

Suffolk HM Courts of Justice Service
St Edmundsbury Cathedral
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Address given by
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FREEDOM OF SPEECH

1. Anyone who has enjoyed the High Sheriff's hospitality in his shrieval year will have savoured his and Nella's appreciation of the pleasures of free speech. But as this is a legal talk, and the law exists to cordon off the unacceptable, I invite you to a short walk on the dark side.
2. Life's experience suggests that the rhyme
Sticks and stones may break my bones
But words will never hurt me
is both poor playground strategy and spectacularly untrue. Words can destroy careers, businesses and personal lives. That is the divine view too - the ninth commandment requires us not to speak ill of our neighbours and there is a like passage in the Koran.
3. If free expression were an absolute right, other rights would wither on the vine including those relating to reputation, confidential information, personal privacy and a fair trial. But how to set the boundaries?
4. To illustrate the delicacy of the exercise, consider the employment reference. When I joined the Bar, the law was well settled - in the interests of plain speaking referees could not be sued provided their reference was honest. In 1994 the House of Lords moved the goal-posts. The referee had to take reasonable care. Which solution better fits the public good? Do you mention an unproven suspicion that an employee may steal with careful qualifications or not at all? Is it reasonable to raise it when the suspicion has not been put to the employee? The care test also catches the negligent complimentary reference, the kind that starts: *Dick Turpin has been a wonderful gardener. . .*
5. There is a fancy phrase for this kind of change - incremental development, but it can be more dramatic.
6. In 1991 Gordon Kaye, the auberge keeper in the television series *Allo, Allo* suffered a grave misfortune. A scaffolding pole detached in a gale and passed through his car windscreen and into his forehead. While in his hospital bed recovering from brain surgery, a journalist and photographer from the

Sunday Sport, masquerading as doctors, obtained what they trumpeted as the first exclusive interview with - and photographs of - a comatose Mr Kaye. The effect of flash photography can only be guessed at. The journalists were trespassers, but Lord Bingham - an exceptional judge in anyone's book said: *'This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.'*

7. Whatever your views on the EU, the European Convention on Human Rights, drafted by an Englishman in 1953, became part of domestic law in 1998 seven years after the Kaye decision and filled the void. Article 8 gave to every citizen an enforceable right *'to respect for his private and family life, his home and his correspondence.'* Although that had to be balanced against the right to free expression, the law required some contribution to a debate of public interest for the latter to prevail.
8. An early scalp for the right to privacy was the kiss-and-tell story, the staple fare of many an English Sunday breakfaster including Mr Jones in Animal Farm. The Courts rejected the tabloid argument that footballers were role models. The nation may look to the Premier League's midfield dynamos for footballing artistry but hardly as beacons of moral behaviour.
9. Privacy injunctions became the dish of the day with judgments given in private and the parties anonymised. Case names read like alphabet soup - PQR v CDE and EFL v PGH. Discomfort grew. Was the new privacy right itself becoming too private? What about open justice? The Master of the Rolls, the country's Senior Civil Judge, intervened - there could be anonymisation or a judgment in private, but not both.
10. Balancing the two rights was often testing. When the Daily Mirror published long lens photographs of Naomi Campbell outside her chosen Narcotics Anonymous hostel with details of her treatment, she sued. Having claimed to have no drugs problem, she accepted that the newspaper could report her treatment at NA to correct the record, but not the details and not the photographs. The Judge found for her, the Court of Appeal unanimously disagreed with the Judge and the House of Lords reversed the Court of Appeal by 3 to 2. She won the match but lost on goals scored.
11. The new wrong bared its teeth when the hacking of voicemail messages by sections of the tabloid press was finally exposed. A celebrity would arrive at a discreet venue with friends to find a posse of paparazzi. Each suspected the others of betrayal. Friendships sundered, and long serving employees were dismissed for leaking the venue to the press. Compensation and costs alone

ran into many tens of millions at News International. Now it's the turn of the Mirror Group.

12. Hacking was not the only creature of new technology to engage the law. Internet trolling and social media became the bully's new forum of choice. Such activities have caused huge damage to the young and vulnerable including several suicides.
13. More by luck than design the Protection from Harassment Act 1997 created a crime of harassment and a civil remedy for repeated intimidatory conduct. It fitted the bill, but how aware are the public of the offence? Prosecutions cannot deter if they're hidden from view.
14. More than 200 local newspapers have closed since 2005 and the number of journalists including Court reporters have halved over the same period. More and more court proceedings go unseen. That is bad for democracy and bad for the administration of justice to quote a former Lord Chief Justice. The new giants, Google and Facebook, show little interest in taking up the slack.
15. Another vexed question: when is an allegation serious enough to be considered defamatory? The Court of Appeal have not always shown a due sense of proportion. Consider this 1997 review by Julie Burchill of a new Frankenstein film:

It's a very new look for the Creature – no bolts in the neck or flat-top hairdo – and I think it works; it's a lot like Stephen Berkoff, only marginally better-looking.

Berkoff sued and the Court of Appeal, by 2-1, held that the charge of ugliness was arguably defamatory. The following year the Court rediscovered its sense of humour, rejecting a claim brought by the opera singer, Jessye Norman, on this passage in the magazine, Classic CD:

This is the woman who got trapped in swing doors on her way to a concert, and when advised to release herself by turning sideways replied: "Honey, I ain't got no sideways."

16. In 2013 Parliament introduced a serious harm test for libel actions: so, watch this space.
17. To a more serious topic – what protection does English law afford defamatory coverage of public interest issues? There has long been a generous defence for opinions, but until the turn of this century allegations of fact had to be proved to be true.

18. Not so in the United States. The American Supreme Court's landmark decision in Sullivan v New York Times in 1964 gave constitutional protection to all criticism of public officials unless dishonestly made. That protection allowed the New York Times to expose the Watergate scandal in reliance on a confidential source known as Deep Throat - revealed 33 years later to be the Deputy Director of the FBI. Had Nixon been an English Prime Minister he could have sued and would probably have won. The newspaper had no first-hand witnesses to call.
19. The English courts came up with a compromise in 1999 as recently defined by statute: you have a defence on a subject of public interest if you reasonably believe publication to be in the public interest - at heart a care test rather than an honesty test, which brings us back where we started with employment references. In an era of false news, I suggest a care test is preferable to Sullivan's more generous honesty test.
20. I end with this thought. In freedom of speech if you look after the pennies, the pounds do not alas look after themselves. The area abounds with warnings from history. Goebbels stated at the Nazi's first press conference that the works of Greta Garbo were acceptable, but Thomas Mann must be consigned to oblivion. Early in his career President Idi Amin said there was always freedom of speech, but he could not guarantee freedom after speech. The first was ignored in an age of appeasement and the latter dismissed as merely funny. We all know what followed.
21. Much that is done in the name of freedom of speech is abusive, but lose it, and all else may quickly follow.

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