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Group Defamation in England

David R. Fryer*

THIS ARTICLE WILL ATTEMPT to sketch briefly the extent of the remedies in tort and the restraints in criminal law which can be invoked in English law when defamatory matter is written or spoken of a group of persons associated either voluntarily or involuntarily on the basis of race, religion, vocation, political views or in any other way.

Civil Liability

So far as liability in tort is concerned, the point usually raised is whether an individual member of the group can recover in an action of libel in respect of the publication of allegedly defamatory matter concerning the group. The law on this point was exhaustively discussed by the Court of Appeal and the House of Lords in the leading case of *Knupffer v. London Express Newspaper, Limited*¹ and must now be regarded as settled. The principle to be applied was clearly stated by Lord Russell of Killowen:

The crucial question in these cases in which an individual plaintiff sues in respect of defamation of a class or group of individuals is whether on their true construction the defamatory words were published of and concerning the individual plaintiff. Unless this can be answered in the affirmative he has no cause of action.²

Knupffer was the head of the British branch of a movement called Mlade Russ or Young Russia. The party had a total membership of about two thousand, mainly in continental Europe and the United States. The British branch of the movement comprised only twenty-four members. The respondents had published a newspaper article with the object of exposing and condemning persons and organisations in countries at war with Germany who were supposed to favour the enemy. The article attacked the Young Russia movement, alleging that it was a Fascist organisation and an instrument of Hitler, which would be used to overthrow the Soviet regime in Russia by subversive means and to

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¹ (1943) K.B. 80; (1944) A.C. 116.

² (1944) A.C. 116 at p. 123.

establish a Fascist state in that country. The article described the movement as "a minute body . . . established in France and the United States." The appellant was not referred to by name, nor did the article contain any reference to the British branch of the movement, though it was alleged on behalf of the appellant that the reference to a minute body would be an apt description of the British branch.

The appellant argued that the article falsely defamed those who were responsible for the policy of the party, and that he was defamed in particular as the representative of the party in Britain and head of the British branch. The court of first instance found in favour of the plaintiff Knupffer, but on appeal this decision was reversed by the Court of Appeal without dissent.³ Knupffer's subsequent appeal to the House of Lords was dismissed by a unanimous decision.⁴

The speeches delivered in the House of Lords set out fully and clearly the kind of test which should be applied in this type of case and the principle enunciated by MacKinnon L.J. in the Court of Appeal can no longer be regarded as applicable. MacKinnon L.J. was apparently of the opinion that there was a general principle which prevented an individual suing in respect of a libel on a class of which he was a member, subject to certain particular exceptions. Thus he stated:⁵

I think that the primary rule of law is that when defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that they are written or spoken of him.

As authority for this proposition he quoted a dictum of Willes J. in *Eastwood v. Holmes*:⁶

Assuming the article to be libellous, it is not a libel on the plaintiff; it only reflects on a class of persons. . . . If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual, which there is not here.

MacKinnon L.J. stated that the principle enunciated by Willes J. had been followed and applied in several Irish and Scot-

³ (1943) K.B. 80.

⁴ (1944) A.C. 116.

⁵ (1943) K.B. 80 at p. 83.

⁶ I. F. & F. 349.

tish cases, including *O'Brien v. Eason*,⁷ where Holmes and Cherry L.J.J. ruled that where comments of an allegedly defamatory character were made of an association called the Ancient Order of Hibernians an individual member of that order who was not named or in any way referred to could not maintain an action for libel. He went on to specify the exceptions to this general principle in the following words:⁸

There are two further rules of law which may be said to constitute exceptions to the primary rule that where there is defamation of a class a member of that class cannot bring an action. The first is that when the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue. The reason for that is that every member of the class, being individually aspersed, can sue, and, therefore, any one of them can.

MacKinnon L.J. suggested that a body of trustees, directors or managers might fall into this category and cited as authority *Browne v. Thomson*,⁹ to which further reference will be made.

The second exception to the general rule is that, although the words purport to refer to a class, yet in the circumstances of the particular case they in fact refer to one or more individual persons.

In this connection MacKinnon L.J. cited the Irish case of *Le Fanu v. Malcolmson*.¹⁰

Lord Justice MacKinnon's view was not however shared by Goddard L.J., the other member of the Court of Appeal. He stated that the question before the court was

. . . whether the words of which complaint is made are capable of supporting an innuendo that they refer to the plaintiff. . . .¹¹ In my opinion, the real question is whether the words are capable of supporting the innuendo that they were written of and concerning the plaintiff.¹²

The House of Lords were at pains to point out that only one rule of law was involved and that special principles did not apply

⁷ 47 Ir.L.T. 266. Also followed in *Wardlaw v. Drysdale* (1898), 35 Sc.L.R. 693; and in *Campbell v. Wilson* (1934), Sc.L.T. 249.

⁸ (1943) K.B. 80 at p. 84.

⁹ (1912) S.C. 359.

¹⁰ (1848) 1 H.L.C. 637.

¹¹ (1943) K.B. 80 at p. 86.

¹² (1943) K.B. 80 at p. 88.

merely because the plaintiff happened to be a member of a class. In the words of Viscount Simon L.C.:¹³

... it is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff." If the words are not so published, the plaintiff is not defamed and cannot have any right to ask that the defendant should be held responsible to him in respect of them.

Lord Atkin went further in stating:¹⁴

I venture to think that it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him, and it is irrelevant that the two or more persons are called by some generic or class name.

Referring to the dictum of Willes J. in *Eastwood v. Holmes*, Lord Atkin said:¹⁵

His words: "it only reflects on a class of persons" are irrelevant unless they mean "it does not reflect on the plaintiff."

The principle which must be applied in this type of case so far as English law is concerned is concisely expressed in Lord Atkin's warning:¹⁶

It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class.

Lord Russell of Killowen and Lord Porter were equally of the opinion that the sole test was whether the words were published of and concerning the plaintiff.¹⁷ In attempting to identify the plaintiff as the person defamed two questions are involved. In the words of Viscount Simon:¹⁸

The first question is a question of law—can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of

¹³ (1944) A.C. 116 at pp. 118, 119.

¹⁴ (1944) A.C. 116 at pp. 121, 122.

¹⁵ (1944) A.C. 116 at p. 122.

¹⁶ (1944) A.C. 116 at p. 122.

¹⁷ (1944) A.C. 116 at pp. 123, 124.

¹⁸ (1944) A.C. 116 at p. 121.

fact—does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?

In *Knupffer's Case* the House of Lords decided that the question of law as expressed above was the question that had to be answered in all cases, irrespective of the plaintiff's membership in a group, and that in the circumstances of that case the article could not be regarded as capable of referring to the appellant.

It is therefore settled law that a plaintiff who alleges that he has been defamed as a member of a class is in law in exactly the same position as any other plaintiff who is not specifically referred to in the publication complained of. In both cases proof of reference to the plaintiff is required. The practical question remains—what are the chances of the individual being able to show that the publication is of and concerning him, when he alleges that he has been defamed as a member of a class? As Lord Atkin stated in *Knupffer's Case*:¹⁹

The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be facetious exaggeration.

Though the principle relied on by Willes J. in *Eastwood v. Holmes* can no longer be regarded as good law, no doubt the concept of a general rule excluding recovery, subject to certain limited exceptions, reflected the practical difficulties which plaintiffs encountered in such cases. Nevertheless, whether the plaintiff is entitled to succeed or not must depend on the circumstances of the particular case. For an indication of the attitude of the courts recourse must be had to Scottish and Irish decisions, since unfortunately there is little English authority on this point other than *Knupffer's Case*.

The cases indicate that there are two sets of circumstances in which a plaintiff, as a member of a group, may succeed in proving that the allegedly defamatory words were published of and concerning him. These circumstances are in substance identical to those which were formerly characterized as special legal exceptions by MacKinnon L.J. in his judgment in *Knupffer's Case*. The

¹⁹ (1944) A.C. 116 at p. 122.

fact that, since *Knupffer's Case*, they have ceased to be legal exceptions means that they are no longer exhaustive, and if the plaintiff can provide proof of reference to himself in any other circumstances he should, in principle, be entitled to succeed. Moreover, once it is shown that the publication is of and concerning the plaintiff it is immaterial that the defendant did not intend to refer to the plaintiff or did not even know of his existence, a point settled by the House of Lords in *E. Hulton & Co. v. Jones*.²⁰

Turning to the first of the circumstances mentioned above, where language is used in reference to a limited class it may be reasonably understood to refer to every member of the class, in which case every member will have a cause of action. In the Scottish case of *Browne v. Thomson*²¹ it was alleged in a newspaper article that in Queenstown "Instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged." It was held that the seven persons who exercised sole religious authority in Queenstown in the name and on behalf of the Roman Catholic Church were entitled to sue for libel as being individually defamed. Nevertheless, this decision was described by Lord Mackay in *Campbell v. Wilson*²² as having gone "as far as the law may safely go."

Similar English authority is provided by the old case of *Foxcroft v. Lacey*.²³ A suit was pending against seventeen defendants including Foxcroft, and Lacey stated that: "These defendants helped to murder H. F." It was held that any of these seventeen persons could maintain an action as if they had been referred to by name. In the Court of Appeal in *Knupffer's Case*, Goddard L.J. stated:²⁴

The class may be so small or easily identifiable, as in the Scottish case of *Browne v. Thomson*, that an attack on the class is an attack on each member. That must depend on the circumstances of any particular case.

²⁰ (1909) 2 K.B. 444; affirmed (1910) A.C. 20. See also *Cassidy v. Daily Mirror* (1929), 2 K.B. 331 and *Youssoupoff v. M.G.M. Pictures* (1934), 50 T.L.R. 581. This principle was extended in *Newstead v. London Express* (1941), K.B. 377, to cover cases where defamatory statements true in respect of A are understood to refer to B, in respect of whom they are false. The Defamation Act 1952 Sect. 4 now provides a limited defence in cases of unintentional defamation.

²¹ (1912) S.C. 359.

²² (1934) S.L.T. 249.

²³ (1613) Hobart 89. See also *R. v. Gathercole* (1838), 2 Lewin C.C. 237.

²⁴ (1943) K.B. 80 at p. 90.

Goddard L.J. did not accept that special legal rules should apply where the plaintiff is a member of a class, but he did admit that in deciding whether the publication is of or concerning the plaintiff,²⁵

To some extent, no doubt, the question of the numbers or size of the body criticized is of great importance . . . (citing *Browne v. Thompson*). . . . To accuse a jury or a body of trustees of corruption would necessarily impute corruption to all, but to say that a political party is corrupt cannot mean that every member of that party is accused of corruption.²⁶

Although the examples given by Goddard L.J. may suggest an arbitrary distinction, depriving members of larger groups of rights of action which are available to members of smaller groups, there is nothing anomalous in such a distinction if it is borne in mind that the basis of an action of defamation is that defamatory matter should be published of and concerning the plaintiff. It is submitted that though the number of members in the group may have some bearing on this issue, the courts have attached more significance to the fact that the group has a determinate membership. This seems to have been the basis of the decisions in *Foxcroft v. Lacey* and *Browne v. Thomson*. As Lord Russell of Killowen said in *Knupffer's Case*:²⁷

Or the class or group can be identified, and is such that each member thereof is necessarily defamed. *Browne v. Thomson* is an instance of this. A body of trustees or directors would furnish another instance in which defamation of the body involves defamation of each member thereof. (In the same case, Lord Atkin stated)²⁸ There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant.

Viscount Simon observed:²⁹

There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action.

²⁵ (1943) K.B. 80 at p. 88.

²⁶ (1943) K.B. 80 at p. 88.

²⁷ (1944) A.C. 116 at p. 123.

²⁸ (1944) A.C. 116 at p. 122.

²⁹ (1944) A.C. 116 at p. 119.

These dicta emphasize the determinate nature of the class rather than the number of members, and it would appear from the cases that when the class ceases to be a determinate one in which every member is identifiable, defamatory matter published in respect of the class will cease, as a practical matter, to be regarded as capable of referring to an individual member. Two cases illustrate the point.

In the Irish case of *O'Brien v. Eason*,³⁰ the defamatory comments complained of related to the Ancient Order of Hibernians, which had a fluctuating membership, and it was held that individual members of the Order, who were not referred to by name, could not bring an action. On the other hand, in the Scottish case of *Macphail v. Macleod*³¹ a newspaper statement alleging that the members of a presbytery were unfit to exercise disciplinary authority over a member of the clergy on account of their own excesses was held to entitle each member of the presbytery to maintain an action. In the Court of Appeal in *Knupf-fer's Case* Goddard L.J. said:³²

Were it said that the directors of the X railway company sweated their servants, perhaps all the directors could sue to vindicate themselves as employers, but were it said that the X railway company were sweaters it is absurd to suppose that every stockholder could sue.

Lord Porter gave some indication of the importance to be attached to the determinate nature of the class in stating: ³³

I can imagine it being said that each member of a body, however large, was defamed where the libel consisted in the assertion that no one of the members of a community was elected as a member unless he had committed a murder.

Nevertheless, where allegedly defamatory matter is published of a class, the question whether the matter is capable of referring to the plaintiff is not conclusively determined in practice by the determinate nature of the class. To quote Lord Porter's view:³⁴

³⁰ 47 Ir.L.T. 266. See also *Wardlaw v. Drysdale* (1898), 35 Sc. L. R. 693. Both these decisions were based on the principle of *Eastwood v. Holmes*, though in *Campbell v. Ritchie* (1907), S.C. 1097 (Ct. of Sess.), Lord Ardwall, in accepting the principle followed in *Wardlaw v. Drysdale*, considered that on the facts of that case the plaintiff was sufficiently identified.

³¹ (1895) 3 S.L.T. 91.

³² (1943) K.B. 80 at p. 88.

³³ (1944) A.C. 116 at p. 124.

³⁴ (1944) A.C. 116 at p. 124.

In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration, but none of them is conclusive. Each case must be considered according to its own circumstances.

These words may appear to offer little guidance to the prospective plaintiff, but it is difficult to see what further indication the courts could give of their attitude in particular cases once it is accepted that the plaintiff who sues as a member of a group is in exactly the same position in law as any other plaintiff who is not referred to by name in the allegedly defamatory matter. The size and character of the group is only relevant in establishing that the publication is of and concerning the plaintiff, and groups being infinitely various, everything must depend on the circumstances of the particular case.

The second type of case in which the courts have held that an attack on a class may entitle an individual member of the class to sue arises where defamatory matter is published which purports to be an attack on a class but which is understood in the circumstances of the particular case to refer to a particular individual. This type of case is said to differ from the first type discussed above in that, in the first type, the defamatory matter is directed against the class itself and the individual claims that he has been defamed as a member of that determinate class. In the second type of case, the attack is in truth directed at the individual and the reference to a class is merely a cloak for the attack on the individual. The legal principle to be applied remains constant in both types of case, though it is clear that there is even less room for the application of special legal rules relating to groups in this second type of case.

An example can be found in the case of *Le Fanu v. Malcolmson*,³⁵ where a letter was published in a newspaper containing defamatory matter attacking the owners of factories in Ireland—clearly an aspersion on a class of persons—but in another part of the paper there was a passage which narrowed down the locality to Waterford, where the plaintiffs were the only owners of factories. It was held that the plaintiffs were entitled to succeed since, in the words of Lord Campbell:³⁶

... whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended

³⁵ (1848) 1 H.L.C. 637.

³⁶ (1848) 1 H. L. C. 637 at p. 668.

description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.

Lord Campbell took the opportunity to criticise the view that special rules should apply in the case of a class of persons:³⁷

The first objection is that this libel applies to a class of persons and that therefore an individual cannot apply it to himself. I am of opinion that that is contrary to all reason and is not supported by any authority.

From these words it can be seen that the question whether the publication refers to the plaintiff is answered in exactly the same way as it would be in any other case where the plaintiff is not referred to by name and the plaintiff's membership of a class is immaterial.

It would therefore appear that in English law the same principle will be applied whether the plaintiff alleges that he has been defamed by matter which makes no reference to him by name or to any class of which he may be a member, or that defamatory matter purporting to be an attack on a class to which he belongs is merely the cloak for a defamatory attack on himself, or that the publication of a defamatory attack on a class of which he is a member entitles him to sue as being individually defamed as a member of that class.

If the individual members of the group cannot be said to have suffered any injury requiring redress in tort, any claim for redress can only be in respect of the damage caused to the reputation of the group as such. The group as such, however, cannot bring an action since the only entities recognised by the common law as having a right to sue in any action are individuals, corporations and registered trade unions.

It is well settled that a trading corporation can maintain an action for libel—*South Hetton Coal Co. v. North-Eastern News Association*.³⁸ In truth such a corporation, being a creature of law, has no reputation which can be injured by a defamatory attack. The reputation that is injured by such an attack is really

³⁷ (1848) 1 H. L. C. 637 at p. 667.

³⁸ (1894) 1 Q.B. 133. In *D.&L. Caterers Ltd. and Jackson v. D'Ajou* (1945), K.B. 364, it was held that a trading company could sue for slander affecting it by way of its trade.

the reputation of the members or other agents who conduct the business of the corporation, but, by attacking their reputations in this way damage may be caused to the corporation itself in respect of its business and property. In the *South Hetton Case* it was stated, per Kay J.³⁹ that a trading corporation "has a trading character, the defamation of which may ruin it." Thus a trading corporation can recover damages for injury caused to its "trading reputation" if it can be shown that the matter complained of has a tendency to cause actual damage to the corporation in respect of its business.

It has been held that an allegation that the management of a trading corporation is incompetent (*Metropolitan Saloon Omnibus Co. v. Hawkins*)⁴⁰ or that the board of such a company is composed of alien enemies in time of war (*Slazengers Ltd. v. Gibbs & Co.*)⁴¹ entitles the corporation to sue. Similarly in the *South Hetton Case*⁴² it was held that an attack on a coal mining company, alleging that it failed to provide decent sanitary accommodation for its workmen and their families, could tend to injure it in the way of its business.

A group or unincorporated association of persons cannot sue for defamation since they are not legal entities. Nor can the individual members sue in a representative action for an attack on the group itself. As Fletcher Moulton L.J. said in *Markt v. Knight*:⁴³

No representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and, therefore, the possibility of representation ceases.

It is, therefore, not open to the officers or members of an association to bring an action for defamation of the association. Thus, in *Jenkins v. John Bull Ltd.*,⁴⁴ in an action for libel brought by the president, treasurer and secretaries of the Salford Civic League

³⁹ (1894) 1 Q.B. 133 at p. 145.

⁴⁰ (1859) 4 H.&N. 87. Certain dicta by Pollock C.B. at p. 90, and by Lopez L.J. in the *South Hetton Case* (1894) 1 Q.B. 133 at p. 143, suggest that a trading corporation cannot sue for libel in respect of an allegation of corruption. It is submitted that these views are not supported by authority. See *Hill v. Hart Davies* (1882), 21 Ch. D. 798.

⁴¹ (1916) 33 T.L.R. 35. See also *Lyons v. Lipton* (1914), 49 L.J. 542.

⁴² (1894) 1 Q. B. 133. It is not necessary to prove that the corporation has actually suffered damage since this is presumed: *Irish Peoples Assurance Co. v. Dublin City Assurance Co.* (1929), 1 R. 25.

⁴³ (1910) 2 K.B. 1021 at p. 1040.

⁴⁴ *The Times*, April 20th, 1910.

of Help, "on behalf of themselves and all other members of the said League," Phillimore J. struck out those parts of the statement of claim which related to all the other members of the League.

No doubt, if the individual members could prove damages separately in the case of each of them they would rely on the principle of Knupffer's case and allege that they were individually defamed by an attack on the group of which they were members, but they would not have any right to bring an action on behalf of the group to recover damages for injury to the reputation of the group. Even a corporation which can sue in its own name will be unable to recover in an action of libel unless it can establish that it has a reputation in respect of which it has suffered loss. It is on this principle that non-trading corporations cannot in general bring actions for defamation.

Thus in *Manchester (Mayor of) v. Williams*⁴⁵ it was held that the absence of a trading character prevented a municipal corporation from suing for a libel charging it with corruption and bribery in the administration of municipal affairs. The correctness of this decision was doubted in *Willis v. Brooks*,⁴⁶ but it is still binding on a court of first instance. In such a case the only persons who have a cause of action are the individual agents of the corporation who have been defamed.

Nevertheless a non-trading corporation can sue if it can show that the libel tends to its pecuniary damage. Thus in *Bourne v. Marylebone Corporation*⁴⁷ it was held that where a municipal corporation possessed statutory powers to trade, e.g., by supplying electricity, it had a trading reputation in the exercise of those powers. As a statutory legal entity, a registered trade union can sue in its registered name. The transaction of business by such a union in connection with the holding and management of property has been held to create a reputation similar to that of a trading corporation which entitles the union to sue for a libel which tends to affect its financial position, e.g., by reducing its subscription income.⁴⁸

⁴⁵ (1891) 1 Q.B. 94. See also *D.&L. Caterers and Jackson v. D'Ajou* (1945), K.B. 364 at p. 367, where du Parcq L.J. stated "A company cannot sue either for libel or for slander unless it is defamed in the way of its business."

⁴⁶ (1947) 1 All. E.R. 191.

⁴⁷ (1908) W.N. 52.

⁴⁸ *N.U.G.M.W. v. Gilliam* (1946), 1 K.B. 81; *Willis v. Brooks* (1947), 1 All. E.R. 191 (allegation of ballot-rigging).

Though these principles have been discussed primarily in relation to libel, they are equally applicable to actions for slander in respect of verbal utterances. The Report of the Committee on the Law of Defamation, published in 1948, stated that the Committee considered whether to recommend the creation of civil liability for group libel which it understood as meaning the vilification of groups or classes of persons distinguishable by race, colour, creed or vocation, but decided against it.⁴⁹

Criminal Liability

It would be a mistake to conclude that defamatory statement concerning a group or class of persons can be made with impunity so long as the statement does not give rise to a cause of action on the principle of *Knupffer's Case*. The criminal law can impose its own restraints on such statements. Though slander is not a crime,⁵⁰ one must consider first the law of criminal libel properly so called, and secondly the law of sedition, which covers both the uttering of seditious words and seditious libel.

Criminal libel is a common law misdemeanour⁵¹ and proceedings are usually commenced by indictment on a summons, though in rare cases proceedings can be taken by way of a criminal information granted at the instance of the Attorney-General. This latter method is usually resorted to only when the libel relates to the holder of some public or judicial office. Civil and criminal remedies for libel are available concurrently, though as a general rule criminal actions should only be brought where there is some element of public concern in the proceedings, or where the libel is frequently repeated or particularly aggravated, or where for one reason or another a civil action is not available.⁵²

The basis of criminal libel is its tendency to lead to a breach of the peace, and this accounts for some of the differences in the matters to be proved in the civil and criminal actions. Thus it is not necessary to prove publication to a third person in crimi-

⁴⁹ (1948) Cmd. 7536, paras. 30-32. In his article in *Current Legal Problems* (1952) 178, Lloyd states that "English law takes the view that if you only contrive to spread your vilifications sufficiently widely you may do so with impunity."

⁵⁰ *R. v. Penny* (1697), 1 Ld. Rayn. 153.

⁵¹ Libel is not a criminal offence in Scotland: *Richardson v. Wilson* (1879), 7 R. 237.

⁵² *R. v. Wicks* (1936), 52 T.L.R. 253.

nal proceedings for libel⁵³ and indeed an indictment will lie for a defamatory statement about a dead person. Moreover, since criminal proceedings are technically carried on by the Crown, and since the overriding concern is to restrain the publication of defamatory matter which might lead to a breach of the Queen's Peace, an indictment will lie for the defamation of a group or body of persons.⁵⁴

Criminal law therefore affords a protection which is not available under civil law. The group as such has no cause of action in tort; the only right that is available is the right of an individual member of the group to bring an action if he can show proof of reference to himself. The criminal law restrains defamatory libels not only on individuals but also on groups as such.

Archbold suggests that:

Writings reflecting upon bodies of men are indictable as libels only if some individual is directly or by implication libelled.⁵⁵

This would be to apply the principle of *Knupffer's Case* to the criminal law. It seems sufficient, however, that the class defamed be a determinate one. For a member of a group to maintain a civil action for libel in respect of words written of that group, he must show that the words are published of and concerning him. This may be done, as in *Browne v. Thomson*,⁵⁶ by showing that he is a member of an ascertainable group and that words written of the group necessarily refer to him.

Proof of reference to the individual member of the group is not the crucial question in criminal proceedings, and the protection of the criminal law is really afforded to the group as such, the only proviso being that the group should be ascertainable. Criminal proceedings will lie if the tendency of the words is to arouse angry passions in the body or group libelled or in the general public against the body or group libelled, and so lead to a breach of the peace.⁵⁷ In the old case of *R. v. Osborne*⁵⁸ the defendant wrote that "certain Jews lately arrived from Portugal

⁵³ *R. v. Adams* (1888), 22 Q.B.D. 66.

⁵⁴ *R. v. Gathercole* (1828), 2 Lewin C.C. 237.

⁵⁵ *Pleading Evidence and Practice in Criminal Cases*, 35th Ed. 1962, p. 1404 s. 3631.

⁵⁶ (1912) S.C. 359.

⁵⁷ *R. v. Wicks* (1936), 52 T.L.R. 253.

⁵⁸ (1732) 2 Swanst. 503n.

and living near Broad Street" had burnt a Jewish woman and her child because the child had a Christian father. It was proved that several Jews who had recently arrived from Portugal and lived at Broad Street had been violently attacked by a mob, and the court overruled an objection that no criminal information lay because it did not appear who in particular the persons reflected upon were. Similarly, in *R. v. Williams*,⁵⁹ a criminal information was granted in respect of a newspaper libel reflecting on the clergy of a particular diocese and generally upon the clergy of the Church of England, though no individual prosecutor was named.

It would seem from these cases that the interest of the Crown in restraining conduct which might lead to a breach of the peace may afford protection to a group even though the individual members cannot be definitely ascertained. Much depends on the circumstances of the particular case and it is probably safer to say that the publication of defamatory matter concerning a large indeterminate group would remain unrestrained by the law of criminal libel and without any remedy in tort. Nevertheless, since the aim of the Crown is to preserve the peace, the courts may be less ready to regard defamatory matter as being merely vulgar abuse than they would be in civil proceedings, where the claim is based on damages for an injured reputation.

Slander is not a criminal offence, so that defamatory words spoken of a group cannot give rise to criminal proceedings,⁶⁰ unless the slander is of a seditious nature.⁶¹ Both spoken and written words may be criminal if they are of a seditious nature, since the law of sedition includes the offences of uttering seditious words and seditious libel.

The law of sedition could be invoked in suitable cases to restrain and punish the defamation of racial, ethnic, religious, political and perhaps vocational groups even though their membership might be quite indeterminate, though its exact scope at the present time is in need of clarification.⁶² It would, of course, be

⁵⁹ (1822) 1 Dow. & Ry. 197. See also *R. v. Burdett*: 4, B. & Ald 314.

⁶⁰ *R. v. Bear*, 2 Salk 417.

⁶¹ Criminal proceedings will also lie if the words are blasphemous—*Bowman v. Secular Society* (1917), A.C. 406, or obscene—*R. v. Barraclough* (1906), 1 K. B. 201.

⁶² It is no defence to prove that the statements are true, or that they are made for the public benefit.

a mistake to regard it as appropriate in the case of every defamatory attack on such groups. Moreover, many other types of groups or associations which are denied the benefit of either civil or criminal proceedings for libel would be quite inappropriate objects for protection under the law of sedition.

The most generally accepted definition of a seditious intent is to be found in Sir James Stephen's *Digest of Criminal Law*:⁶³

. . . an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, . . . or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

Notwithstanding the law of sedition, it is the right of every citizen to discuss freely, fully and candidly any matter of public concern, and the law will not interfere unless such interference is absolutely necessary for the preservation of society.⁶⁴ Thus, to "point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention."⁶⁵

Honest discussion and criticism on these lines is permissible so long as such discussion is not directed to the incitement of unlawful acts or calculated to excite disaffection.⁶⁶ In times of great political upheaval in the past, particularly in the eighteenth century, prosecutions for sedition were fairly frequent but are now rare.

It is submitted, however, that such a prosecution could be an appropriate weapon for use in the case of certain offensive attacks on groups, since an attack on a group or a class of persons, vilifying them on account of their race or religion, can clearly promote feelings of ill-will and hostility between different classes of subjects. Whether it amounts to sedition will de-

⁶³ 8th Ed. Art. 114.

⁶⁴ R. v. Sullivan, 11 Cox C.C. 44.

⁶⁵ Stephen's *Digest of Criminal Law*, 8th Ed., Art. 95.

⁶⁶ R. v. Burns (1886), 16 Cox 355.

pend on the circumstances of the particular case⁶⁷ and the state of public feeling at the time must be taken into account.⁶⁸

The present limitations of this offence are exemplified by the recent unreported case of *R. v. Caunt*, which was decided in 1947. A newspaper editor had attacked British Jewry in particularly virulent terms, and the jury acquitted the defendant after a direction from Birkett J. that it must be shown that the libel was published with the intention of promoting violence. Even allowing for the rule that a person must be taken to intend the natural consequences of his actions, it would seem that at present only the most extreme attacks, in which the necessary intent is manifest, will result in a conviction.

In recent years there has been considerable agitation for the enactment of measures which would make the incitement of racial hatred a special statutory offence separate from the law of sedition. Though Bills for this purpose have frequently been laid before Parliament, the government has consistently resisted such pressure, maintaining that the existing law is sufficient to cope with such conduct. The pressure for such an Act at the present time is largely due to the disgust felt by most people at the activities of the British Union of Facists. This numerically insignificant movement attracts attention on account of the disorders which frequently occur at its public meetings. It is the practice of the movement at these meetings to make outrageous statements concerning Jews and Negroes. These statements are of so offensive a nature as to provoke persons attending the meeting to prevent their repetition by forcibly bringing the meeting to an end. The government has some justification for its view that a special Act prohibiting the incitement of racial hatred is unnecessary, if it is merely required to deal with the activities of the British Union of Facists and kindred organizations.

Apart from the provisions of the common law relating to unlawful assemblies,⁶⁹ this particular type of conduct can be dealt with by the Public Order Act, which was passed in 1936 primarily to deal with the disturbances caused by Communist and Fascist movements at that time. The effective section for this purpose is Section 5 which provides:

⁶⁷ *R. v. Burns* (1886), 16 Cox 355.

⁶⁸ *R. v. Aldred* (1909), 22 Cox 1.

⁶⁹ *Beatty v. Gillbanks* (1882), 9 Q.B.D. 308.

Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

This section was in fact invoked in 1962 in connection with disturbances arising at one of the meetings of the British Union of Fascists. Colin Jordan, one of the leaders of the movement, made a number of highly offensive and provocative statements to the effect that Hitler had been correct in his attitude to the Jews. The meeting broke up in complete disorder and Jordan was sentenced to two months imprisonment by the magistrates' court. His appeal to Quarter Sessions was upheld on the ground that the language used was not likely to lead reasonable people to commit breaches of the peace by physical assaults. On appeal by case stated to the Divisional Court the appeal was allowed and the case remitted to Quarter Sessions with instructions to convict.⁷⁰

In his judgment, Lord Parker C.J. stated that he could not "imagine any reasonable citizen, certainly one who was a Jew, not being provoked beyond endurance, and not only a Jew but a coloured man."⁷¹ Lord Parker, however, regarded this as immaterial for the purposes of the Public Order Act:

. . . there is no room here for any test as to whether any member of the audience is a reasonable man or an ordinary citizen . . . (the speaker) must take his audience as he finds them, and if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence.⁷²

This case seems to establish a wide liability for offences under the Public Order Act and may lead to an effective restraint in the future on public utterances of the British Union of Fascists, particularly since the government has undertaken to review the penalties for offences under the Act.

Though the Public Order Act may be adequate to deal with the more notorious group attacks which occur at public meetings, it does not apply to the publication of written defamatory statements, or to oral statements which are not made in "a public

⁷⁰ *Jordan v. Burgoyne* (1963), 2 W.L.R. 1045.

⁷¹ *Jordan v. Burgoyne* (1963), 2 W.L.R. 1045 at p. 1047.

⁷² *Jordan v. Burgoyne* (1963), 2 W. L. R. 1045 at pp. 1047, 1048.

place.” The law of sedition is wide enough to cover such statements if they contain an incitement to violence, but it is a clumsy weapon to use as presently defined. It has been suggested⁷³ that the common law offence of sedition should be brought up to date and placed on a statutory footing and should clearly include incitement to religious and racial hatred. It would then be unnecessary to pass a special Act relating to racial incitement. Religious or racial groups would then be protected against oral or written attacks, whether made at meetings or otherwise, since sedition embraces the offences of uttering seditious words and seditious libel.

Even if this statutory recasting of the law of sedition were to take place, instances would still occur of defamatory statements concerning groups in respect of which the individual or the group would have no civil redress; nor would the law of criminal libel, or the law of sedition extended as suggested, provide a restraint. Does this not result inevitably from the fact that the basis of the civil claim is the damage caused to the reputation of the person of whom the defamatory statement is published, and because the prime concern of the criminal law is to prevent conduct which is likely to lead to a breach of the peace? It may seem unfortunate in the particular case that there is no effective method of restraining defamation of a group, but if the reputation of an individual or other legal person is not damaged and the peace is not threatened, is there a case for establishing liability for such statements? It is surely another reminder of the fact that not every cause of complaint gives rise to a cause of action. Some friction in daily life is inevitable; the law must draw the line in deciding when this friction has reached the permitted limit.

⁷³ By R. E. C. Jewell in *Justice of the Peace and Local Government Review*, May 4th, 1963 at p. 269.