then carry additional costs. Moreover, any damages award may be insufficient to meet the proportion of the costs bill that even a successful plaintiff would be obliged to meet. It may be to stereotype, but it is easy to understand why the first question asked by publishers following receipt of a complaint is whether their opponent can afford to sue and not whether an allegation is well-founded and underpinned by sustainable evidence.⁵⁴

Common law jurisdictions are comparatively unusual in not providing swift discursive remedies for defamation as standard. This is not to suggest that such remedies are never available. In some circumstances, provision has been made by statute in England and Wales.⁵⁵ Moreover, a number of innovative provisions

54. See UK, HL Deb (17 December 2012), vol 741, col 442-443 (Lord Triesman). Speaking during the Committee Stage debate in the UK Parliament's House of Lords on the Defamation Bill, Lord Triesman noted:

When corporations, particularly wealthy corporations, decide to become claimants, defendants cannot match their power with any equality of arms. It is also not at all infrequent that the claimant finds that they have no equality of arms with the defendant. If you find yourself contesting one of the major newspaper groups, it will tell you in pretty brusque terms that if you really want to bankrupt yourself, to see yourself and your family in penury for very many years, to lose your house or so on, just come on if you feel strong enough (*ibid*).

55. Some such measures are provided under the *Defamation Act 1996*. See *Defamation Act 1996* (UK), c 31. Under the summary procedure provided by sections 8-10, there is a power for the court to make a declaration of falsity and to order that the defendant publish a suitable correction and apology (if the parties cannot agree on the content of the apology or correction, however, all the court can then do is to order the defendant to publish a summary of its judgment) (*ibid*, ss 8-10). If the defendant wishes to take advantage of the "offer of amends" procedure set out in sections 2-4, they must offer a suitable correction and apology, and the availability of qualified privilege for certain reports under section 15 depends on the defendant-publisher being willing to publish a reasonable statement from the plaintiff by way of explanation or contradiction (*ibid*, ss 2, 9, 15). The *Defamation Act 2013* includes two further powers that fall within this area; the section 12 power for a court to order a summary of its judgment to be published, and the section 13 power to order the "take-down" of a defamatory statement. See *Defamation Act 2013*, *supra* note 2, ss 12-13.

have been introduced in the Republic of Ireland.⁵⁶ Canadian jurisdictions have adopted apology legislation to ensure that such actions are not treated as admissions of liability.⁵⁷ Antipodean jurisdictions have generally been slow to adopt such measures.⁵⁸ Where they do exist, these provisions tend to require an application to a court, however. In contrast, most European (and many non-European) states have right of reply and correction provisions that apply in the context of publications disputes, of which many can be deployed more or less immediately upon the publication of a falsehood.⁵⁹ Indeed, discursive remedies are the primary mechanism utilized in resolving defamation-style disputes.⁶⁰

It has long been considered that discursive remedies—corrections, retractions, rights of reply, and apologies—are potentially of great utility in the defamation context.⁶¹ The likely efficacy of such tools has grown enormously

-
56. Section 28 of the *Defamation Act 2009* provides for an application to be made to the court for a declaratory order that a published statement is false and defamatory. An order will be made if the court finds that the statement is defamatory, and the publisher has no arguable defence and has failed to make an apology, correction or retraction. The applicant is not required to prove that the statement was false. If an order is made, the applicant may not bring any other proceedings in respect of the publication. See *Defamation Act 2009* (NI), s 28. Section 30 of the *Defamation Act 2009* allows a court to direct the publication of a correction in such a manner as will ensure “that it is communicated to all or substantially all of those persons to whom the defamatory statement was published” (*ibid*, s 30).
57. See *e.g.* *Apology Act*, SO 2009, c 3.
58. David Rolph, “A critique of the national, uniform defamation laws” (2008) 16 Torts LJ 207; Nina Khouri, “Sorry Seems to Be the Hardest Word: The Case for Apology Legislation in New Zealand” (2014) 2014 NZLR 603.
59. For a survey of international and national discursive remedies, see Kyu Ho Youm, “The Right of Reply and Freedom of the Press: An International and Comparative Perspective” (2008) 76 Geo Wash L Rev 1017; John G Fleming, “Retraction and Reply: Alternative Remedies for Defamation” (1978) 12 UBC L Rev 15; Dario Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008) at 256-79.
60. See The International Forum for Responsible Media Blog, “Libel, Damages and Declarations of Falsity” (2 November 2010), online (blog): *Inform’s Blog* <www.inform.org/2010/11/02/libel-damages-and-declarations-of-falsity> [perma.cc/ED44-PJ83]. See generally Gert Brüggemeier, Aurelia Colombi Ciacchi & Patrick O’Callaghan, eds, *Personality Rights in European Tort Law* (Cambridge: Cambridge University Press 2010); Helmut Koziol, “The Protection of Personality Rights against Invasions by Mass Media: Summary and Outlook” in Helmut Koziol & Alexander Warzilek, eds, *Persönlichkeitsschutz gegenüber Massenmedien* (Vienna: Springer-Verlag/Wien, 2005) 681.
61. See *e.g.* Fleming, *supra* note 59; Randall P Bezanson, Gilbert Cranberg & John Soloski, *Libel Law and the Press: Myth and Reality* (New York: The Free Press, 1987); Andrew T Kenyon, “Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences” (2014) 6 J Media L 21.

in the context of online and social media communications.⁶² In many respects, they are already commonplace in the common law world. It is a tenet of good journalism that errors should be corrected.⁶³ Their use is haphazard, however, and their availability as a matter of law is limited.

Not all discursive remedies are created equal, however; some options may be better suited than others to facilitate the speedy resolution of disputes in the context of ambiguous publications. Rights of reply, retractions and corrections, and apologies are each different in character. A plaintiff has the opportunity to “set the record straight” by taking up a right of reply, but this device does not also involve any necessary admission on the part of a publisher that what has been said was inaccurate. Compulsory rights of reply have often been deemed inapposite in common law jurisdictions as they compel publishers to dedicate space to the speech of others.⁶⁴ Sincere apologies can sometimes address the hurt felt by a plaintiff but, when mandated, they invite cynicism both in their use and their reception.⁶⁵

In contrast, a voluntary retraction or correction provided promptly and prominently, with its explicit recognition of error, would often—perhaps generally—be sufficient to provide a good measure of vindication.⁶⁶ Ensuring that the truth is fully and quickly aired and misrepresentations corrected is likely to be the most effective way of vindicating a person’s reputation. A compelled

62. See generally Ardia, *supra* note 10.

63. The *Editors’ Code of Practice* states that “[a] significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and—where appropriate—an apology published.” See Independent Press Standards Organisation, *supra* note 12, cl 1(ii). Similarly, clause 3 of the National Union of Journalists’ *Code of Conduct* provides that “[a] journalist ... [d]oes her/his utmost to correct harmful inaccuracies.” See National Union of Journalists, *Code of Conduct*, London: NUJ, 2011, cl 3. Interestingly, *The Guardian* newspaper provides an automatic right of reply to any person mentioned in a published article. See “Response,” online: *The Guardian* <www.guardian.co.uk/commentisfree/series/response> [perma.cc/PDW3-XN73]. Broadcasters can be compelled by Ofcom—UK’s communications regulator—to carry summaries of fairness and standards complaints and the regulator’s adjudications. See *Broadcasting Act 1996* (UK), c 55, ss 119-20.

64. Indeed, the Convention-compliance of mandating (or failing to mandate) such opportunities is moot. See Ronan Ó Fathaigh, “The Recognition of a Right of Reply under the European Convention” (2012) 4 J Media L 322. See also András Koltay, *Freedom of Speech: The Unreachable Mirage* (Budapest: CompLex, 2013), c 2.

65. UK, HL & HC, *Joint Committee on the Draft Defamation Bill Oral and associated written evidence Volume II* (HL Paper 203 & HC 930-II, 2011) at 455-56. See specifically the comments of Desmond Browne QC and Hugh Tomlinson QC.

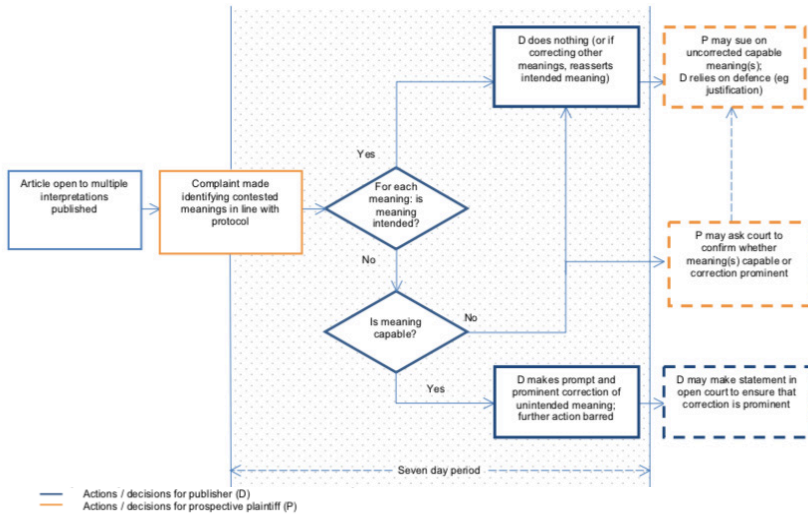
66. For recognition of this general principle, see *Cooke v MGN Ltd*, [2014] EWHC 2831 (QB).

payment of damages following a protracted and contested legal dispute is certain to deliver less effective vindication than a positive intervention in the public sphere of this nature that also served to pre-empt litigation.

Nevertheless, when publishers are not compelled to correct or retract erroneous allegations, it might reasonably be expected—discounting ethical rectitude—that they might not take the trouble. To incentivize the use of such tools, the proposal here is that the law should provide that the prompt and prominent correction or retraction of an error following receipt of a complaint would obviate the possibility of any further action in respect of the meaning in question.⁶⁷ Publishers would be afforded the opportunity to publish a correction or retraction through the introduction of a requirement that plaintiffs communicate details of the imputations complained of and the meaning ascribed to the words in question to the publisher in advance of bringing any action. Alongside the ability to assess the capability of any meanings over which remedial action was not taken by the publisher, a residual power to determine whether the complained of meaning had been properly corrected before any action could proceed could be afforded to the court. The basic scheme envisaged here is represented in the figure, below.⁶⁸

67. One might also envisage the introduction of a cap on damages—not a bar to proceedings—in circumstances where the defendant-publisher had offered a prompt and prominent right of reply to the aggrieved subject of a story. Given that a right of reply does not involve any recognition or highlighting of an error in what was alleged by the publisher, it cannot fairly be treated in the same way as a correction or retraction. See *Television New Zealand Ltd v Ah Koy*, [2002] 2 NZLR 616 (NZCA) at 617.

68. UK, Northern Ireland Law Commission, *supra* note 14 at 88.



The potential benefits of a scheme of this nature can be illustrated by reference to the imaginable outcomes in cases involving ambiguous or multifarious potential meanings. In a case involving *Chase*-levels of meaning, for example, the complainant might suggest that all three levels of meaning could be taken from a publication.⁶⁹ The publisher, having received a complaint, might respond that the form of words used could not tenably be interpreted as possessing the most serious meaning, (A). On reflection, they might agree that the words could be understood as an allegation of reasonable suspicion, (B), even though (perhaps) no such meaning had been intended. They might also explain that it had been intended only to suggest that there was a need for the matter discussed to be further investigated, (C). Under the regime suggested here, the publisher might promptly and prominently disseminate a note stating that there had been no intention to suggest (A) or (B), and thereby provide vindication on those meanings.⁷⁰ They might also indicate that it is not considered tenable that (A) could be inferred, and—importantly—that (C) absolutely was intended. If the complainant then still wished to litigate on meaning (C), this would still

69. For more thorough discussion of the *Chase*-levels, see *supra* note 30. Similar exercises might be conducted in respect of the scenario where “shades of meaning” can be inferred from a publication.

70. If the publisher merely ignored the complaint as it related to meaning (A) thinking that it was an over-stretched interpretation, the complainant could sue but it might be expected that a judge would strike out the action on the basis that the meaning was simply not capable of being inferred from what was published.

be possible. Overall, such an action would reflect a honing of the dispute onto the territory of the allegation made and intended.⁷¹ This narrowing would be accomplished without recourse to court, and without any expensive technical lawyering on the pleading of meanings.

Other instances of publications with complex or multifarious meanings would also be easily managed so as to focus attention quickly on core disputes of fact. For example, in any—verging on hypothetical—case in which a complainant considered it important to differentiate between individual allegations that carried a common sting—“I may be an adulterer, but I was not unfaithful with *that* man”—the publisher could retract the particular contentious allegation if its veracity could not be adequately evidenced while simultaneously affirming the general allegation. Moreover, *Lucas-Box* pleadings would become an artifact of legal history as the dissecting of ‘shades of meaning,’ and the correction of any unintended misrepresentation would occur before legal proceedings were initiated. Responsible publishers would be liable to suit only on meanings that they chose to sustain and would proceed into litigation without having to prepare argument on anything other than their intended meaning. It would allow publishers to have the court cut to the chase and deal with a claim exclusively on this basis.

II. POSSIBLE CRITICISM OF THE REFORM PROPOSAL

The withdrawal of the single meaning rule combined with the introduction of a jurisdictional bar to claims where a publisher has made a correction or retraction promptly and prominently might often provide for plaintiffs to secure adequate redress without recourse to law, while also significantly reducing the chilling effect of potential claims on publishers. Yet, the proposal can be criticized on a range of grounds. When floated by the Northern Ireland Law Commission, a similar proposal generated only a small number of substantive comments from respondents to the consultation.⁷²

71. Logically, the complainant would then have to spell out how any significant harm could have been caused by meaning (C) when that impliedly attributed by him or her to meanings (A) and (B) had been excluded. This would incentivise plaintiffs to “go in low,” or perhaps “realistically,” in the original letter of complaint.

72. UK, Andrew Scott, “Review of defamation law - summary of consultation responses” (2012) at 127, online (pdf): *Department of Finance* <www.finance-ni.gov.uk/publications/review-law-defamation> [perma.cc/ST39-7AG7] (each of the responses were then reiterated by a number of “coat-tailing” respondents to the consultation) [Scott, Summary of Consultation Responses].

The tenor of these responses differed quite markedly as between those respondents who represented the interests of recurrent, media publishers—notably the Media Lawyers Association (“MLA”)—and those who mainly represented non-traditional libel defendants. In the latter category, the Libel Reform Campaign response suggested that the combined proposal “has merit” and that it “could significantly reduce costs and the chill from legal bullying.”⁷³ It emphasized the need to couple such reform with the introduction of revised versions of the main defamation defences “to give the publisher the confidence to defend their actual stated intention (even after it has been narrowed thanks to this procedure).”⁷⁴ It also pondered whether reform in this direction might be exploitable by vexatious litigants.⁷⁵ The response of the MLA, in contrast, indicated strong opposition to the mooted proposal. It stated that the proposal “would be highly damaging to the proper and necessary exercise of freedom of expression by all members of society within Northern Ireland and ... if implemented, may well be incompatible with Article 10 [of the] [European Convention on Human Rights].”⁷⁶ It added that “[t]he scheme is impractical and would have real and harmful consequences for the media and publishers generally in Northern Ireland and in the United Kingdom.”⁷⁷ Specific criticisms offered in the MLA response are included in the following discussion, below, alongside more long-standing objections to proposals of the nature outlined above.

A. SUPERFLUITY

A first criticism that can be made of the proposed reform is that it is essentially unnecessary. This might be especially the case if there is procedural provision for the single meaning of a publication to be determined at an early stage in litigation. The early determination of meaning at a preliminary hearing has become a ubiquitous feature of defamation litigation in England and Wales, one accelerated by the introduction of the seemingly ironbound presumption against jury trials by the *Defamation Act 2013*. Similarly, it can be the focus of a preliminary ruling from the jury in Canadian jurisdictions. When the determination of meaning is not left to a jury at the end of a trial process, the parameters of the dispute that must be argued before the court can be narrowed to the benefit of all parties. Indeed, it can be supposed that such determinations

73. *Ibid* at 83.

74. *Ibid* at 84.

75. *Ibid* at 83.

76. *Ibid* at 114.

77. *Ibid*.

will often result in the subsequent resolution of claims, one way or the other, without the need subsequently to go to full trial.⁷⁸

This is to observe matters through a highly conditioned, legalistic prism. Recent preliminary hearings that have been conducted by the High Court in London have often coupled the determination of meaning with other preliminary questions such as whether the section 1 serious harm threshold has been satisfied and whether the statement complained of comprises allegations of fact or of opinion. Even the determination of preliminary issues by a court can sometimes generate such very significant legal costs that it becomes financially prohibitive for many potential plaintiffs to pursue legal action. Time is a further factor. The delay between the date when publication occurs and the date on which the court's judgment on the determination of meaning is handed down can be several months, even years, in duration. The contrast with the almost immediate clarification of contested meanings—and correction or retraction of meanings that the publisher did not wish to stand by—under the proposed scheme is telling. Indeed, there is a certain incongruity in attaching the label “early” to the determination of meaning by the court.⁷⁹ The wider point is that transposing the task of fixing on contested meanings to any court process necessarily results in stasis—setting the dispute in aspic—and denies the plaintiff access to swift vindication on capable meanings.

In this light, it is very difficult to concur with any suggestion that the need to dedicate time and resources to the determination of meaning under existing litigation practice is at all proportionate. Moreover, the fact that it is left to the court to determine meanings has the result that it can become tactically sensible for litigators to pursue actions that could be resolved at an earlier stage. It must be remembered that the task the court is currently required to undertake is only the determination of the meaning(s) that would be inferred by the ordinary reasonable person on a fairly superficial reading of the publication concerned. This plainly does not require legal or judicial expertise; quite the opposite, in fact.

78. By way of example, see *RBOS Shareholders Action Group Ltd v News Group Newspapers Ltd*, [2014] EWHC 130 (QB) at paras 5-6.

79. In its response to Northern Ireland's consultation, MLA noted that the time taken to determine meaning in two early cases brought under the *Defamation Act 2013* was 179 days after publication in one and, in the other case, 138 days after the claim was issued. This was done to contest an average figure across the previous ten years of 499 days that had been included in the Northern Ireland Law Commission's report. See UK, Northern Ireland Law Commission, *supra* note 14 at para 5.28. This small sample clearly suggests that matters have improved—as one would expect—under the *Defamation Act 2013*. It does not indicate that the problem identified has been in any way resolved.

The single meaning rule makes sense only if it is first assumed that this task must be undertaken in court. Then, the desirability of narrowing the issues between the parties to be determined by the court becomes obvious. This assumption is far from sensible in most cases, however. Far from simplifying proceedings, the single meaning rule complicates massively the transposition of a dispute from the public sphere into the courtroom. This is in the interests only of litigants—whether defendants or plaintiffs—who consider that they might benefit tactically from complicating and prolonging a given dispute.

B. GAMING THE SYSTEM: DEFENDANTS

A second criticism that can be made of the proposed reform is that meaningful vindication would not be achieved for plaintiffs if it became habitual for publishers simply to retract meanings on every occasion that a complaint was brought irrespective of whether the publisher had in fact intended the meaning. This is a potential concern. The UK Parliament's Joint Committee on Human Rights has warned that such approaches may promote irresponsible journalism if publishers were willing simply to publish and correct as necessary.⁸⁰

There are two potential guards against the cynical practice of this type. First, it might be expected that publishers would seek to defend their journalism and would be willing to defend intended meanings before the courts if called upon to do so. Hence, it might be expected that media organizations that valued their reputations for quality journalism would be loath to capitulate and to retract merely to avoid legal action. Moreover, it could be expected that the reputation of media organizations that regularly retracted willy-nilly would be correspondingly discounted by the wider public. The value of publishers' reputations for accuracy and credibility might be expected to militate against abuses. Giving up space to highlight errors is not cost-free for media organizations, either in financial or reputational terms.

80. UK, HL & HC, *Legislative Scrutiny: Defamation Bill* (HL Paper 84/HC 810) (London: The Stationary Office, 2012) at paras 29–34 [*Legislative Scrutiny*]. Ironically, in its response to the Northern Irish consultation the MLA offered a version of this criticism. It complained that by “offering publishers a ‘cheap get out’ for making prompt apologies, the scheme ignores the importance and public interest in defending claims for libel in appropriate cases.” See Andrew Scott, *supra* note 11 at para 3.58. The argument was that the proposal would incentivize publishers not to defend proper, responsible and accurate publications. The obvious rejoinder is that the scheme is designed precisely to facilitate publishers in defending proper, responsible and accurate publications. If publishers then elected not to do so, that is for them.

In addition, it would not be open to a defendant to correct or retract all specific meanings that the statement complained of was capable of bearing. A publisher could not merely retract every specific meaning that was communicated by a complainant and thereby evade all liability. The publisher can be presumed to have intended to convey some meaning. If the attempt were made to correct or retract every capable specific meaning, the court would then treat the correction of one of those meanings as sitting outside the proposed scheme. As at present, that swift correction would become a factor to be taken into consideration in assessing the extent of harms caused.⁸¹

A second guard against the exploitation of the bar to the bringing of claims would be more hard-edged. This would involve the lifting of the bar where there is evidence of malice or an absence of good faith in the publication of the retraction or correction. It is not clear that such a disincentive would be necessary. In any event, there would continue to be the potential for a claim for malicious falsehood to be brought. In addition, any clear inadequacy in the correction or retraction afforded to the plaintiff would permit them to proceed to court.

C. GAMING THE SYSTEM: PLAINTIFFS

There is also room to be skeptical as to the likely response of plaintiffs and their lawyers to any introduction of the proposed reforms. The MLA was concerned that “the proposal would simply shift the focus of the legal disputes and indeed increase legal disputes about meaning, not diminish them.”⁸² It contended that the combined proposal “would encourage plaintiff’s lawyers to propose hyperbolic or unreasonable meanings which may be understood by a small proportion of the audience. ... [S]uch meanings would actually give a plaintiff a cause of action where none existed previously.”⁸³ It added that there would be disagreement over whether, in a given case, “there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim.”⁸⁴ Elsewhere in its response, the MLA suggested that this uncertainty would lead to self-censorship.⁸⁵ It imagined that the proposal “would have an enormous chilling effect on freedom of expression.”⁸⁶

81. Under a scheme such as that in sections 1 and 2 of the *Defamation Act 2013*, this may itself preclude a finding that the publication was defamatory. See *Defamation Act 2013, supra* note 2, ss 1-2.

82. Scott, Summary of Consultation Responses, *supra* note 72 at 127.

83. *Ibid.*

84. *Ibid.*

85. *Ibid* at 120.

86. *Ibid* at 123.

The ‘fifty shades of grey’ that the MLA response supposes can be found in the interpretation of any statement that exists only in the minds of lawyers schooled in current defamation practice in which context obscurantist hairsplitting can be worthwhile.⁸⁷ The ordinarily reasonable audiences for publications are not so picky. Indeed, elsewhere in its response, the MLA itself noted that the determination of meaning is “usually a binary exercise.”⁸⁸ It is salutary that the common law rule on strengths of meaning exemplified in the *Chase*-levels involve only three options: the direct allegation of fact, the assertion of reasonable suspicion, and the suggestion of a need for an investigation.⁸⁹ Of the three options, only the first two are generally deployed. Allegations usually mean only one thing or another, or possibly a third. It is also salutary that the MLA response did not illustrate its concerns in this respect.

Importantly, under the combined proposal, a publisher would need only to respond to meanings communicated in a notice of complaint from a prospective plaintiff. The meanings contended for by the plaintiff would be definitely set out. The bar to a claim on any meaning could be achieved by way of the publication of a correction or retraction on that meaning.

Should a plaintiff set out a hyperbolic or unreasonable meaning, one option would be for the publisher to obviate any potential liability by retracting or correcting that meaning, no doubt with an appropriate rhetorical flourish attached. Should the publisher choose instead simply to ignore any such meaning, liability would still almost certainly not ensue. An unreasonable or hyperbolic meaning is by definition not a meaning that would have been taken by significant proportions of a publication’s audience. As is currently the case, if a plaintiff pursued a claim on such a meaning, it would likely be struck out by a judge as not being capable. Alternatively, as courts—even without statutory intervention such as that reflected in section 1 of the *Defamation Act 2013*—require plaintiffs to show (at least a tendency to cause) serious or significant harm, the plaintiff would have to show that the obtuse meaning nonetheless caused serious damage.⁹⁰

87. See Kenyon, *Defamation*, *supra* note 32. As well as evidencing lawyers’ tendency deliberately to complicate the issue of meaning to their client’s advantage, Kenyon’s research has shown that under the current common law the meanings pleaded by defendants are often left deliberately verbose and general, not because the lawyers wish to establish those meanings *per se*, but rather because the general meaning provides a wider gateway to evidence (*ibid* at 120).

88. Scott, Summary of Consultation Responses, *supra* note 72 at 120.

89. Parkes & Mullis, *supra* note 22 at paras 3.20-3.23.

90. See *Defamation Act 2013*, *supra* note 2, s 1.

The MLA response also suggested that if the combined proposal was introduced, there would often be substantial disagreement over “whether there is a realistic distinction in the sting of different meanings sufficient to give a plaintiff a claim.”⁹¹ This suggestion seems strained. If there was marginal room in a given case to distinguish between a meaning proposed by a plaintiff and a meaning that the publisher wished to sustain, then this should be readily appreciable by the publisher (as it would be by anyone else). In retracting or correcting the former meaning, the publisher would be at liberty, first, to reassert the latter meaning, and secondly, to emphasize the plaintiff’s perceived semantic pedantry. It is difficult to imagine that any plaintiff would wish to highlight an allegation that could be sustained against themselves by complaining of some similar but marginally different meaning. Nor could it be expected that a judge would give anything other than short shrift to a plaintiff who sought to sustain a legal claim on the basis of a meaning that was only marginally different to one that had been corrected or retracted by the publisher. Again, serious harm from the marginally different meaning would have to be demonstrated to the satisfaction of the court.

D. JURISPRUDENTIAL CONCERNS: PRECLUSION OF ACCESS TO JUSTICE

One potential problem with any regime that involves the barring of claims is that, naturally, it can limit access to justice. A concern of this type was identified during the latter stages in the Parliamentary consideration of what became the *Defamation Act 2013*. Campaigners had proposed a defence that would operate to bar proceedings in respect of statements made in good faith on matters of public interest insofar as a prompt clarification or correction had been made with adequate prominence. The UK Parliament’s Joint Committee on Human Rights rejected this approach.⁹² It emphasized that a correction or retraction may sometimes not be sufficient to rectify the harm suffered by the plaintiff. Hence, with its bar on access to damages, the proposed defence would risk breaching the ECHR’s article 8 right to reputation.⁹³ The unremedied harm envisaged by the Joint Committee was particular harm caused in the interim between the times when publication and correction occurred. It is not an unreasonable assumption that any general harm to reputation might be in large part addressed through the swift publication of a correction or retraction. Ultimately, therefore, this

91. Scott, Summary of Consultation Responses, *supra* note 72 at 127.

92. *Legislative Scrutiny*, *supra* note 81 at 29-34.

93. See generally Council of Europe, European Convention on Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, Rome, 4.XI.1950 (1950) at (entered into force 3 September 1953).

fear of susceptibility to challenge under rights charters suggests no more than that a prompt and prominent correction or retraction should not create a bar to proceedings where the plaintiff intends to prove special damages.

E. PRACTICAL RESERVATIONS: UNCERTAINTY OVER PROMPTNESS AND PROMINENCE

Alongside conceptual issues, some practical matters would also need to be considered before any introduction of the proposed reform. A perennial complaint about the use of discursive remedies is that they can “add insult to injury” (especially if the publisher is left to determine what is said, and how it will be presented).⁹⁴ There is clearly room for debate on how the concepts of promptness and prominence should be understood. The MLA envisaged “extensive disputes and litigation about whether a publication has been sufficiently prompt and prominent.”⁹⁵ These would be matters ultimately to be decided by a judge who would be required to take all the circumstances of the case into account in making their assessment. The exercise of this discretion could be tightly controlled, however, by way of norm-setting, statutory guidance from the legislator.

Where European jurisdictions use discursive remedies, it is normal for them to be available very soon after the original publication. Hence, it can be suggested that a correction or retraction should be made within seven days of the receipt of a complaint regarding the original publication insofar as the complaint set out the complained of meanings in an intelligible fashion.⁹⁶ The MLA response to the consultation asserted that this thinking “demonstrates a lack of appreciation for the inevitable complexity of libel disputes and the time which it often takes to properly and thoroughly investigate complaints.”⁹⁷ It added that “even large and well-resourced media organizations may require a significant period of time to consider properly and respond to complaints.”⁹⁸ The upshot, it was supposed, would be that publishers would be obliged “significantly [to] increase their

94. A complaint of this nature was made, for example, by the parents of the abducted child Madeleine McCann regarding the handling of their dispute with the *Sunday Times*. See Gerry McCann, “Leveson has changed nothing—the media still put ‘stories’ before the truth,” *The Guardian* (2 October 2014), online: <www.theguardian.com/commentisfree/2014/oct/02/leveson-gerry-mccann-media-stories-before-truth> [perma.cc/MZD9-S22M].

95. Scott, Summary of Consultation Responses, *supra* note 72 at 127.

96. How the prospective plaintiff and the defendant-publisher should interact, and what was required of each party could easily be prescribed in a pre-action protocol for defamation.

97. Scott, Summary of Consultation Responses, *supra* note 72 at 128.

98. *Ibid.*

reliance on lawyers given the draconian consequences which could follow from failing to apologise promptly.”⁹⁹

On the contrary, this contention illustrated either a preference for hyperbole and obfuscation or the failure of the authors of the MLA response to understand the nature of the proposed scheme. In the case of a complaint from the subject of a publication, there would be no need for a publisher or its lawyers to investigate the complaint. All that would be required would be that the publisher reread the statement complained of in its context, and then determine, first, whether the publication was capable of bearing the meaning attributed to it, and second, whether it had been intended to convey that meaning. The first exercise would take no more than moments. The second may involve an interchange with a journalist or author, and an editor. If it was considered that the meaning was capable but unintended, then a correction or retraction would absolve the publisher of potential liability. It is difficult to see what complexity could require more than a relatively cursory assessment and engagement with colleagues. If the meaning was capable and intended, it would then be for the publisher to determine how to proceed. At that stage, the complaint would move beyond the proposed scheme and there would need to be an investigation and perhaps the preparation a defence. Notably, however, this exercise would already be based upon a single given meaning.

The issue of prominence may be more problematic. It is sometimes argued that corrections or retractions should be published in a manner commensurate with the original publication of erroneous or ambiguous content. It is clearly undesirable and disproportionate, however, that routine publication by a media organization should be swamped—or even significantly affected—by the need to correct or retract prior inaccuracies. Only in the truly exceptional case could it ever be appropriate to expect a broadcaster to dedicate scarce time in a news programme or a newspaper publisher to allocate front-page space to the making of corrections or retractions.

A degree of realism must dictate what it is appropriate to expect in the normal case. Different rules of thumb might be established by statute regarding different media, subject to the overall discretion of the court. In cases where the publisher enjoyed limited capacity to provide an adequate correction or retraction directly to the recipients of the original publication on account of the absence of any continuing engagement with the audience, such as where the defamatory statement was included in a hard copy book, the publisher might be expected to make relatively more expansive use of web pages and social media.

99. *Ibid.*

Indeed, in the general case webpages and online social media could be used to provide a low cost, but pervasive means of ensuring that persons who might have received the original publication might subsequently also receive the clarification. They would also allow a plaintiff to point to the clarification in future to rebut repeated erroneous claims in much the same way as substantial money damages and declarations in open court are perceived to do at present.

More often, it should be immediately possible for a publisher to make a correction or retraction in an equivalent form to that in which the original defamation appeared. As a starting point, a correction or retraction in a newspaper or periodical could be made either on the front page or a well-signposted editorial column; a correction in an online platform could be placed on a website's homepage or prominently-linked from there. In any circumstance where there was concern over the capacity of a publisher to give sufficient prominence to a correction or retraction, provision might be made for a defendant to make a statement in open court in accordance with the fundamental principle that justice should be done. Ultimately, however, a publisher who was found by a judge to have published the retraction or correction without sufficient prominence would face liability before the court as insufficiently corrected errors on all capable meanings would be actionable. Hence, the incentive would always be to afford an objectively reasonable degree of prominence.

F. PRACTICAL RESERVATIONS: OVER-BURDENING PUBLISHERS

A further practical matter prompted the MLA to deride the scheme in the Northern Irish consultation as “highly impractical.”¹⁰⁰ It forewarned that “[t]he proposed scheme ... would lead to newspapers and news bulletins being filled with articles and packages correcting or apologising for meanings which were not intended.”¹⁰¹ Indeed, the MLA considered that the combined proposal would entail “draconian consequences,” and that these consequences would severely and improperly impact on editorial and journalistic functions and would chill freedom of expression.¹⁰²

In some measure, this concern is addressed through the imposition of only realistic expectations of the prominence to be afforded to corrections and retractions. There is also the question of the burden imposed on publishers who are asked very often to respond to requests for corrections or retractions. To some extent, the proposed reforms would occasion a move away from regulation of

100. *Ibid* at 127.

101. *Ibid*.

102. *Ibid* at 128.

publishers by way of a small number of ‘nuclear’ defamation actions towards a system of mundane self-correction. The complaint can be read, therefore, as a preference for the winner-takes-all courtroom drama to the prospect of ‘death by a thousand cuts.’ That is understandable. It not clear, however, why public policy should take such machination into account, nor that it should seek to privilege publishers who prove themselves less than assiduous in avoiding the potential for harm to be caused through under-edited publication.

G. PRACTICAL RESERVATIONS: DIFFICULTY IN THE ASSESSMENT OF DAMAGES

A final criticism of the proposed reforms is that it would create difficulty in the determination of the level of damages in cases where alternative meanings were discernible, but only one meaning was litigated. Evidence would be required to determine the proportion of an audience that had understood the statement complained of in the various capable ways, and therefore to assess the corresponding quantum of damages. These are valid points; such issues would indeed arise in some cases. This complaint does comprise, however, a transparent instance of the tail wagging the dog. Such cases would seldom arise. In general, it might be expected that publishers would defend only mainstream, clear, obvious, and intended meanings. Should such a case arise, it would not be beyond the wit of a court to ascribe relative likelihoods to the range of possible interpretations that might be drawn from a given publication, nor to attribute quantum of harm to the different meanings recognized. Moreover, the law already has developed rules governing such situations, and judges can be expected to manage such tail-end argumentation sensibly.

III. CONCLUDING REFLECTIONS

This article opens with a line from Shakespeare. It might be summarized by paraphrasing another: “[F]irst ... let’s kill all the [libel] lawyers.”¹⁰³ Or rather, in this more accommodating time, let us act so as to reduce unnecessary complexity and ultimately to obviate the need for a specialized and expensive defamation bar. If the semantic dimension of defamation disputes can be excised, then the task of the court becomes merely the much more familiar function of distinguishing truth from falsity. That is a task undertaken daily in every

103. William Shakespeare, *Henry VI*, II.IV.ii.73. In the play, contrary to the intention of the character into whose mouth it was placed, the line was used by the playwright in fact to affirm and laud the contribution to justice in society made by lawyers and judges.

minor court and tribunal across the land in determining other public, civil, and criminal law disputes. The simplification and narrowing of the legal dispute that the combined proposal would achieve, perhaps if coupled with an intelligible revision of the law of fair comment, would mean that defamation disputes too could sensibly be shifted down to subordinate courts.¹⁰⁴

The MLA response to the Northern Irish consultation offered a smorgasbord of reasons why any legislator should not proceed with the combined proposal. Some of the arguments presented by the MLA focused attention on matters of crucial importance. The breadth of the complaints offered and the mutual incompatibility between some of them suggested, however, that its authors had not fully appreciated the nature of the scheme proposed or that the response was strategic in character, or both. In some respects, the arguments set out were strained. In other respects, they strained credulity.

It can be surmised that the real concern underpinning the MLA response was twofold. The first consideration was essentially local in character: That any concession in terms of the making of corrections or retractions to satisfy the requirements of Northern Irish law may weaken a publisher's litigation strategy in the much larger English jurisdiction, given that the same publication could easily generate litigation in both places. This is a natural response, and it is unfortunate that a version of the proposal was not fully considered in the reform debate in England.

The second key concern may have been that, as noted in Part II(E), above, the proposed reforms would occasion a move away from regulation of publishers by way of a small number of nuclear defamation actions towards a system of mundane self-correction. It too is understandable. Media publishers quite naturally recoil from the prospect of washing their dirty linen in public. The proposal discussed in this article would precipitate a profound cultural shift in the post-publication practices of recurrent publishers. That shift would place a distinct emphasis on the role of the media in providing the first draft of history. It would require a broader cultural appreciation, however, that they can offer *only* the first draft. That they can be expected, must be expected, to deliver only partial, fallible, preliminary versions of the truth.

104. See Jason Bosland, Andrew T Kenyon & Sophie Walker, "Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion" (2015) 74 Cambridge LJ 234; Mullis & Scott, *supra* note 6 at 96-98.