

**MCLIBEL:
A CASE STUDY IN ENGLISH DEFAMATION LAW**

MARLENE ARNOLD NICHOLSON*

I. INTRODUCTION.....	2
II. FREEDOM OF SPEECH JURISPRUDENCE UNDER THE EUROPEAN CONVENTION	13
A. THE COMMISSION DECISION IN <i>MCDONALD'S</i>	16
B. <i>HERTEL V. SWITZERLAND</i>	20
C. PRINCIPLES OF ADJUDICATION UNDER ARTICLE 10	24
D. APPLYING ARTICLE 10 TO <i>MCDONALD'S</i>	30
III. DEFAMATION LAW IN ENGLAND AND THE UNITED STATES	31
A. WHEN IS A STATEMENT DEFAMATORY?	31
B. JUSTIFICATION	34
C. FAULT.....	35
D. "OPINION," "FAIR COMMENT" AND "PROVABLE AS FALSE"	36
IV. THE MCDONALD'S OPINION.....	43
A. STARVATION IN THE THIRD WORLD.....	45
B. DESTRUCTION OF RAIN FORESTS.....	58
C. USE OF RECYCLED PAPER MATERIALS	61
D. MCDONALD'S RESPONSIBILITY FOR LITTER.....	69
E. MCDONALD'S FOOD IS UNHEALTHY	71
F. ADVERTISING.....	86
G. WORKING CONDITIONS.....	88
H. CRUELTY TO ANIMALS.....	95
I. SUMMARY OF TRIAL COURT OPINION	101
V. ADDENDUM: THE APPELLATE DECISION	102
A. ENGLISH DEFAMATION LAW	103
B. THE APPLICATION OF ENGLISH LAW.....	108
C. THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS APPLIED TO THE MCDONALD'S APPELLATE COURT OPINION.....	114
D. SUMMARY OF APPELLATE COURT DECISION	125
VI. CONCLUSION.....	127
APPENDIX: MCLIBEL FACTSHEET	134

* Professor of Law, DePaul University; J.D., 1968, B.A., 1961, U.C.L.A. I am appreciative of the research assistance of Michele Lynn Birkmeier, David Lipschultz, Michelle Mills, Yvonne Ocrant and Kevin Vodak. I am also grateful for the research support from Deans Teree Foster and John C. Roberts, and Acting Dean Mark Weber.

On March 31 of 1999, the English Appellate Court decided the defendants' appeal in *McDonald's v. Steel*, the case discussed in this article. The full Appellate Court opinion was released during the summer. The Appellate Court left most of the trial court's judgment in place. However, that court did disagree with the trial court on the application of the law to some of the allegedly defamatory statements. An addendum discussing the ways in which the Appellate Court opinion differed from the trial court opinion and modified the defendants' liability for defamation has been added at the end of this article. The modifications in the Appellate Court opinion did not significantly change either the English law of defamation or the concerns regarding the negative effect of that law on freedom of public discussion in England that are addressed in this article.

I. INTRODUCTION

Helen Steel and Dave Morris joined "London Greenpeace" in 1980. The organization was not connected to international Greenpeace; rather it was an independent activist group that campaigned for social change on a broad range of issues. One of the group's projects was the distribution of a pamphlet that was published in 1986, entitled "What's Wrong with McDonald's."¹ McDonald's hired private detectives to infiltrate the organization, and ultimately threatened to sue the individuals who were distributing the pamphlets.² In order to avoid being sued for libel, three of the five apologized, and in 1990 promised to stop distributing the pamphlets. But Ms. Steel and Mr. Morris, who have been dubbed the "McLibel 2," refused.³ No doubt this obstinacy was not expected, as McDonald's had apparently been successful in the past in stopping criticism and forcing apologies from much more affluent foes, including the BBC.⁴

McDonald's U.S. and its U.K. affiliate ("First Plaintiffs" and "Second Plaintiffs" respectively) filed suit against Morris and Steel. The more than two and a half-year trial, the longest in English history, began in June of 1994, after twenty-eight pre-trial hearings.⁵ In June of 1997, in a 750 page judgment, Justice Rodger Justice Bell found that McDonald's had been

¹ See discussion in John Vidal, *You and I Against McWorld*, GUARDIAN (London), Mar. 9, 1996, at T12.

² See Barry James, *English Activists Bear Up Under Ferocious Big Mac Attack: David vs. Goliath/The Sequel*, INT'L HERALD TRIB., May 20, 1997, at 2, available in LEXIS, NEWS Library.

³ Sarah Lyall, *Golden Arches Are Victorious, But Bloodied, in a English Courtroom*, N.Y. TIMES, June 20, 1997, at A1.

⁴ According to *The Guardian*, during the mid 1980's, McDonald's had "forced apologies or retractions from the BBC, *The Guardian*, and the Scottish TUC, effectively closed down the Transnational Information Centre, stopped the transmission of at least one [T.V.] film and silenced a play." Vidal, *supra* note 1.

⁵ See *id.*

defamed and assessed damages equivalent to \$96,000 against the two defendants.⁶

It is not very likely that McDonald's will ever recover its \$96,000, as Mr. Morris is an unemployed former postal worker and Ms. Steel is a part time bartender.⁷ But the president of McDonald's U.K. testified that this was not about money—it was about preventing lies being used to try to “smash” the company.⁸ The recovery would not come close to compensating McDonald's for its costs in the law suit, which have been estimated to be about \$10 million, including over £ 6,500 per day of trial for their team of top English libel lawyers.⁹

Although a McDonald's official commented that they were “broadly satisfied,”¹⁰ some have suggested that it was at best a Pyrrhic victory.¹¹ The case became a public relations disaster around the world, thanks in large part to the Internet, which now has a very active anti-McDonald's website. The site displays the offending pamphlet as well as even more derogatory comments about McDonald's, including some allegations from other sources that McDonald's had previously successfully suppressed by threats of law suits.¹²

The title of a newspaper article, “David vs. Goliath/The Sequel,”¹³ captures the essence of most of the extensive press coverage of the trial. Although defamation is the only civil action that is routinely still tried by a jury in England, the defendants were denied their request for a jury.¹⁴

⁶ See *McDonald's v. Steel*, available in <<http://www.mcspotlight.org/case/trial/verdict>> [hereinafter *Steel*]. See Lyall, *supra* note 3. The compensation was “for the damages to its trading reputation and goodwill, and to vindicate its good name such as it may be...” Sarah Lyall, *Her Majesty's Court Has Ruled: McDonald's Burgers are not Poison*, N.Y. TIMES, June 22, 1997, § 4, at 7 (quoting the summary of Justice Bell's ruling in the *McLibel* trial).

⁷ Their combined annual income is reported to be \$12,000. See James, *supra* note 2. In 1996, McDonald's had earnings of \$31.8 billion. *McDonald's Plans to Invest \$1 Billion in Latin America*, N.Y. TIMES, Oct. 9, 1997, at D4. McDonald's has indicated that it does not intend to collect from the defendants. See Lyall, *Golden Arches*, *supra* note 3, at A5.

⁸ Maurice Weaver, *McDonald's May "Waive Damages if It Wins Libel"*, DAILY TELEGRAPH (London), May 8, 1996, at 5.

⁹ See Vidal, *supra* note 1. Presumably, McDonald's did not ask to be compensated for its costs as that would obviously have been futile and a public relations nightmare. England and nearly all legal systems outside the United States ordinarily require losing parties to pay the winners' costs. See, e.g., MARY ANN GLENDON ET. AL., *COMPARATIVE LAW 171-72* (1994); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES-TEXTS-MATERIALS 353-54, 366-70* (5th ed. 1988). Exceptions apply in some systems when

¹⁰ Lyall, *supra* note 3. The official response from the chairman of McDonald's was that, “For the sake of our employees and our customers, we wanted to show these serious allegations to be false, and I am pleased that we have done so.” *Id.*

¹¹ See Lyall, *supra* note 6.

¹² See Vidal, *supra* note 1.

¹³ James, *supra* note 2.

¹⁴ Under the Supreme Court Act of 1981, libel and slander is to be tried by a jury. See Supreme Court Act of 1981, ch. 54 (Eng.). However, there is an exception if a party applies for a bench trial and the judge determines that “the case is scientifically complex or otherwise cannot conveniently be tried by a jury.” *Id.*; see JULIE A. SCOTT-BAYFIELD, *DEFAMATION: LAW*

Because legal aid is not available in defamation actions,¹⁵ they represented themselves. Despite their lack of legal training, the defendants were able to elicit a good deal of testimony that was damaging and embarrassing to McDonald's.¹⁶ Newspaper articles included reports of some testimony by McDonald's executives, which was so bizarre as to suggest mental imbalance.¹⁷

When Justice Bell finally released his judgment, it included some rather detrimental conclusions about McDonald's business practices. Although Justice Bell found in favor of McDonald's on nearly all of their claims, he did reject a few. He concluded that McDonald's had contributed to cruelty to animals, used advertising to manipulate children, and paid

AND PRACTICE 32 (1st ed. 1996). Jury trials are ordinarily thought to benefit plaintiffs in libel actions. However, a case like this, in which it is the plaintiff rather than the defendant who has "deep pockets," would be a likely exception. No doubt that influenced McDonald's request for a bench trial. There is, however, no question that there were complex scientific issues to be resolved in the case.

¹⁵ See *infra* text accompanying notes 44-46.

¹⁶ Mark Stephens, an English lawyer who had given the two defendants some help on some of the "finer legal points," commented in a newspaper article in *The Guardian*:

It's incredibly difficult to do what they are doing. It shows a level of commitment that before this case was unheard of. They're good.... Clearly they don't have the backroom book-learning, which is a vital legal ingredient. They would have been more effective with legal help. The legal points have ruled against them because they haven't argued as explicitly as a qualified lawyer would have done.

But they're being solicitors and barristers, they're doing two people's jobs. They are up against a team of solicitors from a big City firm. They're up against private detectives, two barristers including a leading QC, with all the backing of one of the world's most powerful companies. They have to identify the issues, they must collect the evidence and push the information in the courtroom. They have learnt immeasurable amounts. They've shaken top McDonald's executives brought over from the U.S....have got a number of admissions out of people, given people an unpleasant time.

Vidal, *supra* note 1.

The title "QC" is given to those barristers who are the most experienced and well respected in the profession. See GLENDON ET AL., *supra* note 9, at 564. The Lord Chancellor must approve their elevation. See *id.* They are paid substantially more than ordinary barristers and English judges are almost always chosen from their ranks. See *id.*

In addition to a lack of legal expertise, defendants had only a relatively small fund raised by environmental and animal rights activists for needed expenses, such as paying for transcripts, phone and fax bills, research help, document copying and bringing witnesses to London for the trial. See James, *supra* note 2. Immediate transcripts cost \$560 per day, so the defendants waited three weeks until the price dropped to \$32. See Sarah Lyall, *England's Big "McLibel Trial" (It's McEndless, Too)*, N.Y. TIMES, Nov. 29, 1996, at A4.

¹⁷ Some of this testimony was quoted in a newspaper article in *The Guardian*. The president of McDonald's U.K. reportedly testified (presumably with a straight face) that: "If a million people (the number going to UK stores per day at the time) go into McDonald's, I would not expect more than 150 items of packaging to end up as litter." Vidal, *supra* note 1. McDonald's U.K.'s senior vice president took a different approach to the problem of waste disposal: "I can see the dumping of waste to be a benefit. Otherwise you will end up with lots of vast empty gravel pits all over the country." *Id.* The *pièce de résistance* came from the President of McDonald's Japan who reportedly read from the "authorized biography" of McDonald's: "If we eat McDonald's hamburgers and potatoes for 1,000 years we will become taller, our skin will become white and our hair blonde." *Id.*

employees so little as to depress wages in the catering industry in England. These findings were prominently reported in numerous articles describing the judgment.¹⁸ The statements found to be defamatory included assertions in the pamphlet that McDonald's was destroying rain forests; causing starvation in the Third World; producing litter in cities; causing heart disease, cancer and food poisoning; subjecting employees to "bad" working conditions; exploiting women and minority workers; and covering up the low quality of their food with advertising gimmicks aimed at children.¹⁹

London has been described for a number of years as the "libel capital of the World."²⁰ However, English libel laws are in some ways actually less stringent than those of other countries in Europe, where defenses such as "fair comment" frequently do not exist,²¹ and truth is not always a defense.²² Nevertheless, as will be discussed below, adherence to the

¹⁸ See, e.g., James, *supra* note 2; Lyall, *supra* note 6.

¹⁹ See *Steel*, Pt. 11, (Summary of the main findings on the Plaintiffs' claims).

²⁰ See Sarah Lyall, *A Libel Law That Usually Favors Plaintiffs Sends a Chill Through the British Press*, N.Y. TIMES, July 7, 1997, at D7. Lyall points out that: "Many foreigners with libel complaints use even the flimsiest jurisdictional pretexts to file their cases [in England]." Illustrative law suits pending in England included: "a Middle Eastern man suing a Danish newspaper, several Russians suing American newspapers and an American film star suing an American author." *Id.* (quoting Mark Stephens, an English libel lawyer).

²¹ For instance, Austria's criminal defamation law has been applied to value judgments and opinions as well as to facts. The European Court of Human Rights, has found such an application to violate the European Convention on Human Rights because it is impossible to prove the truth of opinions and value judgments. See *Lingens v. Austria*, 103 Eur. Ct. H.R. (Ser. A), *reprinted in* 8 Eur. H.R. Rep. 407 (1986). See *infra* note 52 for a discussion of the role of this court. According to the European Court, the Austrian Appellate Court had asserted that "the task of the press was to impart information, the interpretation of which had to be left primarily to the reader." *Id.* at 415. See *infra* text accompanying notes 129-152 for a discussion of the European Court of Human Rights treatment of opinion and value judgments.

Most European countries have criminal penalties and provide civil remedies for "insult" as well as defamation. The term "insult" is so broad that it frequently covers expression that would be considered a value judgment. For instance, the European Court of Human Rights has described Belgium's "insult" law as covering "gratuitously offensive terms or exaggerated expressions." *De Haes and Gijssels v. Belgium*, 25 Eur. H.R. Rep. 1, ¶ 26 (1997). See *infra* notes 184-219 and accompanying text for a discussion of English and U.S. fair comment defenses and the treatment of opinion and value judgments.

²² In addition to criminal and civil libel laws, most other European countries, have statutes making individuals civilly and even criminally responsible for "insulting" statements. When these statutes are used against value judgments or hyperbole, truth cannot be a defense, as such expression is impossible to prove either true or false. See *supra* note 21. As one authority explains, although truth is a defense to defamation, "insult remains punishable, according to the style and mode of the publication." PETER F. CARTER-RUCK ET AL., *CARTER-RUCK ON LIBEL AND SLANDER* 367 (5th ed. 1997).

In some countries truth is not a defense even when the assertions are factual rather than opinion. For instance, in Spain, the defense of truth was not available when state institutions were insulted by factual assertions. This omission resulted in a finding that the criminal conviction violated Article 10 of the European Convention on Human Rights in *Castells v. Spain*, 14 Eur. H.R. Rep. 445, 464 (1992). It is not clear whether a 1995 amendment to the Spanish law remedied this problem. See *CARTER-RUCK ET AL.*, at 425.

Truth is ordinarily not a defense if the case involves private rather than public matters. See, for example, the discussion of Spain and Switzerland. *Id.* at 367, 396. France probably has the most

European Convention on Human Rights is resulting in abrogation of these restrictive aspects of defamation law in Continental Europe.²³ Furthermore, nearly all European countries other than the U.K. apparently require some degree of fault for criminal or civil defamation actions.²⁴ England's strict liability libel law contributes to its reputation as a haven for libel plaintiffs. But the relatively high damage awards available in English courts compared to awards given in Continental Europe is probably even more significant. Although the possibility of criminal liability for the defendants in Continental Europe may seem repressive, in reality it does not result in serious constraints on the press because the fines are quite small, particularly when compared to English and U.S. civil damage awards.²⁵

stringent privacy laws in Europe. They protect the expression of true private matters even when the expression is not derogatory and is of a rather trivial nature. See Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219 (1994).

In U.S. cases involving state common law privacy protection, courts have interpreted that protection narrowly so as to cover only situations when the facts divulged are such as to "be highly offensive to a reasonable person and not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (1977). For the most part, the cases in which liability has been found involved reports of people with illnesses and/or information about children. See KENT R. MIDDLETON & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 165-66 (3d ed. 1994). The precise parameters of constitutional restraints on such actions are unclear. The two U.S. Supreme Court cases addressing the issue dealt with prohibitions on the publication of the names of rape victims. The Court found such a prohibition unconstitutional as applied to material from public records arising out of an open court proceeding in *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) the Court found the statute unconstitutional because it had no exceptions for situations in which the information would not cause harm.

England has no statutory protection for privacy. However, under the Rehabilitation of Offender's Act, truth is not a defense in some defamation actions when the expression involves former offenders who have served their sentences. Rehabilitation of Offenders Act, 1974 (Eng. & Wales).

For further discussion, see CARTER-RUCK ET AL., at 498.

²³ See *infra* text accompanying notes 129-52.

²⁴ Ordinarily defendants can avoid liability by proving that even if their expression was false they did not act with fault. The language describing the degree of fault differs somewhat from country to country. But the descriptions look like negligence. For instance, German law provides a defense to criminal defamation when the material was from a source that would be considered reliable and the matter is one of interest to the public. See Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 955 (1996). Civil liability in Germany depends on a finding of negligence or intention. See CARTER-RUCK ET AL., *supra* note 22, at 368. For both civil and criminal liability in France a defendant can prove as a defense that "all necessary precautions" were taken. *Id.* at 365. However, outrageous hyperbole can apparently be the basis of liability in courts in continental Europe. See CARTER-RUCK ET AL., *supra* note 22. In such cases, it would seem irrelevant to inquire into questions of negligence or diligent use of sources. But, despite the continued existence of statutes making such expression subject to liability, the jurisprudence of the European Court of Human Rights makes it unlikely that such statutes will be enforced. See *infra* notes 129-52 and accompanying text for a discussion of the jurisprudence of the European Court of Human Rights protection of opinion and value judgments.

²⁵ See Vick & Macpherson, *supra* note 24, at 952. England does have a criminal defamation law, but not a criminal insult law. However, since World War II, prosecutions have been extremely rare. For a comprehensive discussion of English criminal libel laws, see J.R. Spencer, *Criminal Libel—A Skeleton in the Cupboard* (Pts. 1-2), 1977 CRIM. L. REV. 383, 475 (1977).

The discrepancy between damage awards in England and those in Continental Europe is due in large part to the jury system that is not used in civil cases on the continent. Although the defendants Morris and Steel were not granted a jury trial,²⁶ in England, defamation is the one civil action for which a jury is nearly always granted.²⁷ Critics have asserted that juries want to punish rich media defendants and they describe many awards as “windfalls” rather than compensation for loss.²⁸ The problem has been exacerbated because until recently English appellate courts would only reduce jury awards in very extreme circumstances²⁹ and judges were not allowed to give juries significant guidance in arriving at awards.³⁰ The sums

Remedies available in civil actions in Continental Europe ordinarily include only compensatory and not exemplary damages. Even compensatory damages in England are higher than those awarded in most cases in Continental Europe. See Vick & Macpherson, *supra* note 24, at 952. Another reason for the limited availability of large damage awards is that retraction and rectification are frequently used as a substitute for civil damages in many countries in Continental Europe. See *id.*; Charles Danziger, *The Right to Reply in the U.S. & Europe*, 19 N.Y.U. J. INT’L L. & POL. 171, 183 (1986).

A mandatory right of reply in the print media would, of course, be unconstitutional under current U.S. Supreme Court precedent. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). However, those interested in reforming defamation law in the U.S. have asserted that an optional right of reply would pass constitutional muster. See Danziger, at 201. Of course a mandatory right to reply has been found constitutional in the broadcast media. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (finding Fairness Doctrine personal attack rule constitutional).

Commentators writing in 1996 have estimated that English defamation damage awards are at least 10 times higher than those in Continental Europe. See Vick & Macpherson, *supra* note 24, at 962. Civil damages in Germany rarely exceed £15,000. See *id.* at 956. Some countries are particularly stingy in awarding defamation damages. In a 1984 Danish case, a plaintiff received the equivalent of £4,370 for an accusation that he was a mass murderer. See *id.* at 959.

Scotland is part of Great Britain, but unlike Wales, has its own legal system. Libel laws in Scotland are quite similar to those in England, and in some respects are even more favorable to plaintiffs than those in England. Vick & MacPherson, *supra* note 24 at 949-51. However, for various reasons damages are much lower in Scotland than in England. *Id.* Thus, plaintiffs prefer to sue in England for defamation rather than in Scotland. *Id.*

²⁶ See *supra* note 14 and accompanying text.

²⁷ See GLENDON ET AL., *supra* note 9, at 618 (quoting LORD DENNING, WHAT NEXT IN THE LAW 33 (1982)).

²⁸ Sean Thomas Prosser, *The English Libel Crisis: A Sullivan Appellate Review Standard is Needed*, N.Y.L. SCH. J. INT’L & COMP. L. 337, 347 (1992).

²⁹ The test was whether the award could not have been made by “sensible people” or was arrived at “capriciously, unconscionably, or irrationally.” *Broome v. Cassell & Co.*, [1972] App. Cas. 1027, 1135 (1972) (appeal from Q.B.).

U.S. Courts frequently reduce and overturn awards. This is particularly likely to occur in defamation cases given the stringent constitutional hurdles faced by plaintiffs. See *infra* text accompanying notes 177-83. According to one commentator, U.S. appellate courts reverse approximately 70% of the awards in defamation cases in which plaintiffs win at the trial level compared to 19% of all other cases. See Prosser, *supra* note 28, at 352.

³⁰ Judges were not permitted to refer juries to other cases. They could only suggest that jurors consider the real value of large awards, for instance by informing them what income could be received if various sums were invested. See *Sutcliffe v. Pressdram Ltd.*, 1 All E.R. 269 (Q.B. 1990).

Critics compare the huge libel awards to the relatively small sums given in most personal injury cases. For instance, £20,000 was apparently common for the loss of a leg in 1988 when libel

granted rose dramatically in a period of two years between 1987 and 1989. Maximum awards jumped 1400 per cent, culminating with a 1.5 million-dollar award in 1989.³¹ Prior to that period the highest award given had been £100,000 in 1982.³² Parliament responded in 1990 by giving appellate courts more authority to reduce damages,³³ and the Appellate Court in 1995 authorized trial courts to give juries significant guidance in arriving at awards.³⁴ Although the Appellate Court has used this authority to reduce a few damage awards in defamation actions,³⁵ they have left some large awards standing, and overall the changes do not appear to have significantly affected the large sums received by successful defamation plaintiffs.³⁶ Two additional awards over a million pounds have been recorded,³⁷ and six figure sums, unknown until 1982, have become commonplace.³⁸

The \$96,000 award given by Justice Bell in *McDonald's* was, by these standards, quite modest. But a company with annual earnings of \$32 billion does not sue defendants like Morris and Steel for the money. They were suing to stop the criticism and deter future critics, and their track record in squelching criticism by threatened civil suits in England had been quite good until they faced the “McDonald’s 2.”³⁹ Despite the fact that U.S. defamation damages are considerably higher than those in England,⁴⁰ the

plaintiffs were receiving awards in the £300,000 and £400,000 range. *See Koo's £300,000—a Sign of the times*, 138 NEW L.J. 824 (Nov. 11, 1988). Others complained of the lack of uniformity in the sums received by libel plaintiffs, calling such cases a form of “Russian Roulette.” T.G. Krone, *A Newspaper Lawyer's View*, LAW SOC. GAZETTE, Sept. 6, 1989, at 14.

³¹ *See Prosser, supra* note 28, at 347.

³² *See id.*

³³ *See Courts and Legal Services Act of 1990 § 8(2); Rules of the Supreme Court, Order 59, Rule 11 (4) as amended.* After this change in the law, the European Court of Human Rights found a violation of the European Convention on Human Rights by the U.K. based on a large award given under the old law. The combination of an award three times the size of any previous award, and the lack of judicial control over jury verdicts at the time the case was decided led the court to conclude that the £ 1.5 million award was not “necessary in a democratic society.” *Tolstoy Miloslavsky v. United Kingdom*, App. No. 18139/91, 20 Eur. H.R. Rep. 442 (1995) (Court report). The fact that England had already changed the law, seemingly recognizing the problem itself, was referred to by the Court. *See id.* at ¶ 50. *See infra* notes 54-64 and accompanying text for a discussion of the European Convention and the English courts’ application of the Convention.

³⁴ *See Johns v. MGN*, 2 All E.R. 35 (1996).

³⁵ As of March of 1997, it appears that only five awards have been reduced by the Appellate Court. *See table of awards in CARTER-RUCK ET AL., supra* note 22, app. VI at 661, 664, 670-71. A few other awards were reduced by settlement pending appeal, *see id.* at 671-72, a practice that had occurred occasionally prior to the 1990 change in the law. *See id.* at 590, 648.

³⁶ *See id.* at 655-76.

³⁷ *See id.* at 670-71.

³⁸ There were at least twenty-five awards in that range between 1990 and March of 1997. *See id.* at 655-76.

³⁹ *See supra* note 4 and accompanying text.

⁴⁰ The largest U.S. award in a defamation case as of March, 1997 was given by a Texas jury against the Wall Street Journal in favor of a Houston bond firm for 222.2 million dollars. *See Dow Jones Hit with Huge Libel Judgment for Wall Street Journal Article*, AGENCE FRANCE PRESSE, Mar. 21, 1997. The District Court Judge reduced the award to 22.7 million and both sides had filed

threat of such a suit would not be likely to stop criticism in the United States. Since *New York Times v. Sullivan*⁴¹ in 1964, the United States has had the most speech protective substantive libel laws in the world. As will be seen, application of U.S. constitutional constraints to the facts in *McDonald's* would have resulted in a clear defeat for the plaintiffs, probably at a very early stage in the proceedings.⁴²

Morris and Steel faced formidable obstacles under English law due to a combination of restrictive substantive libel laws, denial of a jury trial, the potential for very high damage awards and legal costs,⁴³ and a lack of legal aid. The exclusion of defamation actions from the otherwise rather generous legal aid system in England⁴⁴ is based on the fear of frivolous petty suits.⁴⁵ Reformers have convincingly disputed this rationale;⁴⁶ but in any event, the *McDonald's* case aptly demonstrates the severe disadvantage the rule imposes on defendants of modest means being sued by affluent plaintiffs. Surely the policy concern behind the denial of legal aid is totally irrelevant in such a situation.

One critic has dubbed suing for libel in England “a rich man’s game.”⁴⁷ But more important than the unfairness to individual defendants like Morris and Steel is the potential the package of obstacles poses for chilling expression and constricting the marketplace of ideas in England. Of course, the constriction is felt primarily by those without wealth or power—those who are most likely to be the voices of non-mainstream views. Reformers in England have maintained for many years that English libel laws are a major impediment to freedom of the press.⁴⁸ If the defamation law also becomes a tool to stifle social protest, the English marketplace of ideas will sustain another serious blow. Without access to expensive media outlets, activists like Morris and Steel are, in any country, at a severe disadvantage in competing for attention in the modern media dominated world. The additional burden of threatened litigation could decimate the ranks of a wide range of activist organizations. It should be recalled that Morris and Steel were only two out of the original five protesters threatened by McDonald’s

motions for appeal as of December 1, 1997. See Kate Thomas, *WSJ Libel Verdict for 22M Upheld*, NAT’L L. J., Dec. 1, 1997, at 14.

⁴¹ 376 U.S. 254 (1964). For a discussion of *New York Times*, see *infra* notes 177-83 and accompanying text.

⁴² See *infra* note 176. However, even though ultimate success is unlikely, the threat of a law suit, which could entail a very large judgment and very high attorneys’ fees may deter expression in the United States. See *infra* notes 728-32 and accompanying text.

⁴³ See *supra* text accompanying note 9.

⁴⁴ See MICHAEL ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* 32-36 (1978).

⁴⁵ See REPORT OF THE COMMITTEE ON DEFAMATION, 1975, Cmnd. 5909, at 160-61.

⁴⁶ See *id.*

⁴⁷ Victor Lewis Smith, *Vampires Making Suckers of Us All*, DAILY MIRROR, Aug. 3, 1996, at 7.

⁴⁸ See ERIC BARENDT ET AL., *LIBEL AND THE MEDIA: THE CHILLING EFFECT* (1997); CHARLES WINTOUR, *PRESSURES ON THE PRESS: AN EDITOR LOOKS AT FLEET STREET* (1972).

with a lawsuit—the other three buckled.⁴⁹ A credible threat of litigation certainly would make activists think several times before taking on corporations with deep pockets.⁵⁰

As the U.K., unlike the United States and nearly all other European countries, has no written constitution, protesters like Morris and Steel have no hope of asserting a constitutional right to free speech as a defense to a defamation action. But despite the lack of a written guarantee, the English are proud of what they see as a long tradition of protection for expression.⁵¹ However, the European Court of Human Rights⁵² has on several occasions found that the U.K. has violated the European Convention on Human Rights,⁵³ Article 10, which guarantees freedom of expression.⁵⁴ As one of the original signatories to the Convention in 1953, the U.K. has agreed to abide by a wide range of human rights guarantees. But, unlike nearly all other signatory countries, the convention has not been incorporated into their domestic law.⁵⁵ The U.K. has had to defend suits before the European Court

⁴⁹ See *supra* text accompanying note 3.

⁵⁰ Morris and Steel were in some ways less vulnerable to McDonald's threats of litigation than plaintiffs with a more middle class income. Anyone who is not fabulously wealthy stands to suffer severe economic consequences by losing a defamation action in England. Morris and Steel were virtually judgment proof. Although they could not be certain that McDonald's would not force them into bankruptcy, as it turned out their burden was more psychological and physical exhaustion than serious loss of economic resources. The trial reportedly severely disrupted their lives for at least three years. Morris suggested that the proper analogy was "not so much [to] David and Goliath as Prometheus. I feel chained to this rock that's trying to crush me.... The whole thing is stupid. We have to spend days in court arguing whether we can say that McDonald's pays low wages." Vidal, *supra* note 1.

⁵¹ Lord Goff of Chieveley has commented that "we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world." Attorney-General v. Guardian Newspapers, 1990 App. Cas. 109, 283.

⁵² The European Court of Human Rights was created by the Council of Europe and is the most important enforcement body for the European Convention on Human Rights. The Court of Human Rights should not be confused with the European Court of Justice, the judicial body of the European Union. The Council of Europe, which was formed in 1949, predates the European Union. One commentator has explained that:

The Council of Europe is principally the guarantor of human rights and democracy in the signatory states which include all the EU countries and most of eastern Europe, including Russia. Its "bible" is the European Convention on Human Rights.... But the Council has long lived in the shadow of the EU.... Member states deemed to have breached the Convention guaranteeing respect for human rights, privacy, fair trials, freedom of speech and other fundamental rights, are taken before the Human Rights court in Strasbourg.

Geoff Meade, *Blair to Signal End for Death Penalty*, PRESS ASS'N NEWSFILE, Oct. 9, 1997.

⁵³ See Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 Gr. Brit. T.S. No. 71 (Cmd. 8679).

⁵⁴ See, e.g., Goodwin v. United Kingdom, 22 Eur. H.R. Rep. 123 (1996); Tolstoy Miloslavsky v. United Kingdom, 20 Eur. H.R. Rep. 442 (1995); Sunday Times v. United Kingdom (No. 2), 14 Eur. H.R. Rep. 229 (1991); Observer & Guardian v. United Kingdom, 14 Eur. H.R. Rep. 153 (1991); Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. 245 (1979). For the text of Article 10, see *infra* text accompanying note 69. For a discussion of the European Court's free speech jurisprudence, see *infra* text accompanying notes -67-153.

⁵⁵ According to one source only the United Kingdom, Ireland and Denmark had by 1997 ratified but not incorporated the Convention into domestic law. See Ingrid Persgard, *The Reconstruction of*

of Human Rights in Strasbourg more than any other country except Italy, and has lost about half of those cases.⁵⁶ Judges sitting on England's highest appellate court, the Law Lords, have expressed a variety of views on the significance of the Convention to their application of domestic law, ranging from near irrelevance⁵⁷ to a strong presumption in favor of interpreting a law as consistent with the Convention.⁵⁸ However, the Law Lords have never decided a case based on jurisprudence from the European Convention. Indeed, they seem to have pointedly avoided such an analysis. In a recent case in which the Law Lords found that the expression was protected,⁵⁹ they went as far afield for cases to support their interpretation of English common law as the United States Supreme Court, the Illinois Supreme Court and the South African Supreme Court.⁶⁰

Human Rights in the European Legal Order, EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 347, 363 (C.A. Gearty ed., 1997). See *supra* note 52 for a description of the Council of Europe.

⁵⁶ The European Court of Human Rights had heard 80 cases against the U.K. by May of 1996. See Lyall, *supra* note 55. Violations were found in 41 of those cases. See *id.*

⁵⁷ Some judges are of the view that little attention need be given to the Convention because English law is precisely consistent with the Convention, and on speech issues even more protective. According to Lord Goff:

The only difference is that, whereas [Article] 10 of the convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather on an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.

Guardian Newspapers, 1990 App. Cas. at 283.

It seems that Lord Goff is either being disingenuous or is not well versed in Article 10 of the European Convention. See *supra* text accompanying note 69 for the text of Article 10. Like English law, the Convention starts with the assumption that expression is protected and that exceptions are only permitted when they are "prescribed by law." EUROPEAN CONVENTION art. 10, § 2. Unlike English law, however, exceptions can only be valid if they serve one of the *listed* purposes. There are no such limitations on the purposes that can be pursued by a English statute that restricts expression. Furthermore, even laws enacted to further the listed purposes under Article 10 of the Convention are only valid if they are "necessary in a democratic society." *Id.* No such limitation would be possible in England under the doctrine of Parliamentary supremacy. See GLENDON, *supra* note 9 at 468-73 for a discussion of Parliamentary supremacy in England.

It is instructive to note that the European Court of Human Rights ultimately found that the application of the English law in the case decided by Lord Goff violated the Convention, thus concluding that at least in that case English law was *not* the same as that of the Convention. See *Observer & Guardian*, 14 Eur. H.R. Rep. 153.

⁵⁸ According to Lord Donaldson, "[W]hen the terms of...legislation are fairly capable of bearing two or more meanings[,]...[there is] a presumption that Parliament has legislated in a manner consistent...with...treaty obligations." *R. v. Secretary of State for the Home Dep't*, 1 App. Cas. 696, 670(1991). Lord Gibson went even further. "Only if an Act of Parliament cannot be construed so as to be consistent with the Convention must the courts. . . leave...leave the complainant to seek redress in Strasbourg." *Id.* at 725.

⁵⁹ *Derbyshire County v. Times Newspapers Ltd.*, 1993 App Cas. 534.

⁶⁰ There were two conflicting English cases on the issue in question. Therefore, it would seem that this would have been an appropriate case to use the Convention to choose the better interpretation of English common law. See *supra* note 58. But the Law Lords were not even willing to go that far in relying on the Convention. Instead they used policy arguments from *New York Times v.*

English courts should not be able to avoid reliance on the European Convention for very much longer. Pursuant to a campaign promise made by Prime Minister Tony Blair, Parliament enacted the Human Right Act of 1998, which will be implemented on October 2, 2000.⁶¹ The legislation institutes a process that is intended to incorporate the European Convention into domestic law, but stops short of making the Convention automatically applicable in domestic courts.⁶² Hopefully, this will result in the U.K. defending cases before the European Court in Strasbourg less frequently. However, even if the English courts feel bound to apply the European Convention on Human Rights as domestic law, their application of that treaty may well differ from that of the Court itself. Certainly the incorporation of the treaty into the domestic law of nearly all other signatory countries has not resulted in consistent protection of the rights guaranteed in the courts of those countries. If reliance on proper application of the European Court's jurisprudence could be trusted entirely to domestic courts, very few countries would have found themselves before the European Court in Strasbourg. Furthermore, *dicta* by English judges to the effect that English law is entirely consistent with the Convention casts doubt on the seriousness with which they would approach their task.⁶³ There is even some question as to whether the legislation was intended to require application of Convention case law or whether the U.K. courts' interpretation of the Convention would be considered final in domestic courts.⁶⁴ However, there is substantial support

Sullivan, 376 U.S. 254, 277 (1964); *Die Spoorbond v. South African Ry*, 1946 A.D. 999, 1012-13; and *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (1923) *cited in* *Derbyshire County Council v. Times Newspapers Ltd.*, 1993 App. Cas. 534, 547.

The Law Lords agreed with the Court of Appeal that a local government authority could not sue for libel, but rejected the approach of the appellate court *Derbyshire County Council v. Times Newspapers Ltd.*, 1 Q.B. 770, 817 (1992), which was based on the European Convention. According to Law Lord Keith of Kinkel, "I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention." *Derbyshire County Council v. Times Newspapers Ltd.*, 1993 App. Cas. 534, 547.

⁶¹ See Human Rights Act, 1998, Ch. 43 (Eng); see discussion in Thorndon, *Editorial*, EUR. HU. RTS. L. REV. 241 (1999).

⁶² The legislation would require the "higher" courts to make a declaration when they believe a law is incompatible with the Convention. Then "[t]here would be a 'fast track' procedure for ministers to amend the law, without introducing a new Bill in Parliament, to bring it into line with the Convention." Gavin Cordon, *Human Rights to be part of English Law*, PRESS ASS'N NEWSFILE, Oct. 24, 1997. However, a finding of incompatibility will not have binding force in the case in which the issue was raised. See Lord Cooke of Thorndon, *The English Embrace of Human Rights*, 1999 EUR. HU. RTS. L. REV. 243, 254. Therefore, litigants may have little incentive to raise violations of the Act as a defense, unless urged to do so by human rights organizations attempting to use a case as a vehicle for law reform. Although government ministers may make "remedial orders," the power is discretionary. *Id.* Also, when introducing new legislation, ministers would be required to state whether the proposal is consistent with the Convention. However, the Blair reform would not require that new legislation conform to the Convention; it would only require the minister to explain why the legislation is not in compliance. See *id.*

⁶³ See *supra* note 57.

for the proposition that in interpreting English statutes the implementation of the Human Rights Act will require a very strong presumption in favor of consistency with the convention.⁶⁵ As will be seen in the remainder of this article, the application of English law in the McDonald's case raises some serious questions of compatibility with the European Convention. Indeed, this case may end up in Strasbourg. However, the Convention requires the exhaustion of domestic remedies.⁶⁶

II. FREEDOM OF SPEECH JURISPRUDENCE UNDER THE EUROPEAN CONVENTION

Given the U.K.'s treaty obligations under the European Convention on Human Rights, it is important to examine how the Convention jurisprudence would be applied to the facts of *McDonald's*. It must be acknowledged that there is no clear rule that the case law of the European Convention must be viewed as precedent. Nearly all of the countries that are parties to the Convention have civil law systems that do not accept the concept of binding precedent. Of course, in these systems precedent is often

⁶⁴ According to one source the Government White Paper on the Bill provides that "previous Strasbourg rulings will not be binding." Michael Streeter, *Human Rights: Bill Leaves Unanswered Questions*, INDEPENDENT, Oct. 25, 1997, at 20. One commentator has highlighted the issue by postulating a situation in which a domestic court's reasoning on a finding of incompatibility differs from a later decision of the European Court of Human Rights in the case,

[T]aking a view of the rights wider than that of the United Kingdom court. Would the domestic court's reasoning mark the limits of what the Government would be prepared to accept? The Lord Chancellor's sagacious, if non-committal, reply was that 'the Government would obviously think again.' Presumably the Strasbourg Court will always have the last word but might be receptive to an argument that in the particular circumstances the national authorities had done enough.

Thorndon, *supra* note 61, at 249.

⁶⁵ The Lord Chancellor explained in a legislative report during consideration of the Human Rights Act that "The Act will require the courts to read and give effect to the legislation in a way compatible with the Convention rights 'so far as it is possible to do so'. This...goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so." See *Thorndon*, *supra* note 61 at 251. Thus the Human Rights Act may require English courts to adopt the interpretive method frequently referred to as the "innocent construction rule" in dealing with defamation cases. See *infra* notes 142-46 and 161-66 and accompanying text for a discussion of the use of this interpretive method in the U.S. and by the European Court of Human Rights. Although defamation law in England is based on statutory law, the Defamation Act of 1952, as amended by the Defamation Act of 1996, to the extent that interpretation of the statute is left to common law development by the courts the incorporation of the Human Rights Act should have an even more direct effect. Lord Cooke of Thorndon explained that: "I understand that the Convention rights scheduled to the Act will prevail over the common law as far as may be necessary to give effect to such of them as are capable of application." *Id.* at 257.

⁶⁶ See P. VAN DIJK & G. H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 81-97 (2d ed. 1990).

used as persuasion to argue for particular results, and in some countries this practice has become the functional equivalent of a system of binding precedent.⁶⁷ Furthermore, the European Court of Human Rights nearly always follows the reasoning in prior cases, or finds some way to distinguish them.⁶⁸ Therefore, it is reasonable to treat their jurisprudence as one would precedent in the U.S. or England. This section will examine how the European Court's case law on freedom of expression could be applied in *McDonald's*.

Article 10 of the European Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁶⁹

Like guarantees of freedom of expression in most European Constitutions,⁷⁰ and unlike the First Amendment to the U.S. Constitution,⁷¹

⁶⁷ One commentator describes the current role of case law in civil law countries today as follows: "Court decisions...are de facto sources of legal norms whose authority varies according to the number of similar decisions, the importance of the court issuing them, and the intrinsic persuasiveness of the opinion." GLENDON ET AL., *supra* note 9, at 208. In some countries that have constitutional courts, decisions regarding the compatibility of statutes with the constitution are binding. *See id.* at 207.

⁶⁸ *See* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 139 (1995).

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 Gr. Brit. T.S. No. 71 (Cmnd. 8679).

⁷⁰ *See, e.g.*, GRUNDGESETZ [CONSTITUTION] [GG] art. 5 (F.R.G).

⁷¹ Of course the U.S. Supreme Court has had to grapple with the problem of creating exceptions to what on its face looks like an absolute guarantee. The Court has used a variety of devices; one of the more controversial is to classify some expression as not speech at all. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) (finding obscenity to be unprotected expression). According to the majority in *Paris*, when "communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley*,...the mere fact that, as a consequence, some human 'utterances' or 'thoughts' may be incidentally affected does not bar the

the Convention first guarantees freedom of expression and then qualifies that guarantee by listing governmental purposes that may justify restrictions on expression. For defamation and insult law the relevant exception would be “protection of the reputation or rights of others.” However, the Convention makes clear that not every governmental restriction aimed at a listed purpose will justify restrictions. First, the restriction must be “proscribed by law,” and second, it must be “necessary in a democratic society.” The European Court has been extremely lenient in finding satisfaction of the “proscribed by law” requirement.⁷² The real controversy in Article 10 cases has been whether the restriction is “necessary in a democratic society.” Obviously, this term is very subjective and therefore gives the European Court a great deal of flexibility in deciding whether different kinds of restrictions are consistent with Article 10.⁷³

The European Court’s analytical approach is very similar to that of some other constitutional courts in Continental Europe, where a delicate balancing of interests is employed. Consideration is given to a number of different factors; although some may be more important than others, it is ultimately the combination of factors that will determine the result.⁷⁴ In this section some of the Article 10 freedom of expression cases that seem most relevant to the issues in *McDonald’s* will be discussed so that the principles

State from acting to protect legitimate state interests.” *Id.* at 67. Although the precise meaning of this passage is not at all clear, some scholars agree with Professor Schauer, who asserts that “the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process. The pornographic item is in a real sense a sexual surrogate.” Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979). Of course, the Court has devised a variety of other approaches that are quite speech protective, but that do not provide absolute protection to expression. See, for example, the Court’s defamation jurisprudence described *infra* text accompanying notes 177-83 and the “clear and present danger test” in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁷² Harris, *supra* note 55, at 389-91.

⁷³ According to the Court in *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), reprinted in 1 Eur. H.R. Rep. 737 (1979-80), “the adjective ‘necessary’ within the meaning of Article 10 (2), is not synonymous with ‘indispensable’...neither has it the flexibility of such expressions as ‘admissible,’ ‘ordinary,’...‘reasonable’ or ‘desirable’ [found in other articles of the convention].” *Id.* at 754. The Court has adopted the definition of “a pressing social need.” *Id.*

⁷⁴ See HARRIS, *supra* note 72, at 414. Although some U.S. scholars contend that U.S. constitutional law is ultimately a matter of balancing, such as T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987), European constitutional courts very explicitly employ this technique. For instance, the close to absolutist rule the U.S. Supreme Court has adopted regarding regulation of viewpoint, see, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992), is not accepted in Continental Europe. In Germany, despite the development of a strongly speech protective jurisprudence by the Constitutional Court, see *infra* notes 137, 143 and accompanying text, the offensiveness of the viewpoint being expressed and the value of the expression is considered important. The Political Satire Case, 1987 BVerfGE 369 (politician depicted in a cartoon as a copulating pig subject to prosecution under criminal insult law), is discussed in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 436 (1989) with *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (satiric mock interview, clearly labeled as such, suggesting that Falwell engaged in incestuous conduct with his mother protected by the First Amendment from civil liability).

established in those cases can later be referred to when examining the specific facts of the case. However, before examining that jurisprudence, it is necessary to address defendants' unsuccessful 1993 petition to the European Court of Human Rights.⁷⁵

A. THE COMMISSION DECISION IN *MCDONALD'S*

Until the very recent restructuring of the European Convention procedures,⁷⁶ the European Commission screened petitions, and only those it found "admissible" went to the Court for adjudication.⁷⁷ Although the Commission found Morris and Steel's 1993 petition inadmissible as the grounds were said to be "manifestly ill-founded,"⁷⁸ that finding does not foreclose the success of a subsequent petition. In 1993 the trial had not commenced and there was as yet no way to know how English law would be applied to the facts of the case. Furthermore, there was no way to know at that time how long and complicated the case would be. Nevertheless, the Commission's decision must be considered, particularly because some of the language used was quite broad, and may cast doubt on the likelihood of the defendants' success, should they ultimately seek a hearing before the European Court of Human Rights.

Defendants invoked several articles of the Convention in their 1993 petition to the Commission,⁷⁹ but this discussion will address only the

⁷⁵ See *S. & M. v. United Kingdom*, App. No. 21325/93, 93 Eur. H.R. Rep. 172 (May, 1993) (Commission report).

⁷⁶ See discussion of Protocol No. 9 in BUERGENTHAL, *supra* note 68 at 133.

⁷⁷ See discussion in P. VANDIJK & G. J. H. VANHOOF, *supra* note 66, at 61-118 for a discussion of the role of the Commission and the determination of admissibility.

⁷⁸ See *id.* at 104-106 for a discussion of the meaning of "manifestly ill-founded." The Commission has been criticized for using the term "manifestly ill-founded" quite loosely and thereby exceeding the authority that their screening role under the Convention had contemplated. Describing the Commission's actions in one case, scholars have asserted that:

[I]t was doubtful whether this was so obvious an interpretation of the said provision of the Convention that no difference of opinion was possible among reasonable persons. Since such decisions bar the possibility that the Court—or the Council of Ministers—may give its opinion on the interpretation and application of such important provisions, the case law of the Commission gives rise to serious objections, in the sense that it is contrary to the division of power such as laid down in the Convention. The Commission may declare an application to be manifestly ill-founded only if its ill-founded character is actually evident at the first sight, or if the Commission bases its decision on the constant case-law of the Court.

Id. at 106-07. Commentators also stress that when the Commission is "obviously divided internally" it is quite misleading to use the term "manifestly ill-founded." *Id.* at 107. Because the Commission proceedings are ordinarily not made public, internal divisions are not usually widely known. The author has not found a reference to the vote in the Commission decision in *McDonald's*.

⁷⁹ In addition to Articles 10 and 6, the defendants invoked Article 13 (right to a domestic remedy), and Article 14 (right to equal treatment). See *S. & M.*, 93 Eur. H.R. Rep. 172.

allegations of violation of Articles 6 and 10, as these arguments were the most persuasive and the most relevant to the analysis in this article. The defendants argued that they were denied “effective access to the courts” under Article 6 because they were denied legal aid.⁸⁰ The Commission said that “[a]lthough the Convention does not guarantee a right, as such, to legal aid in civil cases, effective access to court must be ensured. The means by which a State does so is within its margin of appreciation.”⁸¹ The Commission also noted that it had found no violation of the Convention in previous defamation cases in which English law denying legal aid had been challenged.⁸² The Commission also seemed to believe that the defendants Morris and Steel were not unduly disadvantaged by the denial, noting that “[a]n appeal of the public has apparently been made for voluntary funding of the applicants’ case, which seems to have aroused media interest.”⁸³ The Commission further noted that the defendants “seem to be making a tenacious defense against McDonald’s, despite the absence of legal aid, the complexity of the procedures and the risk of an award of damages against them if they are found to have libeled McDonald’s.”⁸⁴ Of course, at this point in the litigation—prior to the trial—a combination of media interest and the “tenacious” work of the defendants to defend themselves might well have made it appear that there was no pressing need for legal aid in order to protect their rights. Furthermore, at that point it was not clear just how long and complex the trial would be. Indeed, the plaintiffs’ barrister had in 1993

⁸⁰ *Id.*

⁸¹ *Id.*, at 172 citing *Airey v. Ireland*, 2 Eur. H.R. Rep. 305, ¶ 26 (1980). The European Court of Human Rights actually found a violation of Article 6 due to the denial of legal aid in this case so that the reference should be considered *dicta*. See discussion of *Airey*, *infra* note 87.

The term “margin of appreciation” is used in the jurisprudence of the European Court of Human Rights to describe the discretion given in many cases to the local or national governments application of their law. As one commentator has explained, that discretion is meant “to provide a certain latitude for local mores and cultures to develop on their own terms. But the size of the margin varies from case to case, depending on the facts.” FREDRICK KIRKUS, JR., INTERNATIONAL ORGANIZATIONS AND THEIR LEGAL SETTING 1078 (2d Ed. 1993). Although the “margin of appreciation” is applied in free expression cases, the degree of discretion given has differed sharply depending on the type of expression involved. For instance a great deal of discretion has been given in cases dealing with moral or religious sensibilities, such as pornography and blasphemy. See, e.g., *Otto-Preminger-Institute v. Austria*, App. No. 13470/87, 19 Eur. H.R. Rep. 34 (1994) (Court report) (Sacriligious depiction of the Holy Family in a movie can be banned to protect religious sensibilities). While very little discretion is ordinarily given to restrictions on political expression. See, e.g. *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986) (Court report). (Freedom of expression extends to criticism of politicians even when it “offends, shocks, or disturbs.”)

⁸² See *S. & M.* at 172; No. 1059/83, *Munro v. the United Kingdom*, D.R. 52, 158, 165 (1987); and No. 108/84, *Winer v. the United Kingdom*, D.R., 48, 154 (1986). Although these cases were all situations in which plaintiffs were seeking legal aid, the Commission, with no explanation, concluded that there was no reason to depart from that rule when defendants were seeking aid. See *S. & M.* at 173, ¶ 1. 173.

⁸³ *S. & M.* at 172, ¶ 1.

⁸⁴ *Id.* at 173, ¶ 1.

predicted a three to four week trial, and no one had suggested that it might take anything close to two and a half years.⁸⁵

Defendants made two arguments relating to Article 10. The second of these will be addressed first, as it is related to the Article 6 argument referred to above. Rather than directly challenging English defamation law, the defendants pointed to the procedural difficulties they faced, arguing that those difficulties interfered with their ability to protect their Article 10 right to freedom of expression. They asserted that “[t]he failure of the United Kingdom to provide legal aid or simplified procedures, or to limit the amount of damages which could be awarded in such defamation proceedings...constitutes a breach of Article 10.”⁸⁶ In rejecting this argument, the European Commission simply concluded, without articulating their reasoning that:

[T]he matters which may involve the responsibility of the respondent Government under the convention, namely a lack of legal aid, simplified procedures or restrictions on damages, essentially interfere with the applicants’ freedom of expression. They have published their views, upon which there was no prior restraint, and if those views are subsequently found to be libelous, any ensuing sanctions would in principle be justified for the protection of the reputation and rights, within the meaning of Article 10(2) of the Convention.⁸⁷

⁸⁵ See John Vidal, *McLibel 2: The Dogged Duo Return with 63 Objections*, THE GUARDIAN, January 13, 1999, at 10.

⁸⁶ *S. & M.* at 173, ¶ 1.

⁸⁷ *Id.* at 173. There is case authority for the proposition that a combination of lack of legal aid and complex procedures in a civil action may result in a finding of a violation of a substantive guarantee. See, e.g. *Airey v. Ireland*, Series A, No. 32, 9 October 1979, 2 E.H.R.R. 305. *Airey* involved the denial of legal aid by Ireland to a woman who was seeking a legal separation. The Court found a violation of Article 6 (effective access to the courts) and a violation of Article 8 (respect for family or private life). The woman had been physically abused by her violent, alcoholic husband. The Court explained that

[L]itigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

Id. at ¶ 24. The petitioner pointed out that of the 255 separation proceedings that took place in Ireland from 1972 to 1978 all the petitioners were represented by lawyers. *Id.* ¶ 11.

One of the dissenting judges rejected the argument that denial of legal aid could violate the substantive rights to family life in Article 8. He explained that “the facts...disclose a violation which goes not to the substance of a right but to its procedural superstructure and is, therefore, covered and absorbed by Article 6 (1).” *Id.* ¶ 2 (Evrigenis, dissenting). A similar response could be made to defendants in *McDonald’s*.

The language used by the Commission in rejecting the defendants' challenge to the denial of legal aid could be interpreted as foreclosing further action by the European Court to a petition based on the application of the substantive law of libel. However, the context of the Commission's decision would lead to a contrary conclusion. The reference to sanctions being "in principle" justified was purely gratuitous. Certainly protection of reputation is within the exceptions to the guarantees of Article 10. However, prior to the application of the defamation law to the facts of *McDonald's* it could not be determined whether that application would meet the requirement that any interference must be "necessary in a democratic society."

In addition to the defendants' allegation that focused on the procedural problems they faced in defending themselves, they argued "that the institution of proceedings against them by McDonald's constitutes an unjustified interference with their Article 10 freedom of expression."⁸⁸ The Commission responded that it had "no competence to deal with that aspect of the complaint directed against McDonald's being a private company not incurring the State's responsibility under the Convention."⁸⁹ The Commission explained that the Convention is binding on the state parties, not on private companies.⁹⁰ It would follow that until the English court rendered judgment in this civil case there could be no violation of the Convention based purely on grounds of freedom of expression. No doubt this is why the defendants in their other allegation of violation of Article 10 tied their free expression claim to the Government's denial of legal aid and simplified procedures. These denials would establish the needed governmental action to bring the Convention into play.

The Commission decision does not make clear whether the defendants had argued that by simply allowing a company like McDonald's to sue defendants like themselves for libel England was applying its law in a manner that was inconsistent with Article 10. However, the Commission decision did at least obliquely reply to such an argument.

The freedom conferred by Article 10 of the Convention is not of an absolute nature. It does not authorize the publication of defamatory material. On the contrary, the second paragraph of Article 10 offers specific protection for the "reputation or rights of others". McDonald's are, therefore, entitled to seek the determination of their civil rights to a good reputation and, if successful, the protection of that reputation against an alleged libel. Similarly the applicants are

⁸⁸ *S. & M.* at 172.

⁸⁹ *Id.* at 173.

⁹⁰ *See id.* The Convention is like the U.S. Constitution in that it is binding on the state and does not apply to private actions that may interfere with the exercise of rights.

entitled to defend themselves against McDonald's writ in the determination of their civil right to free speech and fair comment in matters of public interest.⁹¹

Certainly some of the language in the Commission report casts doubt on likelihood that the European Court of Human Rights will ultimately find a violation of the Convention in the *McDonald's* case. But the Commission's 1993 action is far from determinative. In the recent reform of the structure of the European Convention procedures, the Commission has been abolished. A petition would now go directly to the Court,⁹² and the prior action of the Commission would not prevent the Court from hearing a case initiated by a new petition. Such a petition would be based on the application of English law to the facts of the case in the trial and domestic appeals. Those judicial proceedings would supply the necessary additional facts so that a finding in favor of the defendants by the European Court would not be foreclosed.⁹³ Therefore, it is important to consider the relevant jurisprudence of the European Court of Human Rights in order to determine how the case might ultimately be resolved.

B. *HERTEL V. SWITZERLAND*

The European Court of Human Rights has not to date dealt with a case involving alleged defamation when an organization or group of protesters has attempted to criticize the business practices of a large corporation. Therefore, principles taken from cases involving quite different fact situations will have to be applied to the facts of *McDonald's*. The closest fact situation arose in a 1998 case, *Hertel v. Switzerland*,⁹⁴ in which the Swiss courts found that a scientist had violated domestic unfair competition law⁹⁵ by challenging the safety of microwave ovens. The case was based on a magazine article that included an "extract" from the scientist's findings, and editorial elaboration that exaggerated the findings using very extreme and dramatic language and imagery. Finding a violation of the Convention, both the European Court and the Commission stressed that the statements were not purely commercial. Rather, they involved "a debate affecting the general interest [in] public health."⁹⁶ As will be seen, much of the pamphlet distributed by Morris and Steel likewise involved

⁹¹ *Id.*

⁹² See discussion of Protocol No. 9 in BUERGENTHAL, *supra* note 68, at 133.

⁹³ See Article 35, European Convention on Human Rights, formerly Article 27, para. 1 (b). See discussion in VANDIJK & VANHOOF, *supra* note 66, at 71-75.

⁹⁴ 28 Eur. H.R. Rep. 534 (1998).

⁹⁵ The Swiss Unfair Competition statute did not require that the violator be a competitor of the business that was subject to "unfair competition." *Id.* ¶ 22.

⁹⁶ *Id.* ¶ 47; see *H.U.H. v. Switzerland*, App. No. 25181/94, ¶ 50 (1997) (Eur. Comm'n H.R.).

matters of public health. The other issues discussed in the pamphlet were also of public interest, including environmental concerns, exploitation of Third World peoples, the condition of workers and cruelty to animals. The European Court in *Hertel* emphasized that the effect of the burden on expression was to “reduce [Hertel’s] ability to put forward in the public views which have their place in a public debate.”⁹⁷

In addition to the importance of a free discussion of matters of public health, the European Court in *Hertel* seemingly based its decision on a number of factors. Some of these issues are analogous to *McDonald’s* and some are not. According to the European Court, Hertel’s liability was “derived from the fact that in sending his paper to the [journal] he had accepted its being used in a simplified and exaggerated manner.”⁹⁸ The European Court stressed that Hertel was neither “author nor co-author” of the piece,⁹⁹ and did not choose the inflammatory illustrations used.¹⁰⁰ Although Morris and Steel also had nothing to do with the language of the pamphlet, they were directly involved in its distribution after it was published. Hertel, on the other hand, seemingly was not involved once he sent his paper to the journal. However, he did refuse to disassociate himself from the statements in the magazine once he learned of its contents. He also said at his trial in Switzerland that he approved of the use of the “symbols of death.”¹⁰¹

The European Court pointed out that Hertel’s paper had not “proposed that microwave ovens be destroyed or boycotted or their use banned.”¹⁰² Clearly Harris and Steel distributed the pamphlet with the intention that customers cease buying food from McDonald’s and some of the language urged customers to abstain from eating at McDonald’s.¹⁰³ The European Court also explained that the language of Hertel’s paper was expressed in “the conditional mood” and that Hertel chose “non-affirmative expressions” such as “might” and “deserves attention.”¹⁰⁴ As will be seen, the McDonald’s pamphlet contained “affirmative” language in some parts and “conditional” language in others. However, the trial judge in *McDonald’s*

⁹⁷ *Hertel* 28 Eur. H.R. Rep. at ¶ 50.

⁹⁸ *Id.* at ¶ 48.

⁹⁹ *Id.* According to the European Court the only words which came directly from Hertel were in the six page “extract” and some of the titles of the sections of the discussion. *Id.* The journal asserted that “microwave ovens are more harmful than the Dachau gas chambers.” *Id.* at ¶ 22.

¹⁰⁰ *Id.* at ¶ 50. The journal used images of the Reaper. *Id.* at 22. See discussion of the cartoons used in the McDonald’s pamphlet, *infra* notes 393-94 and accompanying text.

¹⁰¹ *Id.* at ¶ 50. Hertel testified in his Swiss trial that he “had to admit that the journalist from the magazine had gone a bit too far and that his article was a little tendentious. He said that he had not liked that very much as a scientist, but the reporter had nonetheless been right. It was sometimes necessary to use a journalistic style to wake people up.” *Id.* at ¶ 44.

¹⁰² *Id.* at ¶ 48.

¹⁰³ Appendix at 143.

¹⁰⁴ *Hertel* at ¶ 48.

interpreted some of the “conditional” language as “affirmative.” The European Court in *Hertel* also stressed that the publication had a limited, select circulation, and that there was no evidence that it had caused a reduction in sales or other damage to the makers of microwaves.¹⁰⁵ Certainly there is no evidence that the pamphlet distributed by Morris and Steel had any effect on McDonald’s sales. However, the distribution to prospective customers at McDonald’s stores was clearly aimed at those persons who would be most likely to negatively affect those sales. But given the prevalence of microwave ovens in western societies, one could assume that those reading the magazine in question would be just as likely to be affected as the customers at McDonald’s.

McDonald’s might also be distinguished because *Hertel* involved an injunction rather than damages. However, European courts ordinarily do not look upon injunctions as significantly more burdensome to speech than damages, and therefore they are much more likely than courts in the United States to grant that remedy.¹⁰⁶ According to one commentator, the European Court of Human Rights is also not particularly sensitive to the burdens on expression imposed by injunctions.¹⁰⁷ The Court in *Hertel* did, however, stress the scope of the injunction that prohibited “specific statements” that “partly censor the applicant’s work” and are “related to the very substance of the applicant’s views.”¹⁰⁸ Although *Hertel* would be free to express his ideas in academia and “outside the economic sphere,” the Court was not sure that this was “a significant reduction in the extent of the interference.”¹⁰⁹ The Court also noted that if *Hertel* failed to comply with the injunction he could be imprisoned.¹¹⁰

Hertel might be thought to present a stronger case for a finding of violation of the Convention than *McDonald’s* for some of the reasons discussed above. However, in one important respect the defendants in

¹⁰⁵ *See id.* at ¶ 49.

¹⁰⁶ Although in most European countries censorship is considered a particularly serious issue of freedom of expression, the term is ordinarily not applied to injunctions; rather, it is reserved for the more obvious need for approval by an agent of government before distribution. *See* Eric Barendt, *Prior Restraints on Speech*, 1985 PUB. L., 253, 256. Even censorship boards are not uniformly rejected. While the German Constitution explicitly prohibits censorship, *see id.*, in some other West European countries film censorship is a routine practice. *See id.* at 256, 265, 267.

¹⁰⁷ *See* Barendt, *supra* note 106 at 254.

¹⁰⁸ The injunction issued by the Swiss Court apparently prohibited *Hertel* from saying that:

food prepared in microwave ovens was a danger to health and led [sic] to in the blood of those who consumed it [sic] that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using in publications and public speeches on microwaves the image of death whether represented by a hooded skull carrying a scythe or by some similar symbol.

Hertel, 28 Eur. H.R. Rep. at ¶ 50.

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

McDonald's may be seen to have a stronger case, at least in regard to some of the bases for liability found by the trial court. The European Court in *Hertel* asserted that “[i]t matters little that his opinion is a minority one and may appear to be devoid of merit since in a sphere in which it is unlikely that any certainly exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.”¹¹¹ While some of the assertions in the *McDonald's* pamphlet were apparently false, others were true, but most were simply uncertain, and either the subject of an ongoing scientific debate or matters of opinion. Indeed, Morris and Steel could have a stronger case than *Hertel*, because, as will be seen, there is a good deal of respectable scientific support for many of the allegations in the pamphlet. The scientist in *Hertel* was virtually alone in his conclusions, and his studies had apparently been rather thoroughly discredited.¹¹²

Some of the additional arguments made by *Hertel* and some of the rationales adopted by the European Commission¹¹³ are worth noting because of their applicability to the *McDonald's* case, even though they were not explicitly referred to by the European Court. *Hertel* asserted that the microwave industry was using the law “to throttle a weak critic, whereas the producers of microwave ovens constantly advertise their products.”¹¹⁴ Of particular interest is the position of the European Commission on Human Rights that the exaggerated symbol of a “reaper” and language, including the statement that “all microwave ovens...should be destroyed,” did not strengthen the government’s case. Rather, this hyperbole actually made “clear to the reader that the applicant was aiming at expressing his own opinion on a matter on which he felt strongly, rather than engaging in a balanced and pondered scientific discussion.”¹¹⁵ This argument is even more appropriate in the case of an activist organization like Greenpeace, whose literature does not purport to be written by scientists and is not expected to present a balanced discussion. Nevertheless, as will be seen, unlike the European Commission, the trial judge in *McDonald's* placed great weight on some of the inflammatory language and illustrations in the pamphlet, and little weight on some of the more moderate assertions.¹¹⁶

¹¹¹ *Id.*

¹¹² Initially another scientist was collaborating with *Hertel*. However, he later distanced himself from the study after concluding that the “research had a weak basis.” *HUH v. Switzerland*, App. No. 25181/94, 94 Eur. Comm’n H.R. ¶ 50 (1997) (Commission Report).

¹¹³ At the time *Hertel* was decided the procedures of the European Convention on Human Rights required an initial report by the European Commission on Human Rights prior to referral to the Court. See *BUERGENTHAL*, *supra* note 68, at 133. The new procedures under Protocol No. 9 abolish the Commission and provide for direct petitions to the Court. See *id.* at 133-34.

¹¹⁴ *HUH*, 94 Eur. Comm’n H.R. at ¶ 39.

¹¹⁵ *Id.* at ¶ 51.

¹¹⁶ See for example *infra* text accompanying notes 392-395 for a discussion of the court’s reference to headings and cartoons in interpreting the words “diet linked to disease.”

C. PRINCIPLES OF ADJUDICATION UNDER ARTICLE 10

Although *Hertel* is the closest fact situation, principles have been developed in a number of cases that would be relevant to the application of Article 10 in *McDonald's*.

1. *Balancing Matters of Public Concern*

Ordinarily some categories of speech will weigh much more than others in the European Court's balancing process. Political expression has received the most protection, and the Court has stressed the primary importance that kind of expression must enjoy in a democratic society.¹¹⁷ On the other hand, the Court has granted a greater "margin of appreciation" to domestic authorities in the area of commercial expression.¹¹⁸ But *Hertel* illustrates that the European Court would be unlikely to categorize the criticism of McDonald's as commercial expression, both because Morris and Steel were not competitors of McDonald's and because the issues discussed in the pamphlet were matters of serious public concern. One commentator has explained that the European Court has defined political expression quite expansively; It "is not, despite the urgings of governments, restricted to matters of high politics."¹¹⁹ Rather the Court itself has explained that "there is no warrant...for distinguishing...between political discussion and discussion of other matters of public concern."¹²⁰ Indeed, even in a case involving a serious issue of business competition, the Court has focused on the fact that the expression involved addressed a matter of public concern.¹²¹ However, categorizing the expression is only one aspect of the European Court's analysis, albeit a very important aspect. One commentator has explained that

¹¹⁷ See HARRIS, *supra* note 72, at 397. The European Court has given less protection to artistic expression. See *id.* at 401-02. However, these cases have involved moral and religious concerns and the Court has asserted that a greater "margin of appreciation" or deference to domestic legal authorities is warranted under such circumstances than when the concern is an alleged damage to reputation in the area of political expression. *Id.*

¹¹⁸ *Id.* at 402.

¹¹⁹ *Id.* at 397.

¹²⁰ Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A), reprinted in 14 Eur. H.R. Rep. 843, 865 (1992) (finding expression on police misconduct as a matter of public concern entitled to special protection under Article 10).

¹²¹ See *Barthold v. Germany*, 90 Eur. Ct. H.R. (ser. A), reprinted in 7 Eur. H.R. Rep. 383, 404 (1985). In *Barthold* the Court held that a professional rule against advertising by veterinarians could not be applied consistent with Article 10 under the facts of that case. See *id.* at 401-04. Dr. Barthold was quoted expansively and his picture appeared in a newspaper article regarding the need for night emergency veterinary service in Hamburg. See *id.* at 385-86. Even though his comments resulted in publicity for his practice and the government had contended that they included disparaging remarks about other practitioners, the Court concluded that any publicity involved in the article was entirely secondary to his contributions to a debate of importance to the community. See *id.* at 404.

[It] would be a mistake...to imagine that the characterization of the kind of expression would alone be enough to decide whether interferences were legitimate. Many factors related to the vigour of the expression, the means by which it is communicated and the audience to which it is directed will be relevant in each case. The inquiries which must be made are wide and the process by which the information must be assessed is complicated.¹²²

The wide range of issues that the European Court considers in dealing with Article 10 cases makes predicting results in particular cases difficult. Nevertheless, that Court's emphasis on the importance of giving wide latitude to expression on matters of public interest casts doubt on the application of England's defamation law in *McDonald's*. Because the European Court balances a number of considerations and applies Article 10 on a case by case basis, it would be appropriate to consider the effects of various aspects of English law. These include the strict liability nature of the defamation action, the allocation of the burden of proof, the refusal of legal aid in a complex and lengthy trial, and the high damages available in such actions in English courts. Although the damage award in *McDonald's* was not high for an English court, it was high when compared to awards in Continental Europe,¹²³ and could certainly be viewed as chilling dissenting public opinion in England. The argument for squelching such expression is particularly weak when one considers the fact that, as in *McDonald's*, the targets of criticism in defamation actions are ordinarily either government, politicians or wealthy corporations. Such individuals or entities have ample means to respond to such attacks by engaging in the debate and contradicting publicly the allegations made. Instead, in *McDonald's*, as in *Hertel*, they chose to attempt to stifle the debate.¹²⁴

¹²² HARRIS, *supra* note 72, at 414.

¹²³ See *supra* notes 25-38 and accompanying text.

¹²⁴ The European Court has explained that free expression is particularly important to political opponents of the government. In *Castells v. Spain*, the Court stated that "the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media." 236 Eur. Ct. H.R. (ser. A), reprinted in 14 Eur. H.R. Rep. 445, 477 (1992). Although the *McDonald's* case does not involve criticism of the government, it does involve criticism of a huge multinational corporation with ample resources to respond in ways other than suing Harris and Steel for libel. One critic of the case has pointed out that McDonald's has sales greater than the gross national product of many small countries. See JOHN VIDAL, *MCLIBEL* 243 (1997). Furthermore, the fact that the case was civil rather than criminal is unimportant with respect to the effect on freedom of expression. The quite small fines available in criminal defamation cases would be much less likely to chill expression than the possibility of huge damage awards and legal fees in civil actions. Although imprisonment is often authorized by statute in criminal defamation or insult cases, it is almost never imposed. See *supra* note 25.

2. *Difficulty of Proof*

Much of the factual information needed by Morris and Steel for their defense was very difficult for them to compile.¹²⁵ There is some support in the European Court's jurisprudence for the proposition that difficulty of proof of truth should be a factor in determining whether liability for defamation is appropriate. In the 1991 case, *Thorgeir Thorgeirson v. Iceland*,¹²⁶ a journalist's criminal conviction for defamation was found to violate Article 10. Although the Court discussed a number of factors in reaching its conclusion, it stressed that it was "unreasonable if not impossible" for the petitioner to prove the truth of the allegations of police brutality in his article because he was relating what others had told him.¹²⁷ Certainly, the task of Morris and Steel in attempting to prove the truth of all of the allegations in the leaflet was even more daunting. As one commentator explained:

McDonald's strategy was to require Steel and Morris.... two legal amateurs to come up with primary evidence, to prove in particular terms what many respected dietary and food organizations were saying in general terms about diet. The onus was on Steel and Morris to provide conclusive proof of cause and effect between particular elements of the diet and particular diseases, instead of the broad general statement about the link between a high-fat/low-fibre diet and heart disease and cancer. Any argument, scientific or cultural, that was legally incomplete, contradictory, inadmissible or

¹²⁵ Due to lack of resources, their access to expert witnesses was obviously not as great as that of McDonald's. Furthermore, to some extent, one needs information in order to determine what information is possibly available and then to seek the information—a "catch 22" situation. A lack of familiarity with applicable procedures and lack of staff to meet court deadlines was also a problem. See VIDAL, *supra* note 124, at 82. Although McDonald's was obliged to supply them with specific information that was requested, the author of a book about the case suggested that McDonald's may not have been forthcoming with some information. He pointed to the fact that McDonald's lead barrister contended that documents defendants had identified as showing an "unsatisfactory" bacterial count in some of the beef used had been "inadvertently destroyed" by McDonald's. *Id.* at 132-33.

¹²⁶ 239 Eur. Ct. H.R. (ser. A), *reprinted in* 14 Eur. H.R. Rep. 843 (1992).

¹²⁷ *Id.* at 866. Perhaps the most significant distinction between *McDonald's* and *Thorgier* is that in the latter case the statements were not about named individuals, but referred to a relatively small number of unidentified police officers. See *id.* ¶ 66. This would be a factor weakening the interest in reputation that under Article 10 would be weighted against freedom of expression. However, in discussing this aspect of the case the European Court in *Thorgier* did not seem to analyze the problem in the suggested manner. Instead the Court found the factor relevant to whether the defendant had the "aim" to harm the "reputation of the police as a whole." *Id.* Although one might say the defendants in *McDonald's* intended such harm to McDonald's, that harm was merely a necessary result of what the defendants saw as protecting the public from dangerous business practices. There was no personal vendetta or monetary gain in defendants' actions.

given by someone whom McDonald's considered to be unqualified would be mercilessly dismissed by [their lead barrister].¹²⁸

As will be seen in Section IV, McDonald's was largely successful in this strategy.

3. Opinion and Value Judgments

Morris and Steele's burden of proof of the truth of the statements in the leaflet was complicated by the fact that some of the statements were impossible to prove true or false, even if they had access to limitless information. These statements were matters of subjective opinion and value judgments. Justice Bell interpreted some of these statements as facts that needed to be proven.¹²⁹ The European Court of Human Rights has been particularly sensitive to the distinction between facts and opinions or value judgments. English and U.S. defamation law also recognizes this distinction; as will be discussed below, value judgments, and opinions are often protected under the defense of "fair comment."¹³⁰ In the United States, the Supreme Court's defamation jurisprudence since *New York Times v. Sullivan*¹³¹ has given defendants in most cases much more formidable weapons than the traditional "fair comment" defense.¹³² However, in England, the defense is still one of the best weapons available to the defendants.¹³³

As will be seen in Section IV, the question whether statements in the pamphlet were facts or opinions was a major theme relevant to the analysis of many of the allegedly defamatory statements. Justice Bell tended to interpret statements that might have been considered opinion to be statements of fact, thereby making the defendants' defense more difficult. There is some question whether his interpretations were correct under English law. However, his characterizations were clearly questionable under the jurisprudence of the European Court of Human Rights.

In *Lingens v. Austria*,¹³⁴ decided in 1986, the European Court began to focus on the distinction between statements of fact and statements of opinion. The Court explained that "[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof."¹³⁵ There is no possibility of a defense when one is charged with

¹²⁸ VIDAL, *supra* note 124, at 105.

¹²⁹ See, e.g. *infra* text accompanying notes 493-96 (working conditions are "bad").

¹³⁰ See *infra* text accompanying notes 184-219.

¹³¹ 376 U.S. 254 (1964).

¹³² See discussion of *New York Times infra* notes 177-83 and accompanying text.

¹³³ See *infra* text accompanying notes 159-173, 177, 184-96.

¹³⁴ 8 Eur. H.R. Rep. 420 (1986).

¹³⁵ *Id.* at 420.

defamation or insult on the basis of a value judgment or an opinion.¹³⁶ The distinction was not new to courts in Continental Europe. The importance of protecting expressions of “opinion” had previously been established as a matter of constitutional jurisprudence by the German Constitutional Court in a 1982 case.¹³⁷ The European Court has relied upon the distinction between fact and opinion in a number of cases since *Lingens*.¹³⁸ But in some cases the Court has sustained criminal convictions for statements that could be classified as opinion rather than fact, seemingly ignoring the distinction.¹³⁹

¹³⁶ See *id.* at 420-21.

¹³⁷ Campaign Slur Case, 1982 BVerfGE 1, excerpted in KOMMERS, *supra* note 74, at 389 (involving a defendant who denounced the opposing political party using terminology that described it as like another extreme right wing party that is viewed by many as being “neo-Nazi”). The Constitutional Court explained:

The basic right is designed primarily to protect the speaker’s personal opinion. It is irrelevant whether an opinion is “valuable” or “worthless,” “correct” or “false,” or whether it is emotional or rational. If the opinion in question contributes to the intellectual struggle of opinions on an issue of public concern, it is presumed protected by the principle of free expression. Even caustic and exaggerated statements, particularly those uttered in the heat of an election campaign, are fundamentally within the protection of Article 5 (I) [I].

Id. at 390. Somewhat similar views had been expressed by the German Constitutional Court as far back as 1961. See discussion of and excerpts from *Schmid-Spiegel Case*, 1961 BVerfGE 113, in KOMMERS, *supra* note 74, at 377-80. After *Schmid-Spiegel*, the German Court went through a period in which it was not consistently speech protective. Instead, the Court evidenced more concern for the protection of the reputation of individuals subject to derogatory comments; in the 1980s the Court again showed more concern for expression than for the interests of those alleged to be harmed the expression. See discussion *id.* at 381-88. Despite the German Court’s generally speech protective stance, it has in recent years on occasion found that the expression was so outrageous that protection under the German Basic Law (their constitution) was not possible. Thus in the *Political Satire Case*, 1987 BVerfGE 309, the Court concluded that prosecution under criminal insult law was consistent with the Basic Law when a cartoon depicted a politician as a pig copulating with another pig dressed in judicial robes. See discussion in KOMMERS, *supra* note 74, at 436. Because the German Constitutional Court does not describe cases by names, the case names referred to are those used by Kommers in his discussion of the Court’s jurisprudence.

¹³⁸ See *Oberschlick v. Austria* (No.2), App. No. 20834/92 (1997), 25 Eur. H.R. Rep. 357 (1998) (Eur. Ct. H.R.) (calling a politician an “idiot” based on a speech in which he asserted that only soldiers who had fought on one or another side in World War II were entitled to free speech protection could not be basis of criminal conviction for insult); *De Haes & Gijssels v. Belgium*, App. No. 19983/92 (1997), 25 Eur. H.R. Rep. 1 (1998) (accusation of political motive based on political connections between judges and father in a child custody case and upon facts of case which strongly suggested abuse by father were protected value judgments which were not capable of proof); *Schwabe v. Austria*, 242-B Eur. Ct. H.R. (ser. A) (1992). (Comparison of a recent drunken driving incident involving a politician to an 18 year old conviction for negligent driving causing death by an opposition politician was a value judgment. Therefore, statute prohibiting reproaching “a person with a criminal offense in respect of which the sentence had already been served” and of defamation could not be applied consistent with Article 10); *Oberschlick v. Austria*, 19 Eur. H.R. Rep. 389 (1995) (publication of charges that politician had incited hatred and encouraged policies of outlawed political party could not be the basis of prosecution for criminal defamation because it was an expression of a value judgment).

¹³⁹ Three of these cases involved allegedly defamatory attacks upon the judiciary. See *Schopfer v. Switzerland*, 56/1997/840/1046 (May 20, 1998); *Prager & Oberschlick v. Austria*, 21 Eur. H.R. Rep. 1 (1995); *Barfod v. Denmark*, 13 Eur. H.R. Rep. 493 (1989). The fourth case involved a newspaper article published during a pending criminal case that asserted the guilt of a defendant.

Of course, distinguishing between facts and opinions or value judgments is frequently very difficult. Courts in England and the United States have struggled with this task in numerous cases.¹⁴⁰ Although the European Court has not explicitly grappled with this analytical problem, some of the cases in which expression has been categorized as opinion appear to approach the question in a quite speech-protective way. The European Court has not been consistent in this regard;¹⁴¹ however, one commentator has explained that:

[o]n matters of general, political interest the Court is more inclined to regard comments as involving the statement of the author's opinion rather than as a statement of a fact and, if of fact, to hold that their publication ought not to be interfered with if the allegations are made in good faith.¹⁴²

It seems that both the European Court and the German Constitutional Court approach most defamation and insult cases using the analytical technique referred to in the United States as the "innocent construction rule."¹⁴³ Under this approach, which, as will be explained

See *Worm v. Austria*, App. No. 22714/93 (1997), 25 Eur. H.R. Rep. 454 (1998). The journalist was convicted of "having exercised prohibited influence on criminal proceedings." *Id.* at 462.

The Court has found a violation of the Convention in one case involving attacks on the judiciary. *De Haes & Gijssels*, 25 Eur. H.R. at 51-56. The facts in *DeHaes* were, however, much more persuasive than in *Barford*, *Prager*, and *Schopfer* in suggesting that the judges did act improperly. However, the facts in those three cases were arguably also strong enough to support the opinions expressed. It seems that the European Court is particularly solicitous of attacks on the judiciary and is willing to allow restrictions except in situations in which the facts give extraordinary support to the criticism.

The most recent case to deal with expression that can be seen as opinion involved a criminal prosecution for calling police "oafs" and "dumb." In an opinion that scholars see as striking inconsistent with *Oberschlick* (No.2), see *supra* note 138, the European Court of Human Rights found no violation of the Convention. See *Janowski v. Poland*, Ap. No. 25 716/94, 21 Jan. 1999. Legal scholars have commented that the opinion suggests that a double standard is being applied by the Court in cases from the former Soviet block. See Anthony Lester, *Getting Off Lightly: The European court of human rights must apply proper standards to former communist regimes*, THE GUARDIAN, May 31, 1999, at 14.

¹⁴⁰ See *infra* notes 196-219 and accompanying text.

¹⁴¹ See *supra* notes 138-39.

¹⁴² HARRIS, *supra* note 72, at 400.

¹⁴³ See, e.g., Vick & Macpherson, *supra* note 24, at 956 (discussing the jurisprudence of the German Constitutional Court).

The German Constitutional Court in 1994 referred four cases back to the trial court for reconsideration based on the assumption that "[a] criminal court has to investigate if the expression in question must exclusively be understood as a slander or if it is open to another interpretation. In the latter case a conviction for slander cannot be delivered." European Commission for Democracy through Law, *Germany: Federal Constitutional Court*, 1995 BULL. ON CONST. CASE-LAW 309. The case involved prosecutions under German insult law for stating that "all soldiers are murderers." *Id.* The trial court was instructed to determine whether the statement "really meant an insult to the members of the federal armed forces." *Id.*

below, is explicitly employed in some U.S. states,¹⁴⁴ and seems implicitly used in most U.S. defamation cases,¹⁴⁵ a court should choose an interpretation of the challenged statements that will result in protection for the expression if such an interpretation is reasonable.¹⁴⁶ Justice Bell in *McDonald's*, however, seemingly eschewed such a technique, and, as will be discussed below, on some issues appeared to employ an opposite technique.

When a court decides to categorize a statement as opinion, frequently there will be a further question whether the publication includes a sufficient factual basis for that opinion.¹⁴⁷ Sometimes the factual basis need not be in the publication because it is well known, or easily accessible,¹⁴⁸ or because the statement is mere hyperbole with no serious factual connotations.¹⁴⁹ Again, both the European Court and the German Constitutional Court seem to have chosen a speech protective approach to analyzing this issue. For instance, in *DeHaes & Gijssels v. Belgium*,¹⁵⁰ the European Court asserted that an opinion “may be...excessive...in the absence of *any* factual basis.”¹⁵¹ As will be seen, the traditional English and U.S. fair comment defense ordinarily requires a more substantial basis than this *dicta* in *DeHaes* suggests is required under Article 10.¹⁵² The German Constitutional Court has addressed the related issue of whether factual support for an opinion must be included in the publication and found that it need not be.¹⁵³

D. APPLYING ARTICLE 10 TO *MCDONALD'S*

Although the European Court has found the application of English law in violation of Article 10 of the Convention on several occasions,¹⁵⁴ that

¹⁴⁴ See *infra* text accompanying note 163.

¹⁴⁵ See *infra* notes 166-67 and accompanying text.

¹⁴⁶ See *infra* notes 163-67 and accompanying text.

¹⁴⁷ See *infra* notes 191-93 and accompanying text.

¹⁴⁸ See *infra* note 191 and accompanying text.

¹⁴⁹ Sack and Barron explain that in the U.S. “[c]ommon-law tradition has combined with constitutional principles to clothe use of epithets, insults, name-calling and hyperbole with virtually impenetrable legal armor.” ROBERT D. SACK, ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* 3 (Supp. 1996).

¹⁵⁰ See App. No. 19983/92, 25 Eur. H.R. Rep. 1 (1997); see *supra* note 135 for a discussion of *DeHaes*.

¹⁵¹ App. No. 19983/92, 25 Eur. H.R. Rep. 1, 39 (1998) (emphasis added). The Court in *DeHaes* purported to use this proposition to distinguish *Prager* and *Oberschlick* (No. 2). These cases are discussed *supra* note 134.

¹⁵² See *infra* text accompanying notes 191-93.

¹⁵³ The German Court, reviewing a civil defamation judgment explained that “[t]he basic right to free expression of opinion is intended not merely to promote the search for truth but also to assure that every individual may freely say what he thinks, even when he does not or cannot provide an examinable basis for his conclusion.” Echternach, 1976 BVerfGE 163, 168-71, quoted in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 203 (1994).

¹⁵⁴ See *supra* note 54.

Court has never addressed the application of English substantive defamation law.¹⁵⁵ Despite the Commission decision referred to above,¹⁵⁶ there is a serious question whether the European Court would find that Justice Bell's analysis in *McDonald's* is consistent with the Convention. The rather subjective balancing approach applied by the European Court, usually with a heavy weight on the side of expression, could easily clash in a case like *McDonald's* with the more rigid English defamation law which is routinely criticized as being the least speech protective of Western democracies.¹⁵⁷ Indeed, plaintiffs from other countries have brought suit in England on the basis of the distribution of a few copies of a publication in order to take advantage of England's restrictive law.¹⁵⁸ Because English defamation law is more burdensome to expression than the law of most Convention signatory countries, the possibility that the European Court would find a violation of the Convention in *McDonald's* is enhanced. In the analysis of the facts of the case in Section IV, the likely conflicts between English law as applied in *McDonald's* and Convention jurisprudence will be pointed out.

Although the speech protective jurisprudence of the European Court may be inconsistent with English law, the very subjective case by case, balancing analysis used by the European Court makes predictions difficult. However, there is no doubt that English law is inconsistent with defamation jurisprudence in the United States. As the facts of *McDonald's* are examined in Section IV, the ways in which the U.S. Supreme Court's analysis would have differed from Justice Bell's analysis will be highlighted. In the following section, the defamation law of England and the United States will be described and compared.

III. DEFAMATION LAW IN ENGLAND AND THE UNITED STATES

A. WHEN IS A STATEMENT DEFAMATORY?

The threshold issue for a defamation suit in any country is the same—whether the statement is defamatory. There is little difference in the definition among various countries. In a 1936 English case, Lord Aitken defined defamatory words as those “which tend to lower the person in the

¹⁵⁵ The Court has found that the assessment of damages in a English defamation case violated the Convention. See *supra* note 33.

¹⁵⁶ See *supra* text accompanying notes 75-93.

¹⁵⁷ See *supra* text accompanying notes 20-38.

¹⁵⁸ See *Vick & Macpherson, supra* note 24, at 935.

estimation of right-thinking people.”¹⁵⁹ Also, there seems to be no difference in the requirement that plaintiff has the burden of proof to show the defamatory nature of the statement.¹⁶⁰

Both English and U.S. law looks not only to the words themselves, but also to the circumstances and the context in determining whether a statement is defamatory. Frequently the defamatory meaning arises from innuendo, rather than from the actual words.¹⁶¹ It is not always easy to decide whether a statement is defamatory. This is the first point at which there may be a significant divergence between English and U.S. law—a divergence that would be relevant to the analyses applicable to some of the allegedly defamatory statements in the pamphlets in *McDonald’s*. The traditional English approach is simply to determine the “natural and ordinary” meaning of the words, given the context and circumstances.¹⁶² Obviously, there is not always just one “natural and ordinary” meaning. A few U.S. states have adopted the “innocent construction rule,” which requires that if there is a non-defamatory meaning that can reasonably be considered natural, it should be chosen, even if there is also a defamatory meaning that would also be considered “natural.”¹⁶³ As discussed above, the German Constitutional Court has explicitly interpreted their Basic Law as requiring a similar approach to their criminal defamation law,¹⁶⁴ and this approach is consistent with the analyses of the European Court of Human Rights in some cases.¹⁶⁵ Although the United States Supreme Court has not explicitly adopted the innocent construction rule, commentators have suggested that “as a matter of constitutional law the First Amendment thumb is put on the balance in favor of a finding [that] expression is...nondefamatory.”¹⁶⁶ They have asserted that the Supreme Court’s tendency in “the public-issue context” to view statements as opinion rather than fact is an example of this principle.¹⁶⁷

¹⁵⁹ *Sim v. Stretch* 52 T.L.R. 669 (1936), *quoted in* SCOTT-BAYFIELD, *supra* note 14, at 10. The rule in the United States is described in the RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (1977) as language which subjects a person “to hatred, ridicule or contempt.”

¹⁶⁰ See SCOTT-BAYFIELD, *supra* note 14, at 10 (English law); MIDDLETON & CHAMBERLIN, *supra* note 22 at 74 (U.S. law).

¹⁶¹ See SCOTT-BAYFIELD, *supra* note 14, at 13-16 (English law); MIDDLETON & CHAMBERLIN, *supra* note 22, at 84-85 (U.S. law).

¹⁶² See REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, at 22-23. An English jurist has pointed out the difficulty in determining whether a statement is defamatory under the test applied. Lord Diplock noted the “artificial” idea of the “natural and ordinary meaning” test. *Slim v. Daily Telegraph*, 2 Q.B. 157, 171 (1968), *quoted in* REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, at 24.

¹⁶³ MIDDLETON & CHAMBERLIN, *supra* note 22, at 83. See generally Kyu Ho Youm, *The Innocent Construction Rule: Ten Years After Modification*, 14 COMM. & L. 49 (1992).

¹⁶⁴ See *supra* text accompanying note 143.

¹⁶⁵ See *supra* text accompanying notes 142, 144-46.

¹⁶⁶ ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* 120 (2d ed. 1994).

¹⁶⁷ *Id.* (citing *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (Stating that the word “blackmail” in the context of the public controversy was merely “rhetorical

In addition to proving that a statement was defamatory, in the United States plaintiffs must ordinarily prove that they were harmed.¹⁶⁸ Except for some slander actions, English law does not require evidence of damage—it is presumed.¹⁶⁹ However, the distinction between England and the United States may be more semantic than real; proof of actual damage in the United States is not very difficult, usually consisting of quite general and speculative testimony.¹⁷⁰ Apparently, the requirements of proof of actual damages is more rigorous in continental Europe.¹⁷¹

In England, once a plaintiff proves a defamatory meaning and that the statement refers to her, the prima facie case is over. The plaintiff will win unless the defendant can sustain the burden of proof of one of the defenses. Although this approach may seem draconian to many lawyers in the United States, it should be kept in mind that not so long ago—before *New York Times v. Sullivan*¹⁷² was decided in 1964—U.S. libel law was essentially identical to current English law.

hyperbole.”)). Sack and Baron also refer to a Second Circuit case in which the judge explained that “what is libelous must...be measured very carefully because, as Justice Harlan said in *Curtis Publishing Co. v. Butts*,...public officials and public figures have ‘sufficient access to means of counter-argument to be able to expose through discussion the falsehood and fallacies of the defamatory statements.’” SACK & BARRON, *supra* note 166, at 120 (quoting *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)(term “fascist...fellow traveler” too subjective to be susceptible of truth or falsity).

¹⁶⁸ The United States Supreme Court has held that “presumed” damages are only available if the *New York Times* “malice” standard has been satisfied. *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). See *infra* notes 177-83 and accompanying text for a discussion of *New York Times*. Of course this standard is required for any defamation action when the plaintiff is a “public figure,” so the rule’s only importance involves cases of defamation of non-public figures. See *infra* text accompanying note 181 and accompanying text. The one exception to the requirement of malice for the recovery of presumed damages is a private plaintiff suing for defamation over a matter unrelated to a public concern. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality).

¹⁶⁹ *Jones v. Jones*, 2 App. Cas. 481, 500 (1916).

¹⁷⁰ See MIDDLETON & CHAMBERLIN, *supra* note 22, at 125. However, damages must always be proven in the U.S. if the cause of action is “product disparagement,” rather than “defamation.” For recovery in a product disparagement suit plaintiffs must prove that “the communication played ‘a substantial part in inducing others not to deal with her.’” Lisa Magee Arent, *A Matter of “Governing Importance”*: *Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 46 IND. L.J. 441, 448 (1992)(quoting from *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex.1987)). The cause of action frequently overlaps with defamation of a business plaintiff, as it would in the *McDonald’s* case. When there is an overlap, the defamation rules would apply. Arent convincingly argues that the more speech protective rule of business disparagement should apply when there is such an overlap. See Arent, at 471. English law apparently does not distinguish between product disparagement and defamation. According to Carter-Ruck, injury to “business reputation [is] actionable without proof of special damages” in England. CARTER-RUCK *supra* note 22, at 74.

¹⁷¹ See, e.g., *Vick & McPherson*, *supra* note 24 at 904 (France), 956 (Germany).

¹⁷² 376 U.S. 254 (1964).

B. JUSTIFICATION

The most obvious defense to libel is “justification:” the statement was true. It is not necessary that every detail of the statement be true. The English Defamation Act of 1952 requires that:

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defense of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges.¹⁷³

As will be seen, a good case can be made that, with respect to many of the allegedly defamatory statements, Justice Bell placed a greater burden on the defendants than the “justification” defense in England requires.

In *New York Times*, the U.S. Supreme Court shifted the burden from the defendants to prove truth to public figure plaintiffs to prove falsity as an element of their cause of action.¹⁷⁴ This rule alone probably would have resulted in victory for the defendants on nearly all of the alleged defamatory statements had *McDonald’s* been tried in the U.S. Furthermore, although the U.S. Supreme Court has not definitively articulated the standard of proof of falsity, most courts in the United States have assumed that the standard is “clear and convincing evidence,” the same standard required by the Court for “malice.”¹⁷⁵ This standard has been described as requiring that there be a “high probability” which is “substantially greater” than the opposite likelihood.¹⁷⁶ As will be seen, with rare exceptions, the evidence adduced at trial was insufficient to conclude that the plaintiffs could have satisfied the burden of proof of falsity in *McDonald’s*.

¹⁷³ Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 5 (Eng.) [hereinafter Defamation Act of 1952]. Amended by Defamation Act of 1996.

¹⁷⁴ See *New York Times*, 376 U.S. at 279-80. A 1986 case extended that requirement to private plaintiffs involved in matters of public concern suing media defendants. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). However, Justice O’Connor explicitly pointed out in her opinion for the majority that the Court was not deciding whether the plaintiff would have to prove fault in the case of a non-media defendant. See *id.* at 775.

¹⁷⁵ SACK & BARRON, *supra* note 166, at 183. See *infra* note 179 for a discussion of the standard of proof for “malice.”

¹⁷⁶ *Dacey v. Connecticut Bar Ass’n*, 170 Conn. 520, 537 (1976), quoted in SACK & BARON, *supra* note 166, at 307. Sack and Baron have observed that “the extend to which juries respond to the niceties of language in judicial charges is anything but clear. It may be that the fine line between ‘preponderance’ and ‘clear and convincing’ does not significantly affect the outcome of jury verdicts in defamation litigation except in unusual cases.” *Id.* at 308. However, the rule could be particularly important at the summary judgment and directed verdict stage, as the judge would be required to determine whether a reasonable jury could find that this high evidentiary standard could be or had been met. See *id.* at 309.

C. FAULT

One of the important differences between U.S. and English defamation law is that in the United States the tort is no longer a strict liability action. The United States Supreme Court held in *New York Times* that public official plaintiffs must prove “malice” if they are suing for defamation in a matter involving their “official conduct.”¹⁷⁷ Malice can be proven by a showing that the defendants knew the statements were false or recklessly disregarded the truth.¹⁷⁸ In a later case the Court explained that to establish “reckless disregard” plaintiff must prove that defendant had a “high degree of awareness of [the] probable falsity” of the statement.¹⁷⁹ Three years after *New York Times* the Supreme Court extended the rule to “public figures,” defined as persons who “voluntarily...have assumed roles of especial prominence in the affairs of society.”¹⁸⁰

¹⁷⁷ 376 U.S. at 280. The Court in *New York Times* did not define the terms “public official” or “official conduct.” Lower courts have taken a broad approach to the latter issue finding that matters related to the character of the plaintiff are related to their “official conduct.” See MIDDLETON & CHAMBERLIN, *supra* note 22, at 98. Two years after *New York Times*, the Court explained that the term “public official” refers to public employees “who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

¹⁷⁸ See *New York Times*, 376 U.S. at 280.

¹⁷⁹ *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Further refinements by the Court have referred to statements that are “so inherently improbable that only a reckless man would have put them into circulation” or that there are “obvious reasons” to doubt the credibility of the statements. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

After examining cases applying the “reckless disregard” standard, Professor Middleton concluded that:

The courts ask whether a journalist adequately investigated a story given the time available. The courts consider whether the reporter chose reliable sources, ignored warnings that a story was wrong, or disregarded inconsistencies. Other factors that could contribute to a finding of actual malice include a mistake in interpretation, a use of the wrong terms, and a biased selection of facts. Proof of motives such as ill will or hatred could be one of the factors considered. So could intent to print sensational stories in order to attract readers. The failure to print a retraction could also be a factor. Ordinarily, one of these items alone is not sufficient evidence of actual malice—however, a combination of them could be.

MIDDLETON & CHAMBERLIN, *supra* note 22, at 111.

¹⁸⁰ *Gertz v. Welch, Inc.*, 418 U.S. 323, 345 (1974). Lower courts have had little help from the Supreme Court in determining who is a “public figure” and there is a good deal of inconsistency in their findings. The problem has been exacerbated by the creation of a hybrid group—limited public figures. These individuals are subject to the *New York Times* rule only in the context of a particular public controversy which they have “thrust themselves” into. *Gertz*, 418 U.S. at 345. Some popular entertainers, and prominent leaders of political organizations have been found to be all-purpose public figures. Some actors, athletes, Nobel Prize winners, civil rights activists, professors and columnists have been found to be “limited public figures.” DONALD M. GILLMOR & JEROME A. BARRON, *MASS COMMUNICATION LAW: CASES AND COMMENT* 241 (5th ed. 1990).

Lower courts have narrowly defined the term “public controversy” so as not to include everything the public finds newsworthy. See, e.g., *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). Consistent with this approach, the Supreme Court refused to find a messy

The Supreme Court has also found that even when the plaintiff is a purely private individual strict liability is inconsistent with the First Amendment. Thus, in 1974 the Court held that while private individuals did not have to prove malice, the First Amendment required that they prove negligence in order to recover in a defamation action.¹⁸¹

Corporations are treated like individuals for purposes of libel actions in both the U.S. and England.¹⁸² Therefore, had the *McDonald's* case been litigated in the United States, there is no doubt that the company would have been considered a “public figure.” As the analysis in Section IV will illustrate, the Company would have had a very difficult time establishing the requisite proof of “malice.” Therefore, the result would very probably have been a judgment for the defendants on that basis alone. This result would have been particularly likely because the U.S. Supreme Court in *New York Times* found that the First Amendment requires a standard of proof of malice higher than the more probable than not test applied in most civil actions. Public figure plaintiffs must establish malice with “clear and convincing evidence.”¹⁸³

D. “OPINION,” “FAIR COMMENT” AND “PROVABLE AS FALSE”

One element of English defamation law is more speech protective than the law of some other European countries.¹⁸⁴ In England a defense of “fair comment” may be available in defamation actions which involve statements of “opinion” rather than “fact.” As explained above, the European Court of Human Rights’ interpretation of Article 10 of the Convention,¹⁸⁵

divorce proceeding to be a “public controversy” in a suit by a wealthy, socialite wife who was allegedly defamed by the press. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

¹⁸¹ See *Gertz*, 418 U.S. at 345-48. Some states have gone further, interpreting their own laws to require private defamation plaintiffs who are involved in matters of public interest to prove knowing falsehood or reckless disregard of the truth for damages of any kind. New York has taken an intermediate position, requiring proof of gross negligence, but not reckless disregard. See MIDDLETON & CHAMBERLIN, *supra* note 22, at 118-19, n.197.

Courts differ as to whether the negligence standard should be applied by reference to the ordinary reasonable person or the ordinary reasonable journalist, and the Supreme Court has yet to address this issue. See *id.* at 119. For a discussion of the kind of evidence that courts have required for proof of negligence, see *id.*

The Court in *Gertz* also held that private figures involved in matters of public interest must prove “malice” in order to collect presumed or punitive damages. See 418 U.S. at 350-52.

¹⁸² See Arent, *supra* note 170, at 446 (U.S. law); CARTER-RUCK ET AL., *supra* note 22, at 73 (English. law).

¹⁸³ *New York Times*, 376 U.S. at 285-86. See SACK & BARON, *supra* note 166, at 306-07. This standard has been assumed to be the same as the “clear and convincing” standard used in other contexts. *Id.*; *supra* note 176 for a discussion of this standard of proof in the context of proof of falsity.

¹⁸⁴ See *Lingens v. Austria*, *supra* note 21.

¹⁸⁵ See *supra* text accompanying notes 129-52.

and the German Constitutional Court's interpretation of the freedom of expression guarantee of their Basic Law have in recent years developed similar speech protective analyses.¹⁸⁶ The European Court's analysis will probably result in a gradual acceptance of a "fair comment" type defense in those countries in Europe where a comparable defense is not available.¹⁸⁷

Before *New York Times*, the fair comment defense in U.S. defamation actions was, as in England today, one of defendants' best weapons. Although it varied slightly from state to state, the defense was essentially the same as that of current English law. Today, it is rare that fair comment will offer defendants more protection than the requirement that plaintiffs prove falsity and malice. However, in states where fair comment is interpreted broadly, the common law defense can occasionally still play an important role.¹⁸⁸

In both English and U.S. law the burden of proof of "fair comment" is allocated to the defendant. An influential parliamentary law reform committee described the English rule as follows:

(a) the facts (if any) alleged are true, save that where the words complained of consist "partly of allegations of fact and partly of expression of opinion, a defense of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

(b) the expression of opinion is such that an honest man, holding strong, exaggerated or even prejudiced views could have made,¹⁸⁹

(c) the subject matter of the comment is of public interest; and

¹⁸⁶ See *supra* notes 137, 143.

¹⁸⁷ J.G. Merrills, *Decisions on the European Convention on Human Rights During 1986*, BRIT. Y.B. INT'L L. 449, 466.

¹⁸⁸ Plaintiffs might be able to prove reckless disregard of the truth, or in the case of a private plaintiff, negligence, but defendants might still be able to prove the defense of fair comment. This would occur only in a state with a broad interpretation of the defense. See *infra* text accompanying notes 199-209 for a discussion of various approaches to fair comment in the states.

¹⁸⁹ Critics of the current law in England point out that it must be particularly confusing for juries to deal with this defense because the term "fair comment" does not correspond to the legal definition of the defense. They assert that it must be very difficult for lay persons to find "fair comment" when an opinion is "exaggerated" or even "inspired by prejudice." One suggested solution to this problem has been to simply change the name of the defense to "comment." REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, at 40-41. However, that slight change, although helpful, would not solve the difficulty in defining the defense. The trier of fact would still have to make the inherently subjective determination of whether an honest but prejudiced man could have made the statement.

(d) The facts relied on when founding the comment were in the defendant's mind when he made it.¹⁹⁰

The fair comment defense in most of the states in the U.S. is available only if the comment is based on facts that are stated with the comment and are true, are matters of common knowledge, or are easily accessible to the reader. Thus the reader would be able to assess whether the comment was appropriate or not.¹⁹¹ A minority of states would protect the comment even if the facts are erroneously stated, or not stated at all; this approach is particularly likely when the comments are on political matters.¹⁹² The English fair comment defense does not seem to include a rigid requirement that the facts upon which the comment is based be stated with the comment.¹⁹³

In both England and the United States defendants have the burden of proof of the elements of the defense of fair comment. But the defense can be defeated if plaintiff proves "malice."¹⁹⁴ For purposes of fair comment, the term malice is usually defined differently than the "reckless disregard of the truth" standard of *New York Times*. There is a good deal of confusion in both the United States and England regarding the definition of the term. However, most courts look to whether there is "bad faith" or whether the comment is made with a "bad motive."¹⁹⁵

¹⁹⁰ *Id.* at 38 (quoting in part from the Defamation Act of 1952, § 6). The Committee pointed out that some English authorities have limited the defense in cases in which the allegedly defamatory assertion consisted of an imputation of bad motives. In such cases the defense may only be available if the "imputations are warranted by the facts." *Id.* This is essentially a reasonableness standard that is higher than the requirement that a "prejudiced but fair minded" person would form the opinion.

¹⁹¹ See ROBERT D. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* 165-66 (1980). Some degree of inaccuracy in the facts is tolerated so long as those inaccuracies are not serious. Sack has explained that in determining truth or falsity of the underlying facts to support fair comment the same test is used as for proof of other defamatory facts. "'Minor errors of fact' will be overlooked if the 'gist or sting'" of the statements are correct. *Id.* at 166-67.

¹⁹² See *Id.* at 167.

¹⁹³ According to one authority, "If the words complained of do not make clear what are the facts upon which the comment is based the defendant will be ordered to provide particulars of such facts." CARTER-RUCK ET AL., *supra* note 22, at 112. The English Committee on Defamation stated that "in the ordinary fair comment case a defendant relying on this defense is not limited to the statements of fact contained in the publication complained of. He may rely on other relevant facts, provided they were in his mind when he made the comment. Indeed sometimes the publication may contain no explicit statements of fact at all." REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, at 44. However, the Committee cited *Kelmsley v. Foot*, App. Cas. 345 (H.L. 1952) in support of this proposition. That case actually seems to support the more restrictive U.S. rule because the Court found that the underlying facts did not need to be stated because they referred to the reputation of a well-known newspaper.

¹⁹⁴ SACK & BARON, *supra* note 166, at 242.

¹⁹⁵ For a discussion of malice in U.S. common law see *id.* One common description of malice in English defamation law is that the comment must not be "dishonest or reckless or actuated by spite or ill will, or any other improper motive." REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, at 39. Another author defines malice in English defamation law as "ill will or spite towards the plaintiff or any indirect or improper motive in the defendants mind at the time of the

The English and U.S. defense of “fair comment” share another feature; neither country has been successful at giving courts much guidance on the threshold issue—whether a statement is an opinion or an allegation of fact. Some English authorities acknowledge the difficulty, but do not offer any help on how to resolve it.¹⁹⁶ Apparently there is agreement that context is relevant to the distinction. But precisely which aspects of the context, and what weight is given to that factor seems to be left to the judge’s discretion.¹⁹⁷

As will be seen, Justice Bell’s characterization of statements in *McDonald’s* as fact or opinion also lacked sufficient explanation, and in a number of situations seemed questionable.¹⁹⁸

One commentator has described U.S. case law on the fact/opinion distinction as “an uncomfortable legacy of judicial confusion.”¹⁹⁹ Another commentator observed that “[a] cursory glance at the authorities yields the startling realization that the ‘distinction is more often stated than defined,’ and if and when it is defined, that it is often stated in a manner as if the words were self-explanatory.”²⁰⁰ He concluded that courts frequently use the

publication which is his sole or dominant motive for publishing the words complained of.” Kathleen A. O’Connell, *Libel Suits Against American Media in Foreign Courts*, 9 DICK. J. INT’L L. 147, 154 (1991) (quoting 28 HALSBURY’S LAWS OF ENGLAND (5)(i)(145) (Lord Hailsham of St. Marylebone 4th ed. 1979)).

A discussion of how one goes about proving malice merely emphasizes the ambiguity of the concept. *See id.* at 154-55. A narrow interpretation of this requirement might correspond with the *New York Times* rule of knowing falsity or reckless disregard of the truth. *See supra* note 179 and accompanying text for an explanation of the N.Y. Times reckless disregard standard. However, one cannot guarantee that a jury will give such a narrow interpretation.

Commentators have criticized the subjectivity of the concept of “malice” in English defamation law and the difficulty that juries have in attempting to apply the concept. REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45, 39-41. Some reformers in England would do away with the malice qualification of the fair comment rule entirely. *See id.* at 39. Other reformers would invoke a narrow definition of malice that would go to whether the opinion was “honestly held,” and for clarity would substitute that terminology for the term malice. The 1996 amendment to the English defamation law did not make this change, so English juries continue to be faced with drawing the line between a “malicious” comment and one that is “fair” even though it is influenced by prejudice.

¹⁹⁶ *See e.g.*, SCOTT-BAYFIELD, *supra* note 14, at 64.

¹⁹⁷ *See* 28 HALSBURY’S LAWS OF ENGLAND ¶ 134 (Lord Hailsham of St. Marylebone 4th ed. 1979).

¹⁹⁸ *See, e.g.*, *infra* text accompanying notes 274, 494-96, 525-30.

¹⁹⁹ Charles H. Carman, *Hutchinson v. Proximire and the Neglected Fair Comment Defense: An Alternative to “Actual Malice,”* 30 DEPAUL L. REV. 1, 13 (1980).

²⁰⁰ Herbert W. Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1205 (1962) (footnotes omitted). The Supreme Court of Alaska gave up on what it considered an impossible line to draw, pointing out that, “The distinction between a fact statement and an opinion or comment is so tenuous in most instances, that any attempt to distinguish between the two will lead to needless confusion.” *Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711, 714 (Alaska 1966), *discussed in* Robert Neal Webner, Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817, 1820 n.26 (1984). Accordingly, the Alaska court simply extended the “fair comment” defense to “non-malicious statements of fact,” *Pearson*, 413 P.2d at 713-14, bringing the common law of defamation in Alaska close to the speech protective rule subsequently developed by the U.S. Supreme Court. *New York Times* is, however, more speech protective in that plaintiff must prove malice, *see supra* notes 177-83 and accompanying text, whereas it is the

fact/opinion distinction as “handy labels to justify a desired result, rather than as a serious tool for analysis.”²⁰¹

The characterization of the problem by the Kansas Supreme Court seems to precisely explain the problem faced by judges who conscientiously attempt to make the distinction between facts and opinions. That court explained that: “[e]xpressions of opinion and judgment frequently have all the force of statements of fact and pass by insensible gradations into declarations of fact.”²⁰² Thus there are some statements on both ends of the spectrum that are rather easy to classify, while there are a great many in the middle for which classification is very difficult.

Some courts in the United States have not even attempted to devise a test for drawing the line between fact and opinion. Instead they have merely labeled statements one or the other in a seemingly random manner. However, other U.S. courts have valiantly struggled to come up with criteria for classifying fact and opinion.²⁰³ These have included: inquiring into how the reader actually interpreted the statement,²⁰⁴ looking to whether the statement was “cautiously phrased” to alert the reader that the statement was an opinion,²⁰⁵ determining whether the statement is susceptible of proof of falsity,²⁰⁶ looking to the degree of generality of the statements,²⁰⁷ focusing on the context of the statements²⁰⁸ and various combinations of these factors.²⁰⁹

Once the U.S. Supreme Court began to restructure defamation law with *New York Times* and its progeny, fair comment was no longer the defendant’s main weapon in most defamation actions. The requirement that the plaintiff prove “reckless disregard of the truth” with “clear and convincing” evidence, and the shift in the burden of proof of falsity onto

defendant’s obligation to prove malice under the common law “fair comment” defense in Alaska. *See id.*

²⁰¹ Titus, *supra* note 200, at 1221.

²⁰² *Coleman v. MacLennan*, 98 P. 281, 290-91 (Kan. 1908).

²⁰³ *See Webner, supra* note 200, at 1830.

²⁰⁴ *See id.* at 1831-33.

²⁰⁵ *Id.* at 1838 (quoting *Information Control v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980)). This approach is said to require “language of apparency.” *Id.* at 1838, 1852 (quoting *Information Control*, 611 F.2d at 784) (applying the “cautiously phrased” criterion as one of several relevant factors).

Webner would adopt a modified version of the “apparency” test as the sole criteria because it provides a bright line rule that is important to prevent a “chill” on expression. He would protect the comments so long as they are specifically labeled as opinion. Thus, if comments appeared on an editorial or opinion page, or were individually prefaced with language labeling the statements as opinion, the expression would be protected. Although he recognizes that this approach would permit some damage to reputations, he believes that the damage would be minimized because the “label...will alert the reader that what he or she is reading represents no more than the opinion of the writer.” *Id.* at 1852.

²⁰⁶ *See id.* at 1833.

²⁰⁷ *See id.* at 1842.

²⁰⁸ *See id.* at 1836-39.

²⁰⁹ *See id.* at 1830-39. The author of this comment pointed out that the various tests may overlap in application. *See id.*

the plaintiff were usually sufficient to protect such expression. However, the characterization of a statement as fact or opinion again took on major importance ten years after *New York Times* when the Court in *Gertz v. Robert Welch Inc.*²¹⁰ suggested in *dicta* that absolute protection for opinion was required by the First Amendment.²¹¹ However, *Gertz* and subsequent Supreme Court cases gave the lower courts little guidance on how to make this constitutionally required distinction.²¹²

Sixteen years after the *Gertz dicta*, the Supreme Court rejected the position that the constitution requires absolute protection for opinion. In *Milkovich v. Lorain Journal Co.*,²¹³ the Court collapsed the opinion/fact distinction into the plaintiff's burden of proof of falsity. In *Milkovich*, the Court asserted that "the creation of an artificial dichotomy between 'opinion' and 'fact'" was not constitutionally required, given that the Court had found in prior cases that plaintiff had the burden to prove falsity on matters of public concern.²¹⁴ According to the Court, proof of falsity required that the statements be "provable as false."²¹⁵

Although some commentators have interpreted *Milkovich* as watering down speech protection,²¹⁶ others have suggested that the Court is simply giving a new label to the fact/opinion distinction.²¹⁷ Of course, the "provable as false" approach was one of the tests that had been devised by state courts to distinguish between fact and opinion.²¹⁸ But this test suffers from the same vagueness problem as most of the others. In order to determine

²¹⁰ 418 U.S. 323 (1974)

²¹¹ See *id.* at 339-40 & n.8.

²¹² The Court did suggest in *dicta* that "rhetorical hyperbole" in the context of a heated policy dispute could not "be construed as representations of fact." *Old Dominion Branch No. 496, Nat'l Ass'n. of Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (dictum) (noting that the epithet "traitor," used to describe workers who opposed efforts to unionize, is not a representation of fact given the context). The case was actually decided on the basis of federal labor law. See *id.* at 272-73.

A similar analysis, also in *dicta*, was articulated four years before *Gertz*. In *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970), the Court found that use of the term "blackmail" was not defamatory, but would be understood to be merely a "vigorous epithet" used to criticize what the defendant viewed as an "extremely unreasonable...bargaining position." *Id.* at 14.

²¹³ 497 U.S. 1 (1990) (holding that a newspaper columnist who accused a coach of lying when he said he did not encourage a brawl was making an allegation that is factually provable).

²¹⁴ *Id.* at 19.

²¹⁵ *Id.* The Court explained the *dicta* in *Gertz*, 418 U.S. at 340, that "there is no such thing as a false idea" as simply referring generally to the "marketplace of ideas" theory rather than establishing a separate constitutional requirement that opinion be protected. *Milkovich*, 497 U.S. at 17.

²¹⁶ See, e.g., Lisa K. West, Note, *Milkovich v. Lorain Journal Co.—Demise of the Opinion Privilege in Defamation*, 36 VILL. L. REV. 647 (1991); Daniel Anker, Comment, *Milkovich v. Lorain Journal Co.: The Balance Tips*, 41 CASE W. RES. L. REV. 613 (1991).

²¹⁷ See, e.g., Edward M. Sussman, *Milkovich Revisited: "Saving the Opinion Privilege,"* 41 DUKE L. J. 415 (1991); *The Supreme Court Leading Cases*, 104 HARV. L. REV. 129, 219, 223-24 (1990).

²¹⁸ See *supra* text accompanying note 206.

whether the statement is “provable as false,” a court has to decide what the statement means. Therefore, a court must decide what considerations are appropriate in determining that meaning. Since *Milkovich* the Court has not given lower courts any guidance on how to make that determination. The indeterminacy of the new test is illustrated by the fact that two justices applied the same test and reached a contrary conclusion in *Milkovich*.²¹⁹

Milkovich has added to the confusion in the United States regarding how to deal with value judgments and opinions. Nevertheless, as will be seen, many of the statements in the Greenpeace pamphlet distributed by Morris and Steel should rather easily fall within the category of opinion, regardless of the test used, and would clearly be seen under *Milkovich* as assertions that the plaintiffs could not have shown to be “provable as false.” Of course it must be recalled that other speech protective aspects of U.S. defamation law make it so difficult for plaintiffs to prove their case that the “fact/opinion” distinction or the “provable as false” requirement would not have played a very important role had the case been heard in a U.S. court. The plaintiffs’ burden of proving falsity and “reckless disregard of the truth” by “clear and convincing evidence” would have been so formidable a task that the case probably would have been decided in the defendants’ favor even in the unlikely event that every statement in the pamphlet would have been determined to be “provable as false.”

²¹⁹ The dissent’s analysis is more convincing than that of the majority. Justice Brennan pointed out that in asserting that plaintiff had lied the defendant had revealed “the facts upon which he [was] relying [and made] it clear at which point he [ran] out of facts and [was] simply guessing.” 497 U.S. 1, 28 (1990) (Brennan, J., dissenting). Thus, he concluded that: “Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact.” *Id.* Justice Brennan stressed that defendant had made it clear through cautionary words such as “apparently,” that defendant’s conclusion that plaintiff had lied was “conjecture.” *Id.* at 31,34. Stressing the importance of “conjecture” to the free flow of information, Justice Brennan stated:

[O]ften only some of the facts are known, and solely through insistent prodding—through conjecture as well as research—can important public questions be subjected to the “uninhibited, robust, and wide open” debate to which this country is profoundly committed

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American leaders arrange for John Fitzgerald Kennedy’s assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more.

Id. at 34 (footnotes omitted). Justice Brennan concluded that:

[R]eaders are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate.

Id. at 35. Justice Brennan’s classification of the “conjecture” in *Milkovich* as “opinion” is relevant to an interpretation of some of the assertions in the pamphlet at issue in *McDonald’s*. As will be seen, the language and format of the pamphlet suggest that some of the assertions had to be matters of conjecture.

The following section discussing Justice Bell's 750 page decision will be examined to see how he applied English law to the facts. In some instances questions will be raised regarding whether he appropriately applied English law. The different conclusions that would have been expected by a U.S. court and by the European Court of Human Rights will be pointed out.

IV. THE MCDONALD'S OPINION

Several aspects of defamation law in England discussed above account for the success of McDonald's lawsuit. First, unlike the United States, but like most other countries, the defendants have the responsibility to prove the truth of allegedly defamatory statements of fact. This obviously would be very difficult for these defendants, given their lack of legal training and resources. As will be seen, many of the facts alleged would require detailed information about geography, history, business practices, biology, environmental science, and development in the Third World. As discussed above, difficulty of proof would be a factor that might cause the European Court of Human Rights to find that liability is inconsistent with Article 10 of the Convention.²²⁰

Because defamation is a strict liability action in England, it could not be a defense that the defendants relied on the expertise of the authors of the pamphlet, whom they presumed to have such information. Such a defense would be available in the United States because it would be very difficult for the plaintiffs to establish reckless disregard of the truth. The plaintiffs presumably would have had to prove that the defendants had "obvious reasons" to doubt the accuracy of the statements.²²¹ The fact that expert witnesses with knowledge in the relevant subjects shared their views on nearly all of the allegations in the pamphlet makes it unlikely that those statements would be considered so outrageous that the defendants should have taken additional steps to verify them before distribution.

Of course, Justice Bell did not explicitly discuss whether the defendants had recklessly disregarded the truth or whether their actions were sufficient to establish the lesser degree of fault required in some other European countries,²²² as these questions were not relevant to English law. He did, however, discuss a similar issue when considering a counterclaim by the defendants charging McDonald's with defaming them in press releases responding to the pamphlet. In the press releases McDonald's had contended that the defendants had "lied" in the pamphlet. Justice Bell ultimately

²²⁰ See *supra* text accompanying notes 126-27.

²²¹ *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

²²² See *supra* note 24.

rejected the counterclaim, based on McDonald's partial privilege to respond to the pamphlet.²²³ He did, however, find that the defendants had not knowingly lied, and that they essentially believed the statements in the pamphlet.²²⁴ Justice Bell seemed to accept the assumption that the defendants' state of mind was such that they were willing to believe the statements in the pamphlet in the absence of information to the contrary, which presumably they did not have, at least until the litigation commenced.²²⁵ With respect to some of the allegations he concluded that "there was material upon which Ms. Steel could base a belief that the allegations were true, if she chose to."²²⁶ Also, Justice Bell acknowledged that "there was room for [both defendants to believe] what the authors of the leaflet...had written so long as it was not contradicted by something else which they knew."²²⁷

A number of statements in the pamphlet were ambiguous. In the United States, courts would be likely to interpret such ambiguous language in a manner that would lead to a finding that the defendants were not liable for defamation;²²⁸ in some states such a construction would be required by law.²²⁹ It will be recalled that both the European Court of Human Rights and the German Constitutional Court would be likely to employ a similar device in interpreting allegedly defamatory statements.²³⁰ However, the following sections will illustrate that the English court in *McDonald's* seemed to employ an opposite approach. Justice Bell interpreted a number of statements to exaggerate their derogatory meaning and classified some statements that looked much like "opinion" to be statements of fact. Thus, the defendants had to attempt to prove the truth of exaggerated interpretations of the language in the pamphlet, as well as statements of "opinion," which cannot be proven.

In addition to the different substantive rules that would probably be applied by the European Court of Human Rights and that certainly would be applied by a U.S. court, the plaintiffs would have the burden of proof of falsity and of malice in a U.S. Court. Furthermore, the standard of proof would be "clear and convincing" evidence, not the ordinary preponderance of the evidence standard that is applied in nearly all other civil actions in the U.S. and England.²³¹

²²³ See *Steel*, Section 11 (The Defendants' Counterclaims), at *33.

²²⁴ See *id.* at *14-15.

²²⁵ See *id.* at *14.

²²⁶ *Id.* at *15.

²²⁷ *Id.*

²²⁸ See *supra* text accompanying notes 163-67.

²²⁹ See *supra* note 163.

²³⁰ See *supra* notes 142-43 and accompanying text.

²³¹ See *supra* text accompanying notes 175-76, 183.

When considering the differing approaches that would be applied to these issues under U.S. and English law, it should be kept in mind that the defendants would have been able to demand a jury trial in the United States. One may guess that the “David and Goliath” nature of the proceedings could have influenced the jury so that close questions would have been decided in favor of the defendants. As the following discussion will show, if Justice Bell had any such inclinations, he apparently succeeded in suppressing them. Nearly all of the close questions were decided in the plaintiffs’ favor.

The combination of strict liability, the burden of proof on the defendants, and the court’s interpretation of statements in a way most likely to lead to a finding of defamation probably would have made it impossible for any defendant to succeed in such a case. Lack of resources and legal representation made these defendants particularly vulnerable. Nevertheless, the defendants claimed a moral victory when the judge found some of the derogatory statements to be true and chastised McDonald’s for some of its practices.

To be fair to McDonald’s, it should be acknowledged that there were false and derogatory statements of fact in the pamphlet and the defendants were not able to establish sufficient facts to support some of the derogatory opinions. However, there were also true statements of fact, and opinions that were supported by facts. In most instances, it is not likely that the false statements added significantly to the damage caused to McDonald’s by the statements that were true. The various allegations of defamation and the court’s treatment of those allegations will be examined in the following paragraphs.

The strongest part of McDonald’s case was based on the statements in the first and second sections of the pamphlet. In both sections there were some specific statements of fact that were either false or that the defendants could not prove to be true. The first section purported to connect the corporation to starvation in the Third World. The second section, which is probably the most vulnerable under English law to a successful claim of defamation, purported to charge McDonald’s with destroying rain forests. Nevertheless, even Justice Bell’s analysis of these aspects of the case was not entirely convincing.

A. STARVATION IN THE THIRD WORLD

In his summary of the judgment Justice Bell concluded that:

[t]he first section of headings and text [in the pamphlet] plainly bears the meaning that McDonald’s is to blame for starvation in the Third World, firstly because it has bought vast tracts of land in poor

countries (for cattle ranching presumably) and evicted the small farmers who lived there growing food for their own people; secondly because the power of its money has forced poor countries to export food (beef, most obviously) to it in the United States, and thirdly because it has drawn some Third World countries to export staple crops as cattle feed.²³²

1. *Dispossession of small farmers.*

The pamphlet asserted that:

McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.²³³

Justice Bell concluded that there was no evidence that McDonald's had purchased land in poor countries.²³⁴ Apparently McDonald's did not buy land, or at least the defendants could not prove that they did.²³⁵ Furthermore, he found that "[t]hey have not themselves evicted small farmers or anyone else from their land, nor have they caused anyone else to do so."²³⁶

Justice Bell interpreted the words "investments in vast tracts of land" to mean that McDonald's had actually purchased the land. Although his interpretation is probably the most reasonable, the word investment is elastic enough to describe the purchase of beef from owners of tracts of land. Furthermore, whether McDonald's purchased the land or evicted small farmers themselves may not be particularly important in assessing the alleged defamatory "sting" of the pamphlet. It should be noted that English law does not require that all facts in an allegedly defamatory statement be proven true if "the words not proven to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."²³⁷ If the purchase of beef by McDonald's caused owners to evict small farmers in order to turn land into pasture, the negative connotation would, arguably, be

²³² *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *1.

²³³ Appendix at 137.

²³⁴ *See Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *4.

²³⁵ Justice Bell rejected defendants' argument that "'investments in vast tracts of land' meant that McDonald's had an interest in the land by virtue of its commercial interest in cattle reared on the land." *Steel*, Pt. 4 (Starvation in the Third World and the destruction of the rainforest), at *100.

²³⁶ *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *4.

²³⁷ Defamation Act of 1952, § 5.

nearly the same. Justice Bell apparently disagreed, as he concluded that “implication...by virtue of those who have reared cattle which have gone to make McDonald’s burgers fall far short of the charge of buying land and evicting or causing eviction of small farmers.”²³⁸

Although Justice Bell thought there was a substantial difference between buying the land and buying cattle, he nevertheless considered the argument made by the defendants at trial that McDonald’s beef came from cattle grazed on land from which small farmers had been dispossessed. However, he also concluded that there was no evidence that ranchers who sold beef to McDonald’s had “dispossessed small farmers or tribal people.”²³⁹ He reviewed extensive evidence of dispossession of small farmers and tribal people for the purpose of cattle ranching in Brazil, but concluded that “I am unable to draw the inference that any cattle ranchers whose cattle have gone to make McDonald’s burgers have been implicated.”²⁴⁰ Justice Bell reached this conclusion despite the testimony of three expert witnesses in support of the defendants’ argument.²⁴¹ They had identified some cattle collection points on a map put in evidence by McDonald’s as areas in which such dispossession had taken place. Indeed, one witness testified to widespread violence against Indians who were forced off their land and even killed by cattle ranchers in one of those areas.²⁴² The only testimony refuting those allegations came from a McDonald’s executive in Brazil.²⁴³

²³⁸ *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *4.

²³⁹ *See id.*

²⁴⁰ *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *4.

²⁴¹ *See Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *157, *161, *166. The three witnesses seemingly had good credentials. Sue Bradford was described as:

a specialist in Latin America, and particularly Brazil. She had worked for the BBC World Service since 1987. She had spent long periods in Brazil since 1971. She published a book on the Amazon in 1985, which was concerned with the violent struggles involving cattle companies, peasant families and Indians, over land in the North of Brazil. The book also spoke of the fast pace of forest destruction by the cattle companies.

Id. at *142.

George Monbiot was described as “a writer, broadcaster and academic who spent two years in Brazil between 1989 and 1992, investigating the causes of deforestation in the Brazilian Amazon.” *Id.* at *139.

Fiona Watson was said to be the “Campaign Coordinator for Survival International, a world-wide organization that defends the rights of indigenous people. Such rights were her main concern in Brazil for which she had special responsibility.” *Id.* at *166. Ms. Watson was the only one of the three whom Justice Bell singled out as not having first hand knowledge of practices in the specific areas which McDonald’s had identified as sources for their supply of beef. *See id.*

²⁴² *See Steel*, Pt. 4, (Starvation in the Third World and destruction of the rainforest), at *161 (testimony of Sue Bradford).

²⁴³ *See id.* at *153 (testimony of Sr. Morganti)

Justice Bell apparently had two problems with the testimony of the defense witnesses. First, the witnesses discussed some areas that were sources for beef used by McDonald's, but they did not have information about specific ranches in those areas that in fact sold beef to suppliers for McDonald's.²⁴⁴ He did not comment on the testimony of a witness for the defendants who had stated that "the conflicts had been so widespread that they had involved at some time or other almost all the ranches in [the] state."²⁴⁵

In addition to a lack of very specific evidence of cattle coming to McDonald's from ranches that had dispossessed small farmers, Justice Bell pointed to a lack of evidence on the scale of possible purchases by McDonald's from ranches that might have been involved in dispossession.²⁴⁶ He referred to an executive of McDonald's Brazil who had testified that the Company used only 0.22% of the cattle slaughtered in that country each year.²⁴⁷ Justice Bell concluded that:

Weighing all the evidence on the question of displacement of small farmers in Brazil as best I can, I have concluded that the evidence is insufficient to implicate farmers or ranchers whose cattle have gone to make McDonald's burgers in the dispossession of small farms or indigenous people. It is possible that such a rancher here or there reared cattle some of which have been slaughtered [for suppliers of McDonald's]. But this has not been shown to be so by any direct evidence and I am unable to infer that on balance of probabilities it has been so, when incidents of dispossession were spread over such large areas from which McDonald's uptake of beef must have been so comparatively small.²⁴⁸

It is certainly questionable whether the defendants satisfied their burden under English law of proving that it was more probable than not that McDonald's purchased beef from "vast tracts of land" owned by ranchers who had dispossessed small farmers. However, defendants were able to

²⁴⁴ *See id.* at *168.

²⁴⁵ *Id.* at *161. Had Justice Bell commented, he might have found that the statement was not specific enough, as it could not be determined when the conflicts took place during the 30-year period described by the witness. Conflicts that occurred many years before McDonald's purchased beef in Brazil would probably not be sufficiently supportive of the allegations about the role of McDonald's in causing dispossession of small farmers and tribal people. Also, Justice Bell had taken issue with the testimony of this witness on the issue of deforestation. Her statements as to the location of rain forest did not correspond adequately with a government vegetation map. *See id.* at *163. It is not clear whether this discrepancy also led Justice Bell to discount her testimony on dispossession.

²⁴⁶ *See id.* at *159, *164, *165, *166.

²⁴⁷ *See id.* at *167.

²⁴⁸ *Id.* at *169.

present credible evidence of widespread dispossession by cattle ranchers in Brazil. Furthermore, most of the evidence refuting McDonald's purchase of beef from ranchers who had dispossessed small farmers came from employees of McDonald's.

Even under U.S. law, with the burden of proof shifted to the plaintiffs, the trier of fact may have found for the plaintiffs on the question of falsity. However, the plaintiffs would have had to show by clear and convincing evidence that despite the wide scope of dispossession McDonald's had avoided buying beef from landowners who had been involved in widespread dispossession. Presumably, McDonald's would have had to trace the history of most of the ranches that were sources for their meat. This is probably an issue on which the party with the burden of proof would necessarily have lost the case. Under U.S. law, even if McDonald's could have proven falsity, the defendants probably would have won. It is unlikely that the *New York Times* requirement that the plaintiff prove reckless disregard of the truth by "clear and convincing evidence" would have been satisfied by the actions of two non-professionals distributing literature printed by an organization that they trusted.²⁴⁹

Had McDonald's been able to convince a court in the U.S. that the defamatory sting of purchasing land was significantly greater than that of causing dispossession by buying beef and thereby causing others to disposes farmers, McDonald's presumably would have been able to satisfy their burden of proof of falsity. But McDonald's still would have lost their case, as the defendants would not have been found to have recklessly disregarded the truth in relying on the accuracy of statements in the pamphlet.²⁵⁰ It is also doubtful that the lesser standard of fault required by the defamation law of most continental European countries would have been satisfied.²⁵¹

The analysis of the European Court of Human Rights might be even more favorable to the defendants than that applied in a U.S. court. The European Court's preference for interpreting language in a manner to protect expression might cause the Court to accept the argument that the language should be construed as relating to purchase of cattle rather than land,²⁵² though admittedly, such an interpretation could be considered strained. The European Court would be more likely to focus on the extreme difficulty faced by the defendants in determining the truth of the allegations in the pamphlet dealing with the issue of dispossession of small farmers.²⁵³ Also, that Court might conclude, as it did in *Hertel*, that truth or falsity should not be

²⁴⁹ See *supra* notes 175-79 and accompanying text, and text accompanying notes 224-27.

²⁵⁰ See *id.*

²⁵¹ See *supra* note 24.

²⁵² See *supra* text accompanying notes 142-46.

²⁵³ See *supra* text accompanying notes 126-27.

determinative when a matter of substantial public interest is at issue.²⁵⁴ A combination of these factors might cause the Court to determine that, on balance, the burden on expression outweighs the government's interest in enforcing the defamation law against the defendants.²⁵⁵

2. *Export of beef to the United States
and export of staple crops for
cattle feed in the "First World"*

The pamphlet asserts that "McDonald's and Burger King are two of the many US corporations" involved in exporting beef to the United States.²⁵⁶ The defendants were seemingly incorrect in their factual assertion because McDonald's in the United States has a policy of using only domestically raised beef, and this policy, presumably, had been complied with.²⁵⁷ Even under U.S. law the plaintiffs probably would have been able to sustain their burden of proof of falsity, as they could have shown that they did not import beef to the United States.

The defendants were also unable to prove the truth of the statement in the pamphlet that "[s]ome 'Third World' countries, where most children are undernourished are actually exporting their staple crops as animal feed—i.e. to fatten cattle for turning into burgers in the 'First World.'"²⁵⁸ There was somewhat more evidence to support the defendants on this point than on the export of the beef to the United States. They were able to prove that a small amount of soy meal from Brazil was used to feed cattle in Germany that ultimately became beef for McDonald's burgers.²⁵⁹ Soy meal is

²⁵⁴ See *supra* text accompanying notes 111-12.

²⁵⁵ See *supra* text accompanying notes 73, 117-22, 156-58.

²⁵⁶ This statement was actually made in the context of the discussion in the next section of the pamphlet dealing with destruction of the rain forest. Appendix at 138. However, reading the pamphlet as a whole, language in the section on starvation can reasonably be interpreted to refer at least in the part to the export of beef by McDonald's. In the section on starvation the pamphlet alleged that "[t]he power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA—the wealthiest.*" Appendix at 137 (emphasis in original).

Justice Bell also interpreted the pamphlet as asserting that the export of beef was connected to starvation. See *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *101.

²⁵⁷ See *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *121. Although defendants elicited testimony that in fact imported beef had been used, Justice Bell's conclusion that the testimony was based on misinformation seems reasonable. See *id.* at *121-27.

²⁵⁸ Appendix at 137.

²⁵⁹ See *id.* at 173-74. Justice Bell concluded that U.S. McDonald's (First Plaintiff) had incorrectly asserted in an official statement responding to criticism of McDonald's effect on the environment that no soy was used to feed cattle used by McDonalds. See *id.* at 174. An executive of McDonald's testified that "the spirit of those words was that soy or soya meal was used as a minor ingredient in the feed and that held true in Germany as well." *Id.* Justice Bell responded that "[t]o me it means that McDonald's cattle are not fed on soya at all, and if it was intended to tell the

extracted from soybeans as a by-product of making soy oil. Although evidence suggested that Brazil exported more than half of its soy meal,²⁶⁰ Justice Bell concluded that the primary reason for soy farming in Brazil was for soy oil. He also concluded that most of the soybeans grown were for human consumption within Brazil, not for soy meal to be used as cattle feed.²⁶¹ The defendants lost on the issue of the use of soy to feed cattle because Justice Bell concluded that the scale of the proven use of soy by McDonald's was so small that it would not have had a "perceptible" effect on hunger.²⁶²

Had a court in the U. S. addressed the issue of the export of beef and staples from poor countries, it is possible that the plaintiffs would have been able to prove falsity. However, at least with respect to staples, and even with respect to beef exported to England rather than to the U.S., it cannot be determined from the evidence discussed by Justice Bell whether or not the allegations in the pamphlets were true. Seemingly, only the plaintiffs know whether they would have been able to sustain the burden of proof had it been their task. Again, the difficulty of proof of truth faced by the defendants might cause the European Court to protect the defendants' expression, particularly given the strong public interest in the subject matter.²⁶³ Of course, it is extremely unlikely that the plaintiffs could have shown by "clear and convincing evidence" that the defendants recklessly disregarded the truth on this subject, as would have been required by a U.S. court.²⁶⁴ Furthermore, even satisfaction of the lesser standard of fault applicable in other European countries would be questionable.²⁶⁵

3. *The general meaning of statements in the pamphlet relating to starvation.*

It will be recalled that Justice Bell concluded that the meaning of the statements in the section of the pamphlet on starvation is that "McDonald's is to blame for starvation in the Third World."²⁶⁶ Presumably he did not mean

public that soya meal was only a minor ingredient in the feed of some cattle only, which became McDonald's burgers, I do not see why it could not say so." *Id.*

Unfortunately for Defendants, even though Justice Bell strongly implied that McDonald's had lied, he found it irrelevant to the questions raised in the case. *See id.*

²⁶⁰ *See id.* at 173.

²⁶¹ *See id.* at 172. Soy was not used to feed cattle in Brazil due to the year round warm climate and extensive pasture grazing which was less expensive than feeding soy meal. *See id.* There was a suggestion at trial that soy was used to feed some chickens and pigs in England, but Justice Bell asserted that there was "precious little evidence on this." *Id.*

²⁶² *Id.* at 174.

²⁶³ *See supra* text accompanying notes 96-97, 111-12, 117-21.

²⁶⁴ *See supra* notes 178-79 and accompanying text, text accompanying notes 224-27.

²⁶⁵ *See supra* note 24.

²⁶⁶ *See supra* text accompanying note 232.

that McDonald's was solely to blame. Such an interpretation would be absurd in addition to being inconsistent with the explicit references in the pamphlet to other multinationals and the role of governments.²⁶⁷ Indeed, the plaintiffs had interpreted the pamphlet as charging only that McDonald's was "a cause" of starvation.²⁶⁸ The pamphlet never explicitly blamed McDonald's. Rather, the pamphlet contains a heading entitled "the connection between McDonald's and starvation in the Third World."²⁶⁹ Of course, it is not necessary that a defamatory meaning be explicitly stated; context and innuendo are relevant to a determination of meaning.²⁷⁰ However, on the issue of starvation in the Third World, context and innuendo actually detract from the defamatory meaning given to the general statements in the pamphlet by Justice Bell.

There is much more language in the pamphlet focusing on the general problem of First World exploitation of Third World countries than there is of specific allegations against McDonald's. The pamphlet refers to the role of governments and multinationals generally and stresses that eating beef is a "gross misuse of resources" because cattle consume vegetable products that can feed many more people than will the beef that is ultimately produced.²⁷¹ Indeed, the only explicit use of the word "blame" in connection with Third World starvation refers to governments.²⁷² Although the language strongly implies that the power of multinationals is the source of much of the problem of starvation in the Third World, McDonald's is not singled out in this regard. Criticism is also aimed at the First World generally because "millions of acres of the best farmland in poor countries are being used for *our* benefit—for tea, coffee, tobacco, etc.—while people are *starving*."²⁷³

Justice Bell's characterization of the statements in the pamphlet significantly exaggerated the defamatory meaning directed toward McDonald's. If the statements in the section addressing starvation are read as a whole, a much more general accusation emerges than the bald conclusion that "McDonald's is to blame for starvation in the Third World." The relevant section of the pamphlet would much more reasonably be interpreted to state the proposition that McDonald's, as a rich First World multi-national, is a participant in the exploitation of the Third World by the

²⁶⁷ See Appendix at 137.

²⁶⁸ *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at 100.

²⁶⁹ Appendix at 137.

²⁷⁰ See SCOTT-BAYFIELD, *supra* note 14, at 13-16.

²⁷¹ Appendix at 138.

²⁷² See *id.*

²⁷³ *Id.* at 2 (emphasis in original). At this point the pamphlet states that "McDonald's is directly involved in this economic imperialism." It seems fairly obvious that McDonald's purchased coffee and tea, which nearly always comes from Third World countries. Whether this should be considered "direct" involvement is a value judgment which should not be the basis for a defamation charge. See *supra* text accompanying notes 184-97.

First World. The part McDonald's plays in this exploitation involves the inefficient and unfair use of Third World food resources and the displacement of small farmers caused by its purchase of cattle, all of which contribute to starvation. Whether or not the activities of multi-nationals in Third World countries are actually helpful to those countries is an issue that even economists cannot agree upon. To expect the defendants to reach an accurate conclusion on this issue is to place upon them an impossible task. Indeed, such a conclusion should be considered an "opinion" and the question should have been whether the defense of "fair comment" was applicable.²⁷⁴

The defense of "fair comment" probably would only be successful in England or the U.S. if the pamphlet included sufficient facts to support the opinion, or if sufficient facts were widely known.²⁷⁵ As discussed above, the defendants were not able to prove the specific allegations in the pamphlet that McDonald's bought land, evicted small farmers, imported beef to the United States or used more than insignificant amounts of staple crops from "Third World" countries for cattle feed. However, McDonald's is "connected" to "Third World" starvation in less direct, but nevertheless significant ways. Justice Bell acknowledged that Costa Rica, Guatemala and Brazil export a large percentage of their beef to the United States.²⁷⁶ Given the worldwide market for beef, whether U.S. McDonald's actually imports beef would seem to be irrelevant from the standpoint of starvation in the Third World. U.S. McDonald's policy of buying only from the United States merely increases the market for Third World beef from other First World users. If demand for Third World beef is a contributing cause of starvation, McDonald's policy in no way ameliorates the problem. Rather, it merely serves to supply McDonald's with a good public relations gimmick.²⁷⁷ Perhaps it is unfair to McDonald's to "blame" them for the actions of others. But again, the pamphlet referred to the "connection to," not to the "blame" for starvation.

A similar argument is applicable to the allegations of dispossession of small farmers. To the extent that McDonald's adds to the market for cattle, dispossession of small farmers will occur; if not by McDonald's then by some other company in the beef market. Even if suppliers of McDonald's beef are extremely fastidious about their sources, their purchase of cattle will displace small farmers. Displacement of small farmers in order to clear land for pasture is certainly "connected" to starvation. Such economic realities presumably are widely known by anyone with a basic knowledge of

²⁷⁴ See *supra* text accompanying notes 184-219 for a discussion of the treatment of "opinion" and "value judgments" in England and the U.S.

²⁷⁵ See *supra* notes 191-93 and accompanying text.

²⁷⁶ See *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at 122, 132, 139.

²⁷⁷ The policy was described in the judgment as "part of their advertising and appeal to their U.S. customers." *Id.* at 121.

economics. Therefore, they would not need to be specifically stated in the pamphlet.²⁷⁸

Apparently, the defendants made a similar argument during the trial. Justice Bell presumably found the argument relevant, because he did respond to what one witness for the defendants had called “a world-wide Hamburger Connection.”²⁷⁹ Although the issue was raised in the discussion of the allegation of destruction of the rain forest, which will be addressed in the next section, it is equally relevant to the issue of the exportation of beef and the dispossession of small farmers. Justice Bell summarized the testimony of one witness as follows: “McDonald’s Corporation, as a global supplier of beef products to mass markets and in helping to stimulate markets for beef from former tropical forested lands must accept and had to bear some responsibility for encouraging development and land use pressure.”²⁸⁰

But Justice Bell responded that McDonald’s role in the “Hamburger Connection” was “minimal and inconsequential,” despite the fact that the plaintiffs’ own promotional material claimed that they used 0.6% of the total world beef carcasses.²⁸¹ McDonald’s apparently only used a portion of each of the carcasses making up the 0.6 percent figure. Thus, the defendants hypothesized that assuming McDonald’s used 15% of each carcass it took part of 4% of the cattle slaughtered worldwide.²⁸² Justice Bell responded that, by his calculations, 75% of the beef used by McDonald’s had to have been raised in the United States and a great deal more in developed countries.²⁸³ Of course, his response misses the point of the effect of the worldwide market for beef. Again, McDonald’s use of beef in the United States causes other First World companies to import beef from Third World countries.²⁸⁴ Indeed, there was testimony that a great deal of beef is exported from the three countries that were the focus of the trial—Brazil, Costa Rica and Guatemala.²⁸⁵

Justice Bell explained but did not respond to the allegation of one witness that McDonald’s effect on the market went beyond the amount of beef needed to fulfill its needs. That witness stressed that ““McDonald’s successful promotion of the hamburger as a desirable and culturally significant food worldwide has led to an increased demand for beef in many countries.””²⁸⁶ Perhaps Justice Bell’s failure to respond to that argument was

²⁷⁸ See *supra* notes 191-93 and accompanying text.

²⁷⁹ *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at 174.

²⁸⁰ *Id.* at 175.

²⁸¹ *Id.*

²⁸² See *id.* at 175-76.

²⁸³ See *id.* at 176.

²⁸⁴ See *supra* text accompanying note 278 and *infra* note 318.

²⁸⁵ See *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *122, *132, *139.

²⁸⁶ *Id.* at *175.

based on the reality that it is impossible to measure the impact McDonald's has had on cultural dietary norms. This explanation is consistent with his approach to some other issues addressed in the trial, which was to discount or disregard evidence that was not precisely quantifiable.²⁸⁷

Justice Bell's rejection of the "worldwide Hamburger Connection" argument may also be related to his interpretation of the "gist" of the pamphlet. It would probably be difficult for an ordinary individual to view McDonald's role in increasing the overall market for beef as blameworthy. They were simply doing what all businesses do—trying to make money. Most people in "First World" countries do not "blame" businesses for such activities so long as they do not violate laws, or cause environmental or economic damage in some direct way. But it should be recalled that the label "blame" came from Justice Bell, not from the pamphlet. The pamphlet merely "connected" McDonald's to starvation in the Third World.²⁸⁸

In addition to the overall market effect of McDonald's activities, as discussed above, the defendants were able to prove that some Brazilian soy meal was exported for cattle feed.²⁸⁹ Although the amount was found to be small, this is another "connection" to starvation, because the soy meal, presumably, could have been used for food within Brazil. It is, of course, questionable whether most Brazilians are anxious to eat soy meal. Still, it is not unreasonable to conclude that programs to feed some of the desperately poor people in Brazil could have used the soy meal sent to feed cattle in Germany. Although this argument is unlikely to cause ordinary persons to "blame" McDonald's, it does serve as an additional link in a "connection" to starvation.

The pamphlet also pointed to the export of products like tea, coffee and tobacco to the First World. "Millions of acres of the best farmland in poor countries are being used for *our* benefit—for tea, coffee, tobacco, etc.—while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat."²⁹⁰ Justice Bell did not discuss this allegation in the pamphlet. Certainly McDonald's purchases tea and coffee which come from Third World countries. Arguably there would be less starvation in these countries if the land were used for growing food that people could eat. The fact that these products usually come from large landowners who pay very low wages to peasants who work the land makes it plausible to conclude that growing food for people in the country would result in less starvation, even

²⁸⁷ See, e.g., *supra* text accompanying notes 248, and *infra* text accompanying notes 317-18, 502-09.

²⁸⁸ See *supra* text accompanying notes 266-74.

²⁸⁹ See *supra* note 259 and accompanying text.

²⁹⁰ Appendix at 137. The defamatory sting of the comments is unlikely to be changed by adding brown and yellow people to those who are the subject of economic imperialism.

though it might reduce the gross national product. Perhaps it would be considered an exaggeration to refer to McDonald's as "directly involved in economic imperialism"²⁹¹ due to their purchase of coffee and tea. But it should be recalled that the test of "fair comment" under English law merely requires enough facts upon which an honest but prejudiced person would make such a comment.²⁹² However, Justice Bell's analyses of other statements in the pamphlet suggests that he would have required at the very least evidence that tea and coffee used by McDonald's actually came from Third World countries.²⁹³ This probably would not have been difficult to prove. But he would have also wanted evidence of McDonald's percentage of the market for such items.²⁹⁴ No doubt their percentage would have been shown to be very small. Nevertheless, this link, together with others, is relevant to a "connection" to starvation.

Justice Bell ignored a specific argument in the pamphlet that further "connects" McDonald's to starvation. The pamphlet discusses the "gross misuse of resources" involved in consumption of meat.²⁹⁵ Despite the fact that worldwide vegetarianism is not very likely to catch on, the allegation that producing meat is an inefficient use of resources compared to consumption of vegetable products by humans is well documented.²⁹⁶ Probably from Justice Bell's point of view it was absurd to blame McDonald's for encouraging meat eating. But from the point of view of many vegetarians, companies that encourage meat eating for profit are engaging in an immoral activity. The total disconnect between the assumptions of Justice Bell and people such as the defendants in this case illustrate that much, probably even most of the pamphlet was about value judgments concerning social and economic public policy, and ethical choices of life style.

Because Justice Bell exaggerated the defamatory meaning that a reasonable person would understand from the pamphlet, the defendants could not have provided sufficient facts to justify that meaning. Had Justice Bell interpreted the pamphlet by focusing on what was actually said—that there was a "connection" to rather than "blame" for starvation—sufficient factual support might have been found for what was essentially an opinion. That support might have included evidence of the inefficiency of meat

²⁹¹ It might be alleged that there is an implied defamatory factual connotation that McDonald's is more actively involved than simply buying tea and coffee. However, given that the nature of McDonald's business enterprise is very well known to the public, it is more likely that the language would be viewed as mere hyperbole.

²⁹² See *supra* note 190 and accompanying text.

²⁹³ See *supra* text accompanying notes 239-40 for a discussion of his requirement of specific evidence of the source of beef.

²⁹⁴ See *supra* text accompanying notes 246-48 for a discussion of the lack of evidence of the scale of the purchase of beef from ranches that dispossessed small farmers.

²⁹⁵ Appendix at 138.

²⁹⁶ See, e.g., FRANCES MOORE LAPPE, *DIET FOR A SMALL PLANET* 3-60 (1971).

consumption, the export of items like coffee and tea, some export of soy for animal feed, the actual purchase of beef from land from which small farmers had been dispossessed, the international demand for beef created by McDonald's restaurants and the unmeasurable, but real role of McDonald's in increasing the market for beef by popularizing burgers worldwide. Based on these "facts," some of which were specifically referred to in the pamphlet, some of which were encompassed within general language in the pamphlet, and some of which are obvious from the structure of markets, "connecting" McDonald's to starvation in the Third World is not an unreasonable stretch. Had Justice Bell interpreted the language of the pamphlet in that way, even under English law, the defendants probably would have been able to sustain their burden of proof of truth. At least they should have been able to show that there were sufficient facts proven upon which they could base a "fair comment" that McDonald's was "connected" to starvation.

Certainly the tone of the pamphlet and some of the explicit misstatements of actual facts discussed above could lead a court to conclude that the interpretation just suggested is unduly benign. However, it seems appropriate to view the pamphlet in the context of a political, or at least a social policy controversy, in which exaggeration and hyperbolic language are expected and to some extent discounted by the ordinary person.²⁹⁷ It will be recalled that the European Court of Human Rights would have been likely to interpret the language of the pamphlet in a manner that would be least amenable to a finding of defamation,²⁹⁸ particularly in the context of a discussion of public policy.²⁹⁹ A court in the U.S. would probably interpret the pamphlet in a similar manner.³⁰⁰

In a U.S. court, the plaintiffs would not have been able to prove by "clear and convincing evidence" that there were insufficient statements in the pamphlet and from common knowledge to "connect" McDonald's to starvation. Indeed, although some specific factual allegations were seemingly false, it is not even clear that the plaintiffs would have been able to sustain their burden of proof of falsity of those specific statements by "clear and convincing evidence."³⁰¹ Furthermore, the statement that McDonald's is "connected" to starvation would probably be interpreted in a U.S. court as sufficiently general as not to be "provable as false."³⁰² Certainly under U.S. law, the plaintiffs would not have been able to establish that the defendants acted with "malice" with respect to *any* of the

²⁹⁷ See *Nat'l Ass'n of Letter Carriers*, *supra* note 212.

²⁹⁸ See *supra* text accompanying notes 142-46.

²⁹⁹ See *supra* text accompanying note 142.

³⁰⁰ See *supra* text accompanying notes 166-67.

³⁰¹ See *supra* notes 175-76 and accompanying text.

³⁰² See *supra* text accompanying notes 213-19.

allegations regarding starvation.³⁰³ Also, given that there were a number of factors “connecting” McDonald’s to starvation, the defendants may have been able to prove that their conduct involved insufficient fault to satisfy the requirements of defamation in most countries in Europe.³⁰⁴

B. DESTRUCTION OF RAIN FORESTS

The strongest part of McDonald’s case against the defendants involved statements made in the second section of the pamphlet. According to Justice Bell, the statements in that section bore “the meaning that Plaintiffs are guilty of the destruction of rain forests.”³⁰⁵ Unlike the first section of the pamphlet, which noted that McDonald’s was “connected to” starvation and “directly involved in economic imperialism,” the wording of the second section was more specifically accusatory. The heading asked the question: “Why is it wrong for McDonald’s to destroy rain forests?”³⁰⁶ Thus, Justice Bell’s interpretation of the defamatory meaning was reasonable. Most of the specific facts in the pamphlet supporting the charge of destruction of the rain forest were either incorrect or not proven by the defendants to be correct. The pamphlet stated:

McDonald’s and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fat-food [sic] packaging materials.³⁰⁷

Justice Bell concluded that the plaintiffs had not used “lethal poisons to destroy...any rainforest...for any reason.”³⁰⁸ Also, “they had not *directly* destroyed any rainforest.”³⁰⁹ However, he did acknowledge that “the expansion of beef cattle production has, with other factors in Costa Rica and Guatemala, and on its own as well as with other factors in Brazil, led to the destruction of areas of rainforest in those three countries.”³¹⁰ Nevertheless, he concluded that “there was no evidence that either Plaintiff or its partners in

³⁰³ See *supra* notes 177-79 and accompanying text, and text accompanying notes 224-27.

³⁰⁴ See *supra* note 24.

³⁰⁵ *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *2.

³⁰⁶ Appendix at 138.

³⁰⁷ *Id.*

³⁰⁸ *Steel*, Summary of Judgment (Starvation in the Third World and destruction of the rainforest), at *5.

³⁰⁹ *Id.* at *2 (emphasis added).

³¹⁰ *Id.* at *5.

McDonald's Costa Rica, McDonald's Guatemala and McDonald's Brazil has taken any active part in that destruction or urged anyone else to do so.³¹¹

Although the pamphlet had seemingly accused McDonald's of itself destroying rain forests, Justice Bell also extensively addressed the question whether ranches that had sold beef to McDonald's had destroyed rain forests.

The defendants did not refute the plaintiffs' evidence that ranches supplying beef to McDonald's Costa Rica and McDonald's Guatemala had been on land deforested long before McDonald's came to those countries.³¹² The evidence regarding Brazil, like the issue of dispossession of small farmers in Brazil,³¹³ was more ambiguous. McDonald's case was bolstered by evidence of a written policy, in force since 1989, not to purchase beef from ranches that had *recently* been rain forest.³¹⁴ Executives of McDonald's Brazil testified that no beef had ever been purchased from such ranches in that country.³¹⁵ However, the defendants presented expert witnesses who disagreed.³¹⁶ Like his evaluation of the evidence of dispossession,³¹⁷ Justice Bell found the testimony of the use of recent rain forest land to be too general. He wanted evidence of specific farms or ranches that had been recent rain forest and had sold cattle to McDonald's suppliers.³¹⁸

Justice Bell also addressed the argument that McDonald's was responsible for the destruction of rain forests because it was part of the cattle industry, and it was this industry that had caused destruction of the rain forest.³¹⁹ To evaluate this argument, he referred again, as he had when addressing the question of dispossession of small farmers,³²⁰ to the scope of

³¹¹ *Id.*

³¹² *See Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *117, *133.

³¹³ *See supra* notes 240-48 and accompanying text.

³¹⁴ *See Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *118-119. Evidence was presented indicating that "recently" was interpreted as during the time period of McDonald's restaurant operation in the country in question. *See id.* The first restaurants in Brazil opened in 1979. *See id.* at *138.

³¹⁵ *See id.* at *149-53.

³¹⁶ Defendants' witnesses testified that they had seen trucks owned by suppliers of beef for McDonald's with cattle coming from recent rain forest deforestation regions. *See id.* at *157, *159. Also one witness testified that a McDonald's executive had told her that cattle were being purchased from an Amazon area which she knew to have recently undergone extensive deforestation. The executive denied the conversation. *See id.* at *159-60. She also concluded that given the scope of the deforestation in one area it was "extremely likely that some of the cattle came from newly cleared tropical forest." *Id.* at *160. Another witness testified that many of the areas marked as collection points on a McDonald's map were areas of recent deforestation. However, this testimony was found to be inconsistent with a government vegetation map. *See id.* at *170. Another witness, a professor from U.C.L.A., testified that ranches from recently deforested areas "would have been the dominant suppliers of beef cattle" for one of the collection sites listed by McDonalds. *Id.* at *164. Justice Bell found that her conclusion "lacked basis." This witness had given testimony in writing under the Civil Evidence Act, which the Judge suggested might have been the reason the testimony was not very complete. *See id.*

³¹⁷ *See supra* notes 240-45 and accompanying text.

³¹⁸ *See Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *168.

³¹⁹ *See id.*

³²⁰ *See supra* text accompanying notes 246-48.

McDonald's operation in Brazil and found it to be "too small...to be held even partly responsible."³²¹

Given the defendants' burden of proof under English law, Justice Bell's conclusion regarding the allegations of McDonald's destruction of the rain forest seems correct. The statements were very specific, unlike the allegations regarding starvation, which merely referred to a "connection." Therefore, it was probably appropriate to require either proof of an identifiable connection or of a large role for McDonald's in the Latin American beef industry.

Because the allegations in the pamphlet regarding destruction of rain forests were very specific, McDonald's probably would have been successful on the issue of falsity even under U.S. law. They should have been able to meet their burden of proof by establishing that they did not directly destroy rain forests. It would have taken an extreme version of the "innocent construction rule"³²² to interpret the language in this part of the pamphlet as meaning only that McDonald's had purchased beef from others who destroyed the rain forests. The same strained interpretation would have been necessary to interpret the accusations as simply charging that by being part of the beef industry, the plaintiffs had "caused" destruction of rain forests. Even if these benign interpretations were accepted, under U.S. law, McDonald's may have been able to establish that the allegations were false. Of course, only McDonald's would have the information necessary to establish proof or falsity on these points.

Regardless of the interpretation of the statements in this part of the pamphlet and McDonald's ability to prove falsity, it is again highly unlikely that the plaintiffs could have proven that the defendants recklessly disregarded the truth had the case been tried in a U.S. court.³²³ The lower standards of fault applied in other European countries might also be difficult to meet by merely showing that the defendants distributed pamphlets with the offending statements.³²⁴ The European Court of Human Rights would look at a combination of factors to determine whether on balance there had been a violation of the Convention in the finding of defamation for the allegations regarding the rainforest.³²⁵ That Court would look to the difficulty the defendants would have had in trying to establish the truth of the allegations in the pamphlet.³²⁶ The obvious public policy content in the comments

³²¹ *Steel*, Pt. 4 (Starvation in the Third World and destruction of the rainforest), at *170.

³²² See *supra* text accompanying notes 163-67.

³²³ See *supra* text accompanying notes 177-79 and accompanying text, and text accompanying notes 224-27.

³²⁴ See *supra* note 24.

³²⁵ See *supra* text accompanying notes 73, 117-22.

³²⁶ See *supra* text accompanying notes 126-27. Given that plaintiffs were able to prove the falsity of some of the specific allegations in this section of the pamphlet, plaintiffs would probably argue that *Thorgier* is distinguishable.

regarding the rain forest,³²⁷ and the common sense assumption that McDonald's use of beef from rainforest countries had some negative effect should be important factors in the European Court's analysis.³²⁸

C. USE OF RECYCLED PAPER MATERIALS

The pamphlet admonished the public not to "be fooled by McDonald's saying they use recycled paper: only a tiny percent of it is."³²⁹ In the introductory section of the pamphlet that applied generally to the business practices of McDonald's, the pamphlet asserted that the company had "a lot to hide."³³⁰ Justice Bell interpreted these two statements together and concluded that they amounted to an assertion that McDonald's had been lying about the amount of recycled materials it used.³³¹ He found that during the time period in which the pamphlet was published (September, 1987 to September 1990) "a small but nevertheless significant proportion of recycled fiber was used" in McDonald's restaurants in the U.K. and in the United States and therefore the defendants had not lied.³³²

To show justification, the defendants had to establish two facts. First, the plaintiffs had to show that the percentage of recycled materials used was "tiny"; and second, they had to show that simultaneous representations were made by McDonald's asserting that they were using more than a "tiny" amount of such materials. The two prongs of the defendants' defense will be discussed below.

1. *The amount of recycled material used by McDonald's*

The defendants presented almost no evidence on the question of how much material used by McDonald's was actually made from recycled material.³³³ As one might expect, all of the evidence on this issue came from

³²⁷ Given that destruction of rain forests is thought by numerous main stream scientists to have a negative effect on the worldwide environment, few matters should be considered issues of greater public interest. See, e.g., ARNOLD NEWMAN, TROPICAL RAINFORESTS: A WORLD SURVEY OF OUR MOST VALUABLE AND ENDANGERED HABITAT WITH A BLUEPRINT FOR ITS SURVIVAL (1990).

³²⁸ See *supra* text accompanying note 142.

³²⁹ Appendix at 138.

³³⁰ *Id.* at 1.

³³¹ See *Steel*, Pt. 2 (The issue of publication of the leaflet), at 181. Justice Bell also referred to "[t]wo of the sets of McDonald's arches along the top of the leaflet which bear the words 'McWasteful' and 'McGarbage.'" *Id.*

³³² *Steel*, Summary of Judgment (The use of recycled paper), at *2.

³³³ See *Steel*, Pt. 5 (The use of recycled paper), at *183. Justice Bell explained that:

[t]he burden of proof was on the Defendants to prove that the defamatory charge of lying about recycled content was justified and they did not call witnesses to give different figures to those provided by Plaintiffs. They could hardly have done so. Analysis of proportions of recycled and virgin fibre was not put forward as a practical means of inquiry. If the Plaintiffs'

McDonald's and their suppliers; the defendants had no independent source from which to obtain the relevant information. Therefore, the defendants approached the issue by contesting what the ordinary consumer would understand to be the meaning of the term "recycled." If the defendants' definition were accepted, clearly the amount of recycled material used by McDonald's would be much smaller than if the plaintiffs' definition were accepted. Presumably, this would make a difference in the appropriateness of using the label "tiny" as opposed to "small."

The controversy over the meaning of the word "recycled" was based on two questions. The first was whether the use of "post-industrial" waste should be understood as recycling, or whether the term should be limited to the use of "post-consumer" waste. Post-consumer waste is material that has gone "through its useful life," while "post-industrial waste" has never been distributed to or used by a consumer. Rather, this latter material comes from what is referred to as "manufacturing off-cuts."³³⁴ An example of the former would be paper that had been used by an office and then sent to a recycling plant to be made into paper or some other product for consumption. The defendants contended that only material that had gone through a comparable process should be labeled "recycled." A McDonald's employee offered an example of post-industrial waste. A company having excess paper after making paper cups would send that paper to a paper producer who would use the scraps to make more paper.³³⁵ Justice Bell accepted the plaintiffs' contention that material from both processes could be labeled "recycled" without misleading consumers:

I have considered the Defendant's contention that "recycled" would mean recycled after use by the ultimate consumer, in the mind of most members of the public and the ordinary reader; but I do not accept this, although that might be a first and unjustified reaction because he or she might not think of the ways in which waste can arise after paper has been milled and sent off to a paper product manufacturer elsewhere, yet before the ultimate product has served its purpose.³³⁶

In evaluating Justice Bell's conclusion on the question of post-industrial waste, it seems appropriate to point out that the "ordinary reader" that he referred to would probably not go beyond his "first reaction" to the

figures were unreliable the Defendants would have no other figures to support their case of justification.

Id.

³³⁴ *Id.* at *182.

³³⁵ *See id.* at *187.

³³⁶ *Id.* at *192.

word “recycled.” Justice Bell did not explain why the reader’s initial response would be “unjustified.” However, a consideration of the policy concerns behind recycling does support his conclusion. So long as the material being used would otherwise enter the “waste stream” the policy concerns would seemingly be nearly the same for both post-industrial and post-consumer waste. The primary difference would be that it is much easier to be confident that the material would otherwise enter the “waste stream” after use by a consumer than when it had never been so used. For instance, the scraps left over from paper cups referred to above might routinely be sent to make more paper because it is economical to do so, and therefore would never have entered the “waste stream” regardless of environmental concerns. Thus, false claims that material has been recycled from post-industrial waste can more easily be made. This possibility might lend validity to acknowledging a distinction between the use of post-consumer waste and post-industrial waste. Indeed, U.S. Federal Trade Commission regulations acknowledge this problem and therefore require that “[t]o the extent the source of recycled content includes pre-consumer material the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream”³³⁷

The second definitional dispute was based on the defendants’ contention that it was misleading to the ordinary consumer for McDonald’s to use the label “recycled” unless all of the material in the item came from recycled materials.³³⁸ Justice Bell rejected that contention, asserting that “paper cannot be recycled forever, and much ‘recycled’ paper has a proportion of virgin fibre to give it the necessary quality.”³³⁹ Justice Bell did not address the question whether the ordinary consumer would understand that the term was being used when the item was not made entirely or even substantially from recycled material. He did acknowledge that U.S. law now requires that the percentage of recycled material used must be indicated if products are labeled “recycled.”³⁴⁰ The U.S. Federal Trade Commission based that regulation on the assumption that, without complete information,

³³⁷ 16 C.F.R. ch. 1(e) (1998).

³³⁸ See *Steel*, Pt. 5 (The use of recycled paper), at *182.

³³⁹ *Id.* at *193.

³⁴⁰ *Id.* at *182. U.S. Federal Trade Commission Regulations from Oct. of 1996 provide that

[u]nqualified claims of recycled content may be made only if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package.”

16 C.F.R. § 260.7(e). The trade regulations provide in example 10: “if a recycled content claim is being made and the packaging is not made entirely from recycled material, the label should disclose the percent of recycled content. *Id.* example 10.

consumers will be misled.³⁴¹ Justice Bell's rejection of the defendants' conclusion to the same effect was questionable.³⁴²

After interpreting the word "recycle" in a manner favorable to the plaintiffs, Justice Bell addressed the question of the percentages of material used by McDonald's that were in fact "recycled." The defendants had no independent information on this question, and no way of obtaining such information.³⁴³ Justice Bell accepted as accurate the percentages offered in evidence by McDonald's, concluding that "the figures were gathered in what I believe to have been a genuine attempt to reduce waste as public awareness and interest grew. Whether the attempt was motivated by environmental concern or commercial or public relations considerations or under outside pressure probably matters not."³⁴⁴

The data offered by McDonald's may well have been gathered partly in response to the controversy that became the basis for this lawsuit. Little data on McDonald's U.K. pre-dated 1990, and much of it was after 1990. Justice Bell acknowledged that it was not until 1991 that the policy of using recycled material in Europe developed serious momentum.³⁴⁵ He also

³⁴¹ See *supra* note 340.

³⁴² This basis for Justice Bell's conclusion is not clear. Perhaps he assumed that so long as the additional information is not required by law or regulation, failure to give the information is not "misleading." How an activity can be misleading because it is no longer consistent with laws when it was not previously misleading is not explained. Perhaps he assumed that consumers will be aware of the requirement that percentages be given when the item is not made entirely from recycled material and will thus be misled if the regulation is violated. This assumption attributes to ordinary consumers a good deal of sophistication regarding the disclosure requirements of the law. His reasoning on the question of post consumer and post industrial waste, however, suggests that at least with regard to that question he found such an argument persuasive:

No doubt the more information people have the better, and now that practice has changed in the U.S. it might well be deceptive in the U.S. to say simply that something is "Recycled" if it consists substantially of post-industrial fibre. But there was no evidence that the First Plaintiff has taken any such deceptive course in the U.S. since 1992. Indeed the evidence was that it has not, and I do not consider that that course of action would be seen as deceptive in the U.K., yet at least.

Steel, Pt. 5 (The use of recycled paper), at *193. Justice Bell seems to assume that U.S. regulations require that recycling claims distinguish between post-industrial and post-consumer waste, which they do not. However, as noted in testimony he quoted in his judgment, some state regulations do require such information. See *Steel*, Pt. 5 (The use of recycled paper), at *185. See, e.g., R.I. CODE R. 12 070 006 (1999).

³⁴³ See *Steel*, Pt. 5 (The use of recycled paper), at *183.

³⁴⁴ *Id.*

³⁴⁵ Justice Bell explained that:

the reason why recycled content came in, in some items, or why it increased in others in about 1991 was that Perseco became established in Europe then and drove the policy to use recycled paper. Before then the initiative came from McDonald's rather than their suppliers, *but no one was really driving it.*

Id. at *189 (emphasis added). Apparently, Perseco was a supplier of paper materials specializing in the use of recycled material.

acknowledged that during the period of publication of the leaflet, from September 1987 through September 1990, “many paper items appear to have contained no recycled fibre at all.”³⁴⁶ Nevertheless, he based his conclusion that the recycled material used by McDonald’s U.K. was “small” but “not tiny” largely upon the fact that “paper carry bags, napkins and paper trays all of which featured significantly in the McDonald’s system contained substantial proportions of recycled fibre from the early 1990’s.”³⁴⁷ According to Justice Bell, “the recycled fibre in those items makes it impossible for me to hold that only a tiny percentage of the paper which U.K. McDonald’s used during the 1980s was recycled paper.”³⁴⁸ He did not explain how evidence from the 1990’s could shed sufficient light on the years 1987, 1988 and 1989.³⁴⁹

U.S. McDonald’s was able to present more direct evidence on the amount of recycling during the publication period of the pamphlet than was McDonald’s U.K. A supplier testified that 16 to 17 percent of the paper used was from recycled sources between 1987 through 1989.³⁵⁰ But there was no data on the percentage of post-consumer compared to post-industrial waste.³⁵¹ Justice Bell’s opinion is difficult to follow regarding the figures for 1990—the first nine months of that year was the last relevant period for purposes of the defamation action. A report produced by an outside company for McDonald’s and written by an individual who shortly thereafter went to work for McDonald’s placed the percentages at an average of 90%—a huge increase in the period of one year.³⁵² There is, however, some confusion on just how much material was used during that year, as Justice Bell noted that the figures for 1990 were qualified and that “not all changes were fully phased in during that year.”³⁵³ Furthermore, estimates for 1991 and 1992 placed the percentage use of recycled material at only 51%.³⁵⁴ To be generous to McDonald’s, one could assume that close to 50 percent of the materials used in the first nine months of 1990—the only part of 1990 relevant to this lawsuit—were from recycled material.

³⁴⁶ *Id.* at *192.

³⁴⁷ *Id.*

³⁴⁸ *Id.* He also referred to “the fact that during the relevant period of publication some paper towels and toilet tissues began to be produced from recycled fibre.” *Id.*

³⁴⁹ Perhaps he thought that it would have been very difficult for McDonald’s to suddenly change from a “tiny” portion of recycled paper to what in his view in 1990 was more than “tiny.” However, figures he referred to for U.S. McDonald’s showed a dramatic increase in one year. *See infra* text accompanying notes 347–49.

³⁵⁰ *See Steel*, Pt. 5 (The use of recycled paper), at *187.

³⁵¹ *See id.*

³⁵² *See id.* at *184. The percentages were 53% for post consumer waste and 37% for post industrial waste. *See id.*

³⁵³ *Id.* at *180.

³⁵⁴ *See id.* at *187.

Because U.S. McDonald's was ahead of the U.K. in using recycled material, one must assume that U.K. McDonald's was using less than 16 to 17 percent of recycled material in its packaging during the period of 1987 through 1989, and probably significantly less. Thus the difference between "small" and "tiny" for that period of time turned on 16% to 17% for the U.S. and less than that for the U.K. If one were to disregard post-industrial waste, the percentages would probably have been considerably less.

The above discussion shows that the first prong of the defendants' defense of justification failed because Justice Bell rejected the characterization of "tiny" as appropriate to describe the recycled material in the range of 16 to 17 percent that was used in the U.S. for two years and three months, and the approximately 50% used for nine months. The adjective was also rejected for recycled material used in the U.K even though significantly less of such material was used than in the U.S. The evidence presented all came from the plaintiffs, and the defendants had no independent method of obtaining such evidence. Furthermore, the appropriateness of the use of the adjective "tiny" was affected by Justice Bell's acceptance of the plaintiffs' broad definition of the word "recycled" and rejection of the defendants' definition.

2. *Representations by McDonald's regarding recycling*

The second prong of the defendants' justification defense failed because they were not able to satisfy their burden of proof regarding specific representations made by McDonald's. It should be recalled that Justice Bell interpreted the pamphlet not only as asserting that McDonald's was not using significant amounts of recycled material, but also that they were simultaneously representing that they were using such material. Although Justice Bell found some rather isolated instances of a clearly misleading nature regarding McDonald's UK's efforts to recycle,³⁵⁵ the evidence on McDonald's representations regarding the use of other's recycled material was ambiguous.

According to Justice Bell, "[t]he dates of the Plaintiffs' claims to use recycled paper, which Ms. Steel specifically drew to my attention, were not always clear but they all appeared to be from 1989 onwards."³⁵⁶ The defendants were apparently not able to produce very much in the way of such representations even during that period.³⁵⁷ Justice Bell concluded that "the

³⁵⁵ The most egregious was a representation in a magazine distributed in U.K. schools. The date of the article was not clear, however, a complaint was filed with the U.K. Advertising Standards Authority in April of 1991 and was upheld by the Authority. *See id.* at *197-98. Justice Bell found that between 1988 and 1994 McDonald's had put "a knowingly misleading spin on [the] as yet unproductive existence" of a recycling plan. *Id.* at *198.

³⁵⁶ *Id.* at *193.

³⁵⁷ *See id.* at *193-95.

documents to which I have referred point to a growing consciousness of the benefits and appeal of recycling from 1989 by which time both plaintiffs were already using some small but significant amount of recycled paper.”³⁵⁸ He was not very precise in explaining how the defendants had failed in their burden of proof. However, it appears that until 1989 or 1990 there was little evidence regarding representations with respect to recycling in either the U.K. or the U.S. Thus, for a period of about two years when small amounts of recycled material were being used, there appeared to be few, if any, representations being made regarding recycling.

There may have been a period around 1989 when representations were being made, and the recycled amounts were still in the range of 17 percent in the U.S. and less in the U.K. However, in 1990 the amount of recycled material used apparently jumped to about 50 percent in the U.S. and significantly increased in the U.K.—although by an uncertain amount. Thus, there seemingly was only a short period during which McDonald’s representations regarding the use of recycled material could be interpreted as inconsistent with the actual use of such materials.

It is difficult to assess whether McDonald’s was or was not making representations that they were recycling during the late 1980’s. Certainly, the defendants were not able to prove that many representations were made. Of course, access to material containing recycling claims from 1987 and 1988 might have been difficult for the defendants to obtain—particularly if they were in the form of disposable containers. It is possible that the defendants’ problem on the issue of deception was simply one of difficulty of proof. Thus, had the burden been shifted to the plaintiffs, as it would have been in the U.S., perhaps the plaintiffs would have failed to show that such representations had not been made. Of course, had the plaintiffs’ had that burden of proof, they may have been able to come up with examples of advertising and packaging from the relevant period to satisfy their burden of showing that such representations had not been made.

3. The differing analyses likely from most courts outside of England

The defendants were not able to establish their defense of justification regarding the statements about the use of recycled material due to three factors. The first two go to the truth of the representations that the plaintiffs used only a “tiny” percent of recycled material. Justice Bell first accepted the plaintiffs’ broad interpretation of the word “recycled” and rejected the defendants’ narrow interpretation. Then Justice Bell assessed the

³⁵⁸ *Id.* at *195.

evidence on the amount of recycled material finding the amount used to be more than “tiny.” Lastly, Justice Bell found insufficient evidence of representations regarding recycling during the relevant period. Therefore, the plaintiffs could not justifiably be accused of misrepresentation.

Were the European Court of Human Rights to address the allegations of use of recycled material, they would probably approach the issue using a multifaceted balancing analysis.³⁵⁹ A number of factors suggest that the defendants would have a reasonable chance of convincing that Court that liability for defamation based on the recycling claims is inconsistent with Article 10 of the Convention. First, it should be recalled that the public importance of the subject of the use of recycled material would likely permeate every aspect of the Court’s analysis.³⁶⁰ On any close question the defendants would therefore seem to have the edge. Second, the European Court has been particularly sensitive to the burdens on expression caused by requirements that the defendants prove the truth of representations in situations in which proof of truth would be difficult or impossible for them.³⁶¹ Thus, the Court might have found that liability should not be based on the defendants’ inability to prove that representations were made regarding recycling prior to 1990. Also, the defendants’ failure to show that only a “tiny” amount of recycled material was actually used might be affected by a concern with difficulty of proof, given that all relevant material was in the hands of McDonald’s. Indeed, Justice Bell commented on the defendants’ problem, pointing out that “[i]f plaintiffs’ figures were unreliable the defendants would have no other figures to support their case of justification.”³⁶²

The European Court’s tendency to interpret language in a manner that would result in protection under Article 10 may well cause them to find that the 16 to 17 percent amount of recycled material used for two years and three months could be viewed as “tiny.” The Court also might be reluctant to find that the sudden change in McDonald’s practices resulting in nine months of substantial use of recycled material would be sufficient for a finding of defamation based on the defendants’ use of the adjective “tiny.” Indeed, that Court would probably interpret the adjective “tiny” as a value judgment or an opinion, for which defamation liability could not be assessed consistent with Article 10 of the Convention.³⁶³ The real-world consequences of such a finding should be taken into account. Those protesting what they view as the improper actions of corporations would be required to keep

³⁵⁹ See *supra* text accompanying notes 73, 117-22.

³⁶⁰ See *supra* text accompanying notes 96-97, 111-12, 117-20, and 142 for a discussion of the relevance of public interest to speech protection under Article 10 of the Convention.

³⁶¹ See *supra* text accompanying notes 126-27.

³⁶² See *Steel*, Pt. 5 (The use of recycled paper), at *183.

³⁶³ See *supra* notes 134-52 and accompany text.

abreast of any changes in those practices, even if they had no source of information on the subject. One could hardly find a requirement less conducive to dialogue on many important social issues. The ample resources corporations ordinarily have to counter any false charges makes such an imposition on the expression of social activists quite unnecessary to prevent unfair damage to reputations.

In continental European countries, some degree of fault is ordinarily required before liability for defamation can attach.³⁶⁴ It seems unlikely that such fault would attach to the defendants' failure to obtain information prior to distribution of the pamphlet when the information was in the sole control of the plaintiffs. The defendants' characterization of the amount of recycled material used as "tiny" when it was in fact only "small" is also an unlikely basis for a finding of serious fault, as would the defendants' error with respect to the seemingly substantial amount of recycled material used for nine months in 1990. Of course, in the United States, where the standard of fault would be reckless disregard of the truth, the plaintiffs surely would not have been able to successfully maintain that the defendants were liable based upon the representations in the pamphlet regarding use of recycled material.³⁶⁵

D. McDONALD'S RESPONSIBILITY FOR LITTER

Although the plaintiffs did not claim that a brief reference in the pamphlet to the litter caused by customers' disposal of McDonald's packaging³⁶⁶ was defamatory, the defendants apparently raised the issue of litter in their defense.³⁶⁷ According to Justice Bell, "[t]he Plaintiffs clearly sensitive about widespread allegations of responsibility for litter picked up the gauntlet."³⁶⁸ His analysis of this issue, although technically *dicta*, casts further light on his approach to defamation issues.

The pamphlet had asserted that tons of packaging waste from McDonald's, Burger King and other fast food restaurants "end up littering the cities of 'developed' countries."³⁶⁹ Justice Bell suggested that it could be defamatory if the pamphlet was interpreted as charging McDonald's with being "to blame" for litter. Testimony refuted McDonald's contention that their apparent policy of sending out "litter patrols" in the neighborhoods of

³⁶⁴ See *supra* note 24.

³⁶⁵ See *supra* text accompanying notes 177-79 and accompanying text, and text accompanying note 224-27.

³⁶⁶ "Tons of [waste from McDonald's] end up littering the cities of 'developed' countries." Appendix at 139.

³⁶⁷ Justice Bell hypothesized that it was raised "in partial justification of the leaflet in which it appeared or in diminution of any damages." *Steel*, Pt. 5 (The use of recycled paper), at *198. He did not discuss whether the issue would be relevant to either concern.

³⁶⁸ *Id.* at *198.

³⁶⁹ Appendix at 139.

their restaurants had been consistently complied with. Indeed, Justice Bell concluded that the evidence from one neighborhood in which such patrols were only active during “a period of particular scrutiny” was probably typical.³⁷⁰ Furthermore, he found it “impossible to accept testimony from an executive who contended that assuming that one million cups of drinks were sold by McDonald’s in one day only one hundred to one hundred and fifty were likely to end up as litter.”³⁷¹ Nevertheless, despite his acceptance of the proposition that McDonald’s did in fact cause litter, he found the fact to be irrelevant.

Justice Bell explained that the defendants had argued that “by giving inconsiderate customers the opportunity to drop litter and by not clearing it up McDonald’s were culpably responsible for it.”³⁷² He responded:

I am far from persuaded to the standard required [sic] that McDonald’s...is in ordinary good sense “to blame” or culpably responsible for litter which has left their restaurants as packaging in customers’ hands. I do not consider that they can fairly be blamed for it just because they have provided disposable packaging.³⁷³

According to Justice Bell, it was the “inconsiderate customer,” not McDonald’s who was to blame.³⁷⁴ He added that the plaintiffs “were entitled to give their customers what they clearly wanted in the way of takeout food and drink in disposable packaging.” Although some might argue that it is immoral to supply this material knowing that it will end up as litter, probably few would disagree with him on this point. However, it appears that the defendants’ argument was more modest—McDonald’s should have made a serious effort to clear the litter from the neighborhood of their restaurants.

No doubt Justice Bell’s assessment of McDonald’s lack of blame would be shared by most other people. But this is clearly a value judgment that should not be the basis for liability for defamation. Probably only a small percentage of the population would view it as immoral to engage in a business that is known to cause others to harm the environment. Perhaps a somewhat larger, but still small, percentage would consider it immoral if the business does not make a serious effort to eliminate the litter. Those who hold minority opinions should be entitled to express their views without being liable for defamation. Surely the European Court of Human Rights would

³⁷⁰ *Steel*, Pt. 5 (The use of recycled paper), at *202. Testimony from residents was the primary support for Justice Bell’s conclusion. *See id.* at *201. Because the neighborhood was upper income, he assumed that a greater effort was probably undertaken there than in most other areas. *See id.* at *202.

³⁷¹ *Id.* at *200.

³⁷² *Id.* at *100.

³⁷³ *Id.* at *203.

³⁷⁴ *Id.*

find the statements to be protected value judgments on a matter of public interest.³⁷⁵ In the United States such opinions would not be considered “provable as false.”³⁷⁶ Such subjective comments would not satisfy the requirement of fault applied in defamation actions in most European countries,³⁷⁷ and would never be sufficient to establish the reckless disregard of the proof required in the United States.³⁷⁸

E. MCDONALD’S FOOD IS UNHEALTHY

There were several allegations in the pamphlet relevant to health. Those included allegations of a “connection” to heart disease and cancer, a danger of food poisoning, and negative health effects from hormones, pesticides and antibiotics used in the production of food products. In addition, the pamphlet asserted that McDonald’s had made claims that their food was nutritious.

1. *The connection to heart disease and cancer*

Justice Bell found that the defendants were liable for defamation for the allegations regarding heart disease and cancer of the breast and bowel because they were not able to prove the truth of those assertions.³⁷⁹ The third section of the pamphlet bears the headline “What’s so unhealthy about McDonald’s food?”³⁸⁰ The pamphlet then goes on to assert:

MCDONALD’s try to show in their “nutrition Guide” (which is full of impressive-looking but really quite irrelevant facts & figures) that mass-produced hamburgers, chips, colas, milkshakes, etc., are a useful and nutritious part of any diet.

What they don’t make clear is that a diet high in fat, sugar, animal products and salt...and low in fibre, vitamins and minerals—which describes an average McDonald’s meal—is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in England, heart disease alone causes about 180,000 deaths.³⁸¹

³⁷⁵ See *supra* text accompanying notes 134-52.

³⁷⁶ See *supra* text accompanying notes 213-19.

³⁷⁷ See *supra* note 24.

³⁷⁸ See *supra* notes 177-79 and accompanying text.

³⁷⁹ See *Steel*, Summary of Judgment (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel), at *2.

³⁸⁰ Appendix at 139.

³⁸¹ *Id.*

The defendants presented a good deal of expert testimony regarding the connection between a high fat and low fiber diet and heart disease and cancer of the breast and bowel. Indeed, with respect to the connection to heart disease, there was no serious contradiction from the plaintiffs' experts.³⁸² On the question of a connection to cancer, experts on both sides presented strong evidence.³⁸³ However, the allocation of burden of proof to the defendants, together with Justice Bell's interpretation of two key words—"diet" and "linked"—spelled defeat for the defendants with respect to both the heart disease and cancer statements.

Justice Bell interpreted the words "linked" with heart disease and cancer to mean "causally linked."³⁸⁴ There was no question that meals such as those sold by McDonald's could be causally linked to heart disease. The problem arose on the issue of cancer. The defendants cited reports of various national and international health organizations and officials warning of the risk of cancer from a high fat diet.³⁸⁵ Respectable scientists who were experts in the field testified to their belief of a causal connection between fat and cancer based on their own studies and those of others.³⁸⁶ However, the plaintiffs' experts testified that they disagreed on the question of cancer,³⁸⁷ and Justice Bell found their experts more convincing than those of the defendants.³⁸⁸

³⁸² The expert witness who Justice Bell found "most impressive" testified that a diet like that of McDonald's meals "over years probably does lead to heart disease." *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at *345. But he said this would only occur if such meals were eaten "more than occasionally," which he meant to be "several times a week." *Id.* Dr. Wheelock, who derived approximately 20% of his income from consulting for McDonald's testified that he "was 'pretty certain...that heart disease comes from high saturated fat content.'" *Id.* at *313. He explained that "when the risk was high, the diet was characterized by a high fat content, especially saturated and by relatively low amounts of dietary fibre." *Id.* at *315.

³⁸³ Three experts testified at length for defendants. *See id.* at *252-311. However, several witnesses for plaintiffs contradicted this testimony. *See id.* at *311-39. Justice Bell found plaintiffs' witnesses to be more balanced and that they had "no axe to grind." Whereas he found that defendants' witnesses seemed to be clearly committed to their hypothesis regarding the dangerousness of high fat diets and even meat based diets. *See id.* at *342.

Dr. Arnott, the witness for plaintiffs whom Justice Bell seemed to rely on most strongly, conceded that diet was a risk factor for cancer, but that it could not be determined what part of the diet caused the risk. *See id.* at *346. He suggested that an alternative hypothesis was that general over-nutrition was a causal factor of cancer. *See id.* at *348. However, he also noted that "one of the easiest ways to become obese was to eat too much fat, because of the relative amount of calories that fat contained relative to the size of the meal" and that obese persons have a more negative outlook for treatment of cancer than do thin people. *Id.* at *335. Dr. Arnott explained that there was a stronger case for a connection between colon cancer and high fat than for breast cancer. The former risk he described as "strongly possible." *Id.* at *348. But still this could not be said unless the diet was high in fat "more than just occasionally." *Id.* at *348.

³⁸⁴ *Id.* at *210-14.

³⁸⁵ *See id.* at *253, *254, *258, *267, *268, *270, *284, *302, *338, *340, *341.

³⁸⁶ *See supra* note 383.

³⁸⁷ *See id.*

³⁸⁸ *See id.*

Although he was not convinced that causation had been proven, surely it could be said that cancer had been “linked” to ingestion of fat in studies conducted by respected epidemiologists. Indeed, with respect to colon cancer, Justice Bell acknowledged that “it is strongly possible that a sustained diet which is high in fat, including saturated fat, and animal products, and low in fibre, increases the risk of cancer of the bowel.”³⁸⁹

Like his interpretation of the word “linked,” Justice Bell’s interpretation of the word “diet” was a major obstacle for the defendants. That interpretation led to the defendants’ failure to prove justification even on the question of heart disease. The pamphlet’s reference to the danger from a “diet” like that found in McDonald’s foods—clearly implied that one would have to eat that type of food quite often in order for the danger to be serious. But Justice Bell interpreted the language to mean that such dangers are caused by “eating [McDonald’s food] more than just occasionally.”³⁹⁰ Giving credit for very little common sense on the part of ordinary readers, he concluded that they “would not notice any distinction made in the text between diet on the one hand and food on the other.”³⁹¹ Had he accepted an interpretation of the word diet as conveying the idea that McDonald’s food, or comparable food, would have to be eaten frequently to cause ill effects, the defendants’ evidence easily would have been sufficient to show a serious risk of heart disease.

Justice Bell supported his interpretation of the words “linked” and “diet” by reference to other material in the pamphlet. He pointed to the headline: “What’s so unhealthy about McDonald’s food?”³⁹² together with the depiction of three arches labeled “McCancer,” “McDisease,” and “McDeadly.”³⁹³ In addition, beneath the text discussing the nutritional issues was a cartoon that Justice Bell described as “showing a man or a woman and a cow or steer, held in a burger with the legends ‘if the slaughterhouse does

³⁸⁹ *Steele*, Pt. 6 (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel), at *349.

³⁹⁰ According to Justice Bell:

[t]he leaflet bears the meaning that McDonald’s food is very unhealthy...[and therefore] eating it more than just occasionally [causes] the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald’s know this but they do not make it clear; that they still sell the food and they deceive customers by claiming that their food is a useful and nutritious part of any diet.

Steele, Summary of Judgment (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel), at *1.

³⁹¹ *Steele*, Pt. 6 (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel), at *207.

³⁹² *Id.* at *210-14; Appendix at 139.

³⁹³ *Steele*, Pt. 6 (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel) at *210. The version of the leaflet available on the internet that appears as the appendix to this article has four arches labeled “McDollars,” “McGreedy,” “McCancer,” and “McMurder.” Appendix at 138.

not get you' and 'the junk food will!'"³⁹⁴ He also referred to the first page of the leaflet that stated that McDonald's "got a lot to hide," and "[e]verything they don't want you to know."³⁹⁵ But, despite the arches, the cartoon, and the other comments in the pamphlet referred to, there is no obvious reason why Justice Bell chose "more than just occasionally" as the frequency of eating McDonald's food that the leaflet suggests is dangerous to health.

Certainly a court employing the "innocent construction" rule³⁹⁶ would have focused more on the language of the text, which contained the only explicit allegations on the subject, than on the other aspects of the pamphlet. Such a court would also have given the ordinary reader more credit for understanding that the pamphlet was not asserting that anything more than an occasional meal would cause heart disease or cancer. Indeed, even courts not explicitly adopting such a rule may have done the same in an attempt to assure that ample breathing space for expression was preserved.³⁹⁷ It has been noted above that the European Court of Human Rights has shown a preference for interpreting expression in a manner that will lead to protection rather than restriction.³⁹⁸ *Hertel*³⁹⁹ is particularly relevant because the European Commission found that exaggerated language and symbols, including that of a "reaper," did not strengthen the case for restriction of speech. Rather, such expression made clear to the reader that the material was "merely an opinion and not a balanced and pondered scholarly discussion."⁴⁰⁰

Once Justice Bell interpreted the pamphlet as alleging that McDonald's food presented a substantial danger of "causing" heart disease and cancer "if eaten more than just occasionally," the defendants' burden of proof became impossible, given the current state of medical knowledge on the subject. It should be pointed out, however, that if, as in the United States, it was the plaintiffs who had the burden of proof to show by clear and convincing evidence that their food did not present such a danger,⁴⁰¹ they might well have failed in that endeavor. The evidence of the connection to heart disease of high fat, high saturated fat, high sodium and low fiber was very strong. Indeed, even the expert witnesses for the plaintiffs, including one scientist who was a consultant for McDonald's, did not seriously refute

³⁹⁴ *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel) at *210. Justice Bell interpreted this language as meaning that "McDonald's food will kill you. See *id.* This cartoon does not appear in the version of the leaflet available on the internet that appears as the appendix to this article.

³⁹⁵ *Id.* at 212; Appendix at 136.

³⁹⁶ See *supra* text accompanying notes 163-67.

³⁹⁷ See *supra* text accompanying notes 166-67.

³⁹⁸ See *supra* text accompanying notes 142-43.

³⁹⁹ For a discussion of *Hertel v. Switzerland*, 28 Eur. H.R. Rep. 534 (1998), see *supra* text accompanying notes 94-116.

⁴⁰⁰ *Hertel*, 28 Eur. H.R. Rep. at ¶ 51. See *supra* text accompanying note 115.

⁴⁰¹ See *supra* notes 174-76 and accompanying text.

that allegation.⁴⁰² It could have been very difficult to prove that a serious danger of heart disease did *not* exist from more than an occasional meal like that served at McDonald's.⁴⁰³

The evidence with respect to a connection to cancer was much less clear, with experts on both sides making a strong case.⁴⁰⁴ Justice Bell was probably correct that the defendants' burden of proof had not been met on that point. Nevertheless, there was a good deal of evidence of a connection to cancer. Therefore, had the burden of proof been shifted to the plaintiffs, as it would have been in the U.S., they may have had difficulty proving by "clear and convincing evidence"⁴⁰⁵ that there was no serious risk of cancer from more than an occasional McDonald's meal.⁴⁰⁶

Although the European Court of Human Rights has not required that the burden of proof be shifted to the plaintiffs, that Court has found violations of Article 10 of the Convention in situations in which it was very difficult for the defendants to prove truth.⁴⁰⁷ Furthermore, the European Court is particularly sensitive to restrictions on speech involving issues of

⁴⁰² See *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at *345.

⁴⁰³ This conclusion is reinforced by evidence that such food may create a craving for similar food so that "more than an occasional meal" at McDonalds would lead to a predominance of such food in the diet. One expert testified that "people tended to want to maintain a relatively constant fat [and salt] intake." *Id.* at *272. Justice Bell acknowledged that evidence, but stated that he did not think that "a McDonald's meal once or twice a week, or less, can habituate the ordinary person into eating similar food frequently enough to affect his diet adversely." *Id.* at *245. He did not explain the basis for his conclusion. However, as defendants had the burden of proof, presumably they did not prove that such habituation was likely.

⁴⁰⁴ See *supra* note 383.

⁴⁰⁵ See *supra* text accompanying notes 175-76.

⁴⁰⁶ An expert testifying for defendants stated that based on his studies there was no threshold below which a reduction in fat intake would not prevent cancer and heart disease. See *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at 299. However, Justice Bell's favorite expert, who testified for plaintiffs, stated that there were:

question marks regarding fat in the diet...and certainly we knew that people who were obese did seem to have a worse outlook following the treatment of their cancers than people who were thin. One of the easiest ways to become obese was to eat too much fat, because of the relative amount of calories that fat contained relative to the size of the meal.

Id. at *335, testimony of Dr. Arnott. Also meals at McDonald's may create a craving for similar food eaten in other fast food restaurants or at home. See *supra* note 403.

When asked to comment upon the statements in the leaflet regarding heart disease and cancer he stated that it "was a reasonable thing to say to the public." *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel) at *335. At a later point in his testimony he stated, however, that it was important to note the proviso that although "dietary factors and the diseases were linked...the links might be indirect." *Id.* at *339.

Even Justice Bell asserted that, at least with respect to cancer of the bowel "[i]t is strongly possible that a sustained diet which is high in fat, including saturated fat, and animal products, and low in fibre, increases the risk of cancer of the bowel, but that is as far as the evidence takes me." *Id.* at *348

⁴⁰⁷ See *supra* text accompanying notes 126-27.

strong public interest such as public health.⁴⁰⁸ The common sense knowledge that McDonald's food is not healthful would probably cause the European Court to find that liability for defamation based on the defendants' inability to prove the allegations regarding heart disease and cancer is not consistent with the Convention.

Placing the burden of proof on the defendants when allegations involving scientific issues of public health are at issue can be particularly injurious to the welfare of the public. Often scientists disagree—as did the experts testifying in *McDonald's*. Neither side can be assured of the objective truth. Furthermore, most plaintiffs have ample resources to publicize the other side of the disagreement. The fact that they instead try to stifle any public debate makes clear their preference for no debate at all. If activists, such as the defendants, have the burden of proof in such a situation, they cannot take sides in such debates and bring the scientific information into popular public view. Indeed, the European Court in *Hertel* explained, with respect to the health assertions in that case, that “it matters little that [the] opinion is a minority one and may appear to be devoid of merit since in a sphere in which it is unlikely that any certainly exists, it would be particularly unreasonable to restrict freedom of expression to generally accepted ideas.”⁴⁰⁹ It should be recalled that in *Hertel* the health assertions were virtually devoid of scientific support, while those made by the defendants in *McDonald's* have substantial support. Indeed, the witness for the plaintiffs whom Justice Bell most relied upon at one point testified that the charge of a connection to heart disease and cancer “was a reasonable thing to say to the public.”⁴¹⁰ It seems extremely odd for a Court to find defendants liable in defamation for statements described by the plaintiffs' own expert witnesses as reasonable. That result serves to highlight the repressive nature of the English defamation law.

Given the strong evidence backing the defendants' claims regarding heart disease and cancer, it is clear that had defendants' liability required a showing of fault, as it would in most other European countries,⁴¹¹ the plaintiffs would have been unsuccessful. They would never have come close to meeting the reckless disregard standard required in the United States.⁴¹²

⁴⁰⁸ See *supra* text accompanying notes 96, 142, 111-12, 117-21.

⁴⁰⁹ *Hertel v. Switzerland*, 28 Eur. H.R. Rep. at ¶ 83. See discussion *supra* text accompanying notes 111-12.

⁴¹⁰ *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at *335. At a later point in his testimony Dr. Arnott qualified his earlier comment with the caveat that “it was important to note the proviso that although “dietary factors and the diseases were linked...the links might be indirect.” *Id.* at *339. Although the distinction might be important to scientists, it seems unlikely that it would be significant to the general public.

⁴¹¹ See *supra* note 24.

⁴¹² See *supra* notes 177-79 and accompanying text.

2. The nutritional value of McDonald's food

McDonald's did not escape unscathed from Justice Bell's discussion of the health issue. He found that the assertions in the pamphlet about McDonald's false claims of nutritional value were true, and thus were not actionable. According to Justice Bell the "various...advertisements, promotions and booklets have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match."⁴¹³ In reaching this conclusion he considered in some detail the alleged "nutritional" information supplied to the public by the plaintiffs. He noted that the material was presented so as to leave out information that would permit the reader to make meaningful judgments as to the real nutritional content. Also, McDonald's discussion of nutrition gave the appearance of being informative but actually merely confused the reader.⁴¹⁴ Justice Bell asserted that McDonald's had erroneously implied that you could eat a balanced diet at their restaurants.⁴¹⁵ In one of his few expressions of annoyance at McDonald's, he asserted that "it needed a lot of gall to paint McDonald's food in such a beneficial light."⁴¹⁶

Justice Bell made very clear that McDonald's misrepresentations had been purposeful. Referring to one advertising campaign he explained that McDonald's:

did talk moderation and balance, but it also, in my view tried to sell nutrition and to get people to come to McDonald's for nutrition. The overall impact of the advertisements together was quite clearly to give the consumer the impression that he would be doing himself a good turn, so far as his health and nutrition were concerned by eating at McDonald's. [U.S. McDonald's] must have known that

⁴¹³ *Steel*, Summary of Judgment (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at *3. The hedging reference to fiber is due to the fact that defendants apparently had no evidence of current fiber content. See *id.* at *1. However, it is difficult to imagine that McDonald's has augmented its meals with fiber in the last few years.

⁴¹⁴ Justice Bell summarized a number of examples of misleading claims. For instance, McDonald's advertised that "our sodium is down across the menu." In fact not all of the items on the menu were reduced in sodium. A McDonald's executive said that the statement only meant that reduced sodium items were "spread across the menu." *Steel*, Pt. 6 (McDonald's food, heart disease, cancer of the breast and cancer of the bowel), at *351. Justice Bell rejected that meaning and found the statement misleading.

Another advertisement asserted that their food was low in cholesterol, ignoring the fact that it was high in a more important ingredient for determining the risk of heart disease: saturated fat. See *id.* at *352. Justice Bell commented that "[t]he cholesterol advertisement must have left a lot of readers with the impression that McDonald's food met dietary recommendations when in my view it made it more difficult rather than easier to avoid the government's guidelines to "avoid too much fat, saturated fat." *Id.* at *354.

⁴¹⁵ See *id.* at *354.

⁴¹⁶ *Id.* at *356.

and seen it as a selling point in the current mood of interest in healthy eating.⁴¹⁷

When asked what the word “nutritious” meant, one of the plaintiffs’ experts testified that it only meant “something containing nutrients,” and that Coca-Cola was one of these “nutritious” items on McDonald’s menu.⁴¹⁸

⁴¹⁷ *Id.* at *355. Justice Bell was convinced that “the way in which [the nutritional information] was presented...demonstrated [that] its main purpose was marketing”. *Id.* at *360.

⁴¹⁸ *Id.* at *359. According to a news report, a McDonald’s executive gave a similar definition which resulted in the following colloquy:

Miss Steel: Going over to the third page: “To help all our customers eat healthily, we are constantly making our menu even more nutritious.” Is the implication of that your menu was nutritious in the first place?

Mr. Oakley: It certainly contains all the nutrients you need in a daily diet.

Q. All of Them?

A. Not in the amounts that you need. We are not claiming that. You have to balance the diet to get the correct amount....

Q. What do you mean by nutritious?

A. Foods that contain nutrients.

Q. That is what it means?

A. Yes....

Mr. Morris: Over the page it says: “every time you eat at McDonald’s you will be eating good nutritious food.” If I go into McDonald’s and buy a milk shake and take it away, that is eating good nutritious food?

A. Yes, there are a lot of nutrients in a milk shake.

Q. If I just go in and have some chips [french fries] that is good nutritious food?

A. Potatoes are a good source of nutrients, yes.

Miss Steel: Is there any food you know of that is not nutritious?

A: I do not know if you would call it food or not, but you could put up an argument for black coffee or black tea or mineral water.

Q. Right.

A. On their own.

Q. What about Coca-Cola?

A. Coca-Cola has a good source of energy, no question of that.

Q. So you think it is nutritious then?

A. Yes, it can be.

However, the expert later acknowledged that “most people would think it meant something of nutritional benefit.”⁴¹⁹ Justice Bell agreed, concluding that:

the overall impact of the Plaintiffs’ publications in the U.K. and the U.S.... Create...the impression that McDonald’s food was positively good..., not just in the sense of giving...needed energy intake or some protein, some fibre, vitamins, minerals, but in the broader sense of being a positively useful and contribution to a healthy diet. Both Plaintiffs must have known that this would be the impact of the material to which I have referred.⁴²⁰

3. Food poisoning

Under the heading “WHAT’S YOUR POISON?,” the pamphlet asserted that:

MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders.⁴²¹

A few explanatory sentences gave some quite unappetizing explanations of how the contamination of meat occurs.⁴²² Justice Bell did not dispute these explanations. Indeed, he explained at some length why ground meat is more likely to be a cause of food poisoning, even of deadly *e-coli* infections, than other meat.⁴²³

According to Justice Bell “the defamatory message and meaning of the leaflet is that...plaintiffs sell meat products which, as they must know, expose their customers including children, to whom they promote their meals, to a serious risk of food poisoning.”⁴²⁴ However, the pamphlet did not assert that McDonald’s “must know” that consuming their food entailed a “serious” risk of food poisoning. Although such knowledge might be implicit if an allegation of a serious risk was made in the pamphlet, the leaflet did not comment on how serious the risk was. It was merely asserted that meat products carried a much higher risk of food poisoning than other food products and that minced meat and chicken were the most likely products to have these ill effects.⁴²⁵

⁴¹⁹ *Steel*, Pt. 6 (McDonald’s food, heart disease, cancer of the breast and cancer of the bowel), at *359.

⁴²⁰ *See id.* at *360.

⁴²¹ Appendix at 142.

⁴²² *See id.* at 5.

⁴²³ *See Steel*, Pt. 9 (Food poisoning), at *5-*6.

⁴²⁴ *Steel*, Summary of Judgment (Food poisoning), at *1.

⁴²⁵ *See* Appendix at 142.

Rejecting the defendants' interpretation of the pamphlet as merely pointing out the additional risk of food poisoning inherent in a meat based diet,⁴²⁶ Justice Bell pointed to the section of the pamphlet dealing with advertising to children, which described McDonald's food as "at best mediocre, at worst poisonous."⁴²⁷ He acknowledged that the language could be interpreted as meaning that food poisoning was merely a "worst case scenario."⁴²⁸ However, he rejected that meaning, basing his interpretation on a combination of several factors. First, he interpreted the language in the general context of the pamphlet, which was a "very strong attack on McDonald's, stating facts that should deter [the reader] from eating...McDonald's food in particular."⁴²⁹ Furthermore, there was no point in telling the ordinary meat-eating person that McDonald's food was "at worst poisonous unless the...risk was very real, serious and substantial."⁴³⁰ Justice Bell next combined the reference to seventy percent of food poisonings coming from chicken and minced beef with the comment "at worst poisonous," and with the heading "What's Your Poison." He concluded that together these statements conveyed the idea that McDonald's food posed a "serious risk of food poisoning."⁴³¹ He also asserted that the pamphlet went beyond "disparagement of their food products to allege that they knew the harm that they were doing."⁴³²

Presumably because Justice Bell interpreted the pamphlet as conveying the impression that McDonald's meat products were particularly dangerous, a good deal of evidence was offered by both sides on the hygiene practices, or lack thereof, of some of McDonald's employees and meat suppliers. Some instances of food poisoning at McDonald's were put into evidence. The most serious involved a number of people who contracted *e-coli* from eating under-cooked burgers at one restaurant in 1991.⁴³³ Also, one expert testified that one of McDonald's meat suppliers was "not well run so far as hygiene was concerned."⁴³⁴ She supported this conclusion with a number of specific objections to the supplier's procedures.⁴³⁵ However, Justice Bell stressed that she "never actually said that the meat...was unfit for human consumption or unsafe."⁴³⁶ The testimony of several expert witnesses for the plaintiffs regarding the adequacy of the hygienic procedures of the

⁴²⁶ See *Steel*, Pt. 9 (Food poisoning), at *1.

⁴²⁷ Appendix at 141.

⁴²⁸ *Steel*, Pt. 9 (Food poisoning), at *1.

⁴²⁹ *Id.* at *2.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ See *id.* at *13.

⁴³⁴ *Id.* at *23.

⁴³⁵ See *id.* at *16-23.

⁴³⁶ *Id.* at *23.

supplier was presumably found to be persuasive.⁴³⁷ Another witness for the defendants who testified to what he regarded as unhygienic procedures was found to be an “unsatisfactory witness in a number of respects.”⁴³⁸ The primary objection to this witness was his testimony that “a system was unhygienic if it produced any incidents of food poisoning, however many meals it produced overall.”⁴³⁹

Two former employees who testified that burgers were frequently under-cooked were discredited because Justice Bell thought they exaggerated testimony on another subject: “the general dreadfulness of working at McDonald’s.”⁴⁴⁰ However, several other former employees gave similar testimony that was not discredited.⁴⁴¹ Justice Bell’s conclusion that such under-cooking was “an occasional event” was based primarily on the testimony of only one employee, a manager still employed by plaintiff.⁴⁴² Furthermore, there was no disagreement that the principal method of avoiding food poisoning was to avoid under-cooking. Indeed, Justice Bell asserted that “[p]roper cooking is the last and strongest line of defense to food poisoning.”⁴⁴³ Furthermore, he concluded that the danger of under-cooking was “endemic in the fast food system whatever protective measures the plaintiffs put into place.”⁴⁴⁴ This is because the “objective of quick service taken with a perfectly normal share of human fallibility...lead to...undercooked minced meat products.”⁴⁴⁵ Nevertheless, he found that “it is inherently unlikely that [McDonald’s] could have traded so successfully for so long if there had been any significant incidence of food poisoning from eating its food.”⁴⁴⁶ Ultimately he determined that “my judgment on all the evidence which I have heard is that the risk of food poisoning from eating McDonald’s food is minuscule. From time to time people will no doubt get food poisoning from eating McDonald’s foods, but the risk is very small indeed.”⁴⁴⁷

As explained above,⁴⁴⁸ the statements regarding food poisoning were interpreted as defamatory because they were said by Justice Bell to mean that the risk was “serious.”⁴⁴⁹ Apparently he concluded that a “small” risk is not “serious.” Even conceding that his characterization of the risk as “small”

⁴³⁷ See *id.* at *23-28.

⁴³⁸ *Id.* at *14.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at *31.

⁴⁴¹ See *id.*

⁴⁴² See *id.*

⁴⁴³ *Id.* at *43.

⁴⁴⁴ *Id.* at *31.

⁴⁴⁵ *Id.* at *35.

⁴⁴⁶ *Id.* at *34.

⁴⁴⁷ *Id.* at *36.

⁴⁴⁸ See *supra* text accompanying notes 424-31.

⁴⁴⁹ *Steel*, Summary of Judgment (Food poisoning), at *3.

was a fact and not a value judgment—a concession that itself is questionable—his further conclusion that the risk was not “serious” should be seen as a value judgment. As such, the truth or falsity of the assertion cannot be proven one way or the other. Indeed, if two individuals were offered statistics on the number of incidents of food poisoning and on the severity of the consequences of those instances, it is quite likely that they could not agree on the appropriate adjective to describe such incidents. This is particularly true for parents of children, who often view statistically unlikely but very dangerous risks to their children as “serious.” It hardly seems appropriate for Justice Bell or anyone else to tell them they are wrong.

Again, Justice Bell interpreted the defamatory sting of the pamphlet in an exaggerated manner, particularly by seeing value judgments as statements of facts. This approach would surely be rejected by the European Court of Human Rights⁴⁵⁰ and is contrary to the analysis that a court in the United States would apply.⁴⁵¹ Furthermore, this exaggerated interpretation made it impossible for the defendants to sustain their burden of proof. The difficulty of proof alone would probably lead to a contrary result before the European Court.⁴⁵² It is doubtful that the fault requirement for liability in most European countries⁴⁵³ could have been satisfied. Certainly the plaintiffs would have fallen far short of establishing the reckless disregard required in the United States⁴⁵⁴ based on such a subjective evaluation of the degree of seriousness of the risk of food poisoning.

4. Antibiotics, Hormones and Pesticides.

The pamphlet combined the allegations about food poisoning with assertions that antibiotics and growth hormones were “routinely injected” into animals used for meat. Those substances, together with pesticide residues in animal feed “build up in the animals’ tissues [and thereby] can further damage the health of people on a meat-based diet.”⁴⁵⁵ Justice Bell interpreted these statements to mean that “[p]laintiffs sell meat products which as they must know expose their customers...to a serious risk of...poisoning by the residues of antibiotic drugs, growth-promoting hormone drugs and pesticides.”⁴⁵⁶ Again, Justice Bell interpreted a rather mild statement—“can further damage...health”—as an allegation of a “serious” danger to health that was known to the defendants.

⁴⁵⁰ See *supra* text accompanying notes 142-43.

⁴⁵¹ See *supra* text accompanying notes 166-67.

⁴⁵² See *supra* text accompanying notes 126-27.

⁴⁵³ See *supra* note 24.

⁴⁵⁴ See *supra* notes 177-79 and accompanying text, text accompanying notes 224-27.

⁴⁵⁵ Appendix at 142.

⁴⁵⁶ *Steel*, Pt. 9 (Food poisoning), at *42.

Once this interpretation of the leaflet was accepted, it became the defendants' burden to prove that such a serious danger existed. Testimony regarding scientific reports showing pesticide residues in one third of food tested between 1987 and 1989 were found to be insufficient.⁴⁵⁷ Justice Bell rejected without explanation the assumption that the study made it reasonable to conclude that one third of all McDonald's food must similarly contain such residues.⁴⁵⁸

The evidence with respect to the use of antibiotics was also found to be insufficient by Justice Bell. The defendants adduced evidence that antibiotics are regularly included in feed lots for cattle in the United States, both to prevent disease and to promote growth.⁴⁵⁹ They also presented evidence that some U.K. chickens are regularly fed antibiotics for the same reasons and that U.K. pigs are given prophylactic antibiotics when a pig in an "adjacent piggery" is ill.⁴⁶⁰ Although there is a required withdrawal period prior to slaughter to clear these substances from the animals' systems, testimony was given to the effect that market forces resulted in those periods not always being observed.⁴⁶¹ Justice Bell asserted that the defendants' expert on this subject was unclear as to the danger from antibiotics; however, one of the hypotheses he assumed to be of concern was the development of drug resistant organisms.⁴⁶² Seemingly, this would be a concern even if the antibiotics were in fact gone from the animals' systems prior to slaughter.

Growth hormones had been banned by the European Union since 1990, and thus since that time presumably were not given to U.K. cattle. Of course, U.S. McDonald's was one of the two plaintiffs in the case and testimony was given that U.S. cattle are routinely given growth hormones.⁴⁶³ Also, one expert described the dangers caused by hormone residues in meat,⁴⁶⁴ and his testimony was seemingly not refuted. Despite this evidence

⁴⁵⁷ Although the judgment does not describe the study in any detail, Justice Bell did not attempt to challenge the efficacy of the findings or the expertise of the source. Because he frequently distinguished between evidence having to do with the U.K. and the U.S., by specifically labeling evidence applicable to the U.S., the study was most likely conducted on food in the U.K. There was also testimony from an expert based on scientific studies he had read "that pesticide residues were found in meat in the U.S.," but that the "risk...was very small." *Id.* at *41.

Justice Bell was skeptical of defendants' main witness on the question of pesticides because he changed his opinion about the dangerousness of those substances from his first testimony in 1993 to his testimony in 1996. *See id.* at *39.

⁴⁵⁸ *See id.* at *37.

⁴⁵⁹ *See id.* at *41.

⁴⁶⁰ *Id.*

⁴⁶¹ *See id.* at *39-40.

⁴⁶² *See id.* at *40.

⁴⁶³ *See id.*

⁴⁶⁴ Justice Bell explained this expert's testimony to the effect that:

[T]he danger was that they would come through in meat or milk and that at excessive doses they would affect certain sensitive members of the public, for instance women in their

Justice Bell asserted that “[t]he European ban on growth hormone drugs in the rearing of animals for food does not mean that the use of such drugs, for instance in the U.S., leads to a risk of harm. The European ban is consistent merely with a fear that this may be so.”⁴⁶⁵

The determining factor for Justice Bell with respect to pesticides, antibiotics and growth hormones was that the defendants had not been able to prove that residues of these substances were found in McDonald’s food or that any McDonald’s customers had been harmed by these substances.⁴⁶⁶ Given English law, which allocates the burden of proof to the defendants in defamation cases, Justice Bell was probably correct in his conclusion. The defendants had not proven that these substances more probably than not caused harm to McDonald’s customers.

Scientific studies are being and will no doubt continue to be conducted for years as to the presence of these substances in food and as to their effects. Many experts believe that the substances discussed in the pamphlet cause serious health problems and many others disagree. Indeed, the results of studies released in early 1999 has caused Canada to ban synthetic growth hormones, leaving the United States as the only major industrialized country in which the hormones are legally used.⁴⁶⁷ One prominent expert recently quoted in the *New York Times* asserted that “the possible health effects could not be dismissed.”⁴⁶⁸ Of course, dismissal of these concerns seems to be precisely what McDonald’s would like to occur. Furthermore, the U.S. Food and Drug Administration has recently initiated a revision of its guidelines for the use of antibiotics in animals due to the “mounting evidence that the routine use of antibiotics in livestock may diminish the drug’s power to cure infections in people.”⁴⁶⁹ Thus, were the trial held today, the defendants might be able to show that it is more probable than not that antibiotics are harmful.

With respect to the allegations concerning hormones and pesticides, the scientific data is much less clear. Thus, like the analysis of liability for the material in the pamphlet dealing with heart disease and cancer, the party

reproductive years. It would be a low dose, chronic insidious effect. That is why they were banned in Europe: the authorities could not be assured of their safety.

Id.

⁴⁶⁵ *Id.* at *42.

⁴⁶⁶ See *Steel*, Summary of Judgment (Food poisoning), at *3.

⁴⁶⁷ See Susan Gilbert, *Fears Over Milk, Long Dismissed, Still Simmer*, N.Y. TIMES, Jan. 19, 1999, at D7. These studies and reevaluation of an earlier study have found that the hormones cause elevation of a protein that is a “strong risk factor for breast cancer and prostate cancer.” *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ Denise Grady, *A Move to Limit Antibiotic Use in Animal Feed*, N.Y. TIMES, Mar. 8, 1999, at A1. One doctor was quoted as asserting that “he thought the rising levels of resistance to bacteria taken from sick people had been caused by the ‘heavy use of antibiotics in livestock.’” *Id.* He added that “Public health is united in the conclusion...[and] [t]here is no controversy about where antibiotic resistance in food born pathogens comes from.” *Id.*

with the burden of proof on the dangers of hormones and pesticides would probably fail. When that party is the side most likely to be interested in bringing the issue to the attention of the public, the negative consequences for public awareness of a possible risk to public health are obvious. This conclusion demonstrates how ludicrous such an allocation of proof is in a case involving an ongoing public health controversy. Today the defendants may be able to assert a danger from antibiotics, without liability – but last year they could not do so. Presumably they must wait until the weight of scientific studies prove harm from pesticides and hormones before they can make assertions about the dangers they and many respectable scientists believe are caused by those substances.

In the United States, McDonald's would have had the burden of proof of showing by clear and convincing evidence⁴⁷⁰ that no serious harm was caused by pesticides, antibiotics and hormones—a burden they could not have met. The European Court of Human Rights would certainly be sensitive to the impossibility of the defendants' meeting their burden of proof on unresolved scientific controversies, and on that ground alone should find liability for these statements inconsistent with Article 10 of the Convention.⁴⁷¹ Again, *Hertel*, would be a crucial precedent. In that case the European Court found that even the totally unfounded statements made by Hertel on a matter of public health could not be the basis for liability consistent with Article 10.⁴⁷²

In *McDonald's* the difficulty of proof faced by the defendants was exacerbated by Justice Bell's extremely negative interpretation of the language in the pamphlet. Similar to his interpretation of the allegations regarding heart disease, cancer and food poisoning, he employed an interpretative technique that seems the inverse of the innocent construction rule.⁴⁷³ However, the European Court of Human Rights would probably choose an interpretation that would result in protection of the expression.⁴⁷⁴

Finally, it is clear that there was enough support for the health allegations so that any finding of fault—whether mere negligence or reckless disregard of the truth—would not be established in the context of the controversy over the allegations regarding the effects of antibiotics, pesticides or hormones. Thus liability would be foreclosed in most European countries⁴⁷⁵ and in the United States on that ground alone.⁴⁷⁶

⁴⁷⁰ See *supra* text accompanying notes 175-76.

⁴⁷¹ See *supra* text accompanying notes 126-27.

⁴⁷² See *supra* text accompanying notes 111-12.

⁴⁷³ See *supra* text accompanying notes 163-67.

⁴⁷⁴ See *supra* text accompanying notes 142-43.

⁴⁷⁵ See *supra* note 24.

⁴⁷⁶ See *supra* notes 177-79 and accompanying text, text accompanying notes 224-27.

F. ADVERTISING

The pamphlet also criticized McDonald's for its advertising, particularly that directed at children. The pamphlet stated that "as if to compensate for the inadequacy of their products, McDonald's promotes the consumption of meals as a 'fun event.'" It then described the food as "at best mediocre."⁴⁷⁷ Justice Bell found the comments about the quality of the food not defamatory because they were just "general terms of disparagement like 'junk food.'"⁴⁷⁸ He did, however, find defamatory "the allegation of covering up the food's quality...so far as children are concerned."⁴⁷⁹

Justice Bell interpreted McDonald's advertising, including their various "gimmicks," as merely "aimed at making the experience of their visiting McDonald's seem fun."⁴⁸⁰ He concluded that no cover-up was necessary, because the food was precisely what the children would expect.⁴⁸¹ Justice Bell seems to be ignoring the effect that atmosphere can have on the palatability of food. This is not, of course, a phenomenon limited to children. If one is having a good time, food may taste better. Alternatively, one may not be paying a lot of attention to how the food actually tastes. It is not difficult to imagine a young child, who in a completely neutral environment might prefer the food of some other restaurant, begging to go to the restaurant with the big clown, the free action figures, or "Star War" mugs. Although the term "cover-up" may not be the most precise phrase to describe such a situation, it does not seem to be so inaccurate as to amount to defamation.

The pamphlet focused on the particular susceptibility of children to advertising, going so far as to contend that it "traps children into thinking they aren't 'normal' if they don't go there too."⁴⁸² According to Justice Bell this was false; the advertising merely makes "McDonald's attractive so that they will want to go there."⁴⁸³ Justice Bell seemed to be splitting hairs. It is not far-fetched to believe that a child deprived of the experience of McDonald's, which all the happy children on television and all her peers were experiencing, would feel she was not living a "normal" life. At the very least a parent could expect charges from their children that they were abnormal parents.

⁴⁷⁷ Appendix at 141.

⁴⁷⁸ *Steel*, Summary of Judgment (Advertising), at *1.

⁴⁷⁹ *Id.* at *3.

⁴⁸⁰ *Id.*

⁴⁸¹ "McDonald's food is just what a child would see it and expect it to be: beef burgers in buns or chicken in a coating, for instance, soft drinks, milk shakes and 'best bits' of all, I suspect, chips or fries. No cover-up could last long." *Id.*

⁴⁸² Appendix at 140.

⁴⁸³ Summary of Judgment (Advertising), at *2.

Justice Bell did show some sensitivity to the plight of the beleaguered parent dealing with a child who has been exposed to McDonald's advertising. The pamphlet had asserted that "McDonald's knows exactly what kind of pressure [advertising] puts on people looking after children. It's hard not to give in to this convenient way of keeping children 'happy.'"⁴⁸⁴ He rejected McDonald's allegation of defamation with respect to this part of the pamphlet, explaining that:

McDonald's advertising and marketing is in large part directed at children with a view to them pressuring or pestering their parents to take them to McDonald's and thereby to take their own custom [sic] to McDonald's. This is made easier by children's greater susceptibility to advertising, which is largely why McDonald's advertises to them quite so much.⁴⁸⁵

Nevertheless, Justice Bell found the defendants liable for defamation based on the difference between the allegation that McDonald's advertising was "covering up" mediocre food and what Justice Bell found to be true, that the advertising was used to make the experience "seem fun."⁴⁸⁶ Further liability was based on the difference between making children think they were not normal and what Justice Bell found to be the truth, which was that the advertising makes children pester their parents into taking them to McDonald's.⁴⁸⁷

The difference between what Justice Bell saw as the "truth" and the allegations in the pamphlet is so small and so subjective as to be an extraordinarily weak basis for liability. Had the burden of proof been on the plaintiffs, or had some element of fault been required, liability certainly could not have been established. Thus, a U.S. court,⁴⁸⁸ or a court in most European countries,⁴⁸⁹ would not have found liability for defamation based on the small and subjective difference between what Justice Bell saw as the truth and the allegations in the pamphlet. The European Court of Human Rights would almost certainly classify the statements as opinion,⁴⁹⁰ and a U.S. court would have found them not "provable as false."⁴⁹¹

⁴⁸⁴ Appendix at 141.

⁴⁸⁵ *Steel*, Summary of Judgment (Advertising), at *3.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ See *supra* notes 177-79 and accompanying text.

⁴⁸⁹ See *supra* note 24 and accompanying text.

⁴⁹⁰ See *supra* notes 142-43 and accompanying text.

⁴⁹¹ See *supra* notes 213-19 and accompanying text.

G. WORKING CONDITIONS.

The leaflet asserted that:

Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

As there is no legally-enforced minimum wage in England, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further.⁴⁹²

Justice Bell concluded that “the real, general sting of this part of the leaflet is the combination of low pay and bad working conditions: low pay for bad conditions.”⁴⁹³ Again he showed his willingness to make value judgment in the guise of determining facts. Both the allegations of low pay and bad working conditions were found to be facts. However, even Justice Bell was struck by the possibility that some might consider the term “do badly” to be an “expression of opinion or comment.”⁴⁹⁴ But he reasoned that because the term “do badly” followed a heading which asked “[w]hat's it like working at McDonald's,...[c]learly what is to follow are the facts, or alleged facts, about working for McDonald's.”⁴⁹⁵ The sophistry of this rationale was highlighted by his caveat that another phrase following the heading— “[t]here must be a serious problem”—was merely “opinion or comment.”⁴⁹⁶ No reason for making the distinction between the two general statements “do badly” and “serious problem” was offered.

Although Justice Bell concluded that the reference to low wages was an allegation of fact, at least with respect to U.K. McDonald's, it was proven to be a true fact.⁴⁹⁷ Indeed, he even found that the defendants were correct in

⁴⁹² Appendix at 143.

⁴⁹³ *Steel*, Summary of Judgment (Employment practices) at *1.

⁴⁹⁴ *Id.* at *2.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at *6.

⁴⁹⁷ Justice Bell compared McDonald's pay to that of other catering industry jobs. *See Steel*, Pt. 10 (Employment practices), at *16-18. McDonald's executives had argued that the “benefits” received by their employees should be taken into consideration. Justice Bell summarized the testimony of one of McDonald's executive on this subject:

Mr. Nicholson said that the Second Plaintiff's total package put them “way at the top” of the High Street league. The most often mentioned of the benefits was training. Mr. Preston said that McDonald's training was highly valued by other employers. It provided elements geared to basic work disciplines such as time-keeping, team work, health and hygiene goals and what he called “objectives setting” and “accomplishment review.” Mr. Beavers said that work at McDonald's was a source of training and experience for a number of people which was highly valued.

asserting that McDonald's depressed wage levels in the U.K. catering industry generally.⁴⁹⁸ However, he did not find that the same allegation regarding U.S. McDonald's was true. As might be expected, the defendants had much less information regarding comparative pay scales in the United States, which made it very difficult for them convince Justice Bell that wages were low.⁴⁹⁹ But the lack of evidence Justice Bell complained of might be explained by the fact that the defendants thought the matter of low pay in U.S. McDonald's to be common knowledge. It is hard to imagine that statistics on comparative pay scales could have resulted in a finding that McDonald's wages in the U.S. could not be fairly described as "low."

With respect to the allegations in the leaflet regarding working conditions, Justice Bell determined that there was simply not enough evidence regarding conditions in restaurants in the United States to reach a conclusion on that subject.⁵⁰⁰ Of course, given the defendants' burden of proof of truth, they were therefore found liable for the assertions with respect to conditions in the United States. Considerably more evidence was presented regarding U.K. restaurants, but it only came from 20 of the 380 restaurants in business in the U.K. in 1990. The narrowness of this sample seemed to be an important element in Justice Bell's conclusions on the question of working conditions at U.K. McDonald's. He commented that he would:

not speculate on whether more witnesses from more restaurants should have been available if the allegations had general application in McDonald's restaurants. I will just look at the evidence which I

Id. at *18. Justice Bell, however, concluded that:

[T]he benefits and value of McDonald's training to which Mr. Preston referred seemed to me to relate more to the fact of having held a job at all, which has been no mean achievement for many school leavers in recent years, rather than a particular benefit which McDonald's provided.

Id. *19.

⁴⁹⁸ See *Steel*, Summary of Judgment (Employment practices), at *2.

⁴⁹⁹ See *Steel*, Pt. 10 (Employment practices), at *25. Justice Bell explained that

[w]ith some hesitation, I have decided that I am not able to find that the charge that the First Plaintiff pays low wages is proved. The evidence does not in my view establish that it does. There was evidence from some U.S. witnesses that they started on a minimum wage or very close to it.... But there was also evidence of crew earning well above the starting rate and I do not have the material to judge what is or has been "low" in the U.S. I do not have any feel for U.S. wages and living costs as I do of the U.K.

Id. at *26.

⁵⁰⁰ See *id.* at *80. Justice Bell did comment that he saw no reason to believe that the pressures that led to some objectionable employee working conditions in the U.K. "should be any different in the U.S." *Id.* at *82. He pointed out that "[T]he Second Plaintiff uses the First Plaintiffs' essential systems." *Id.* The one exception was that it was likely that weekly hours over 40 would be less likely to occur due to U.S. laws requiring the payment of overtime. See *id.* at *83.

have. In my view the number of restaurants at which events or practices complained of have been shown to have occurred is just too small for me to hold that the events or practices occurred widely in McDonald's restaurants unless the Plaintiffs' evidence provides some support for their wide occurrence or the McDonald's system of operation means that they are likely to be widespread.⁵⁰¹

Because it would be very difficult to obtain evidence from a large percentage of McDonald's restaurants in the U.K., the defendants' best strategy would seem to have been to show that "McDonald's system of operation" makes it likely that "bad" employee conditions will exist. Indeed, Justice Bell did conclude that one aspect of McDonald's system—its method of scheduling employees—was likely to lead to employees being pressured to work very long hours. He explained that McDonald's scheduling system required a great deal of skill, which was not always within the capacity of the managers. Even skillful managers could not anticipate unexpected occurrences, such as increased customers or employee unavailability. Also, "there must be a temptation for some scheduling managers to schedule as few crew as they feel the operation of the restaurant can cope with...[due to] the pressure of keeping labour costs down."⁵⁰² All of these problems lead to "restaurant short-staffed [sic] and asking crew to stay."⁵⁰³

There was testimony from some employees that they had been pressured to work long hours—sometimes as much as 23 hours at a time, without advance notice.⁵⁰⁴ Under-staffing in order to keep profit margins high was a consistent theme of the defendants' witnesses.⁵⁰⁵ Justice Bell

⁵⁰¹ *Id.* at *81. Justice Bell did acknowledge that the lack of evidence from more restaurants did not necessarily prove that the rest did not have the same problems even though "the Defendants have many supporters and the case has received a lot of publicity." *Id.* According to Justice Bell many people may simply have not "wanted to get involved or were just not interested enough to come forward." *Id.*

⁵⁰² *Id.* at *84-85. Justice Bell observed that "there was evidence of this happening." *Id.* at *85

⁵⁰³ *Id.* at *85. Justice Bell rejected McDonald's argument that if this was really going on employees would not "turn up." He responded that "[t]his no doubt happens in some cases, but generally speaking people will put up with quite a lot if they need the money badly enough or they are in a job of limited, anticipated duration." *Id.*

⁵⁰⁴ These occasions were to prepare for visits from high-level company supervisors by having some employees work all night to clean the restaurant. *See id.* at *36-37. There was testimony that employees who did not want to stay late were threatened with a reduction in their hours, *see id.*, or simply reminded that their "review" was coming up. *Id.* at *49. At other times shifts would be extended for lesser but some times substantial periods when the restaurant became unexpectedly busy, or when other employees did not show up. *See id.* Justice Bell seemingly found this evidence credible as he stated in response to the testimony of one witness who testified about the restaurant he had worked at that "his evidence of understaffed shifts,[and] crew being pressured to stay on at the end of their shifts were all matters which occurred in other restaurants and I accept Mr. Whittle's evidence that they occurred at Sutton." *Id.* at *50. However, he also accepted McDonald's evidence that in at least some cases the extra hours were voluntary or even desired. *See id.* at *76, *83.

⁵⁰⁵ *See, e.g., id.* at *43-45, *49, *71, *74.

might have concluded that the specific testimony of such practices, together with the inherent pressure resulting from the McDonald's scheduling system made it likely that the practice was sufficiently "widespread" so that the adjective "bad" could with justification be applied to McDonald's working conditions.⁵⁰⁶ However, he concluded that:

[d]espite all this the evidence was insufficient to satisfy me that crew have regularly been asked to stay on at the end of shifts for significant lengths of time as a matter of general practice...the body of evidence of substantial, unwarned extensions leading to long shifts was too small for me to say that the practice has been widespread, even taking full account of what I see as the potential risks of the scheduling system. My conclusion is that there is a significant risk of it happening from time to time.⁵⁰⁷

Such a risk occurring from time to time apparently was not seen by Justice Bell as sufficient to label McDonald's working conditions "bad."

It is not clear from Justice Bell's opinion whether the defendants' evidence was inadequate because the practice was not seen to be sufficiently frequent, even in the restaurants in which it was shown to have occurred, or whether the inadequacy was due to an insufficient sample of restaurants. His explanation, quoted above, could be interpreted either way. It will be recalled that Justice Bell had stressed the small sample of restaurants from which evidence was available on working conditions.⁵⁰⁸ However, he also suggested that very long hours were not required very frequently, even in those restaurants where the practice was shown to have occurred.⁵⁰⁹ Arguably Justice Bell would have found the evidence inadequate even if the long hours worked "occasionally" in a few restaurants could have been shown to have also occurred in most other McDonald's restaurants.

In addition to very long periods of work, Justice Bell acknowledged that the scheduling system led to the risk of employees having "erratic"

⁵⁰⁶ See, e.g., *id.* at *85.

⁵⁰⁷ *Id.* Justice Bell assumed that the practice must also occur in the United States (although somewhat modified by the interest in avoiding overtime pay) because "the pressures are the same." *Id.*

⁵⁰⁸ See *supra* text accompanying note 501.

⁵⁰⁹ He commented with respect to employees working all night after their regular shift to clean the restaurant for visits from high level supervisors that an employee would probably only be required to do so three or four times a year. See *Steel*, Pt. 2 (The issue of publication of the leaflet), at *48. Commenting on the testimony of one former employee, Justice Bell asserted that:

Mr. Whittle was looking back about ten years, when he gave his evidence and on balance I feel that he probably translated a number of incidents over a long three year period into a constant state of affairs in his recollection.

breaks, and there was a good deal of evidence from former employees that this practice occurred.⁵¹⁰ But he did not seem to be unduly concerned about any of the employee working conditions with the exception of one.⁵¹¹ He was quite critical of what he referred to as the “unfair” practice of “inviting” employees to go home early if business is slow. He viewed this as coercive and not voluntary.⁵¹² Indeed, he was quite uncharacteristically vehement in his criticism of this practice, commenting that:

[O]n the evidence before me I cannot say that it happens often but it should not happen at all, and in my judgment it shows where the ultimate balance lies in the Second Plaintiff’s judgment between saving a few pounds and the interests of the individual young employee.⁵¹³

⁵¹⁰ Breaks nine minutes after starting, or 45 minutes before leaving were reported. Some former employees testified that they were not even permitted to take short breaks for a drink. *See id.* at *76. Others said that breaks were not given at all on extra time worked. *See id.* at *40. Again, Justice Bell accepted that this had occurred. *See id.* at *50. He explained that:

Proper breaks are subject to the demands of custom [sic] in the Second Plaintiff’s restaurants. This means that that they are often taken early or late in a shift, or cut short. Adequate drink breaks are not always easy to come by. The result is that crew can work hard for long periods without adequate breaks.

Steel, Summary of Judgment (Employment practices), at *3.

⁵¹¹ He also rejected an allegation that working at McDonald’s was dangerous. He explained that although there “is an element of risk” due to the fast pace and long hours, he did not find sufficient evidence that the restaurants were “unsafe.” *Id.* at *4. Describing the risk he stated:

People suffer minor burns as one would expect in any work involving kitchens and they suffer other injuries from time to time. But even the number of burns has not been extravagant and the number of serious injuries, including serious burns has been modest. I was told of only one fatal injury to a crew member employed by the Second Plaintiff. Although that was one too many it occurred after eighteen years of operation in the U.K. There is no reason to believe that the safety picture is different in the U.S.

Id. at *5.

Responding to the allegation in the leaflet that plaintiffs had “a policy of preventing unionization by getting rid of pro-union workers,” Appendix at 142, Justice Bell disagreed, acknowledging only that plaintiffs were “strongly antipathetic to an idea of unionization.” *Steel*, Summary of Judgment (Employment practices), at *5. One should recall that Justice Bell’s conclusion could only mean that defendants had not proven that such a policy existed.

Justice Bell also rejected the allegation that opportunities for promotion were “minimal,” preferring the adjective “small.” *Id.* at *2. Again, liability for defamation turned on Justice Bell’s distinction between two labels with very slight differences in meaning.

⁵¹² *See Steel*, Summary Judgment (Employment practices), at *4.

⁵¹³ *Id.* Justice Bell explained how this practice was likely to occur:

Some crew agree to go but the very act of asking puts pressure on young crew to agree and there have been occasions when direct and unfair pressure has been put on crew to agree. Sometimes crew have been sent home for reasons, like an untidy uniform, which would not have bitten [sic] if the restaurant had been busy. If a crew member agrees to go home, he or

Justice Bell even found that this practice probably occurs in the U.S. as well as in the U.K.⁵¹⁴ Despite his strong criticism on this point, the practice added little to his determination of the issue of working conditions, as he found that it was “primarily relevant to pay,”⁵¹⁵ and he had already found that the allegation of low pay was justified with respect to U.K. McDonald’s.⁵¹⁶

Ultimately, with respect to working conditions, Justice Bell concluded that:

Despite the hard and sometimes noisy and hectic nature of the work, occasional long, extended shifts including late closes, inadequate and unreliable breaks during busy shifts, instances of autocratic management, lack of third party representation in cases of grievance and occasional requests to go home early without pay for the balance of the shift, if business is slack, I do not judge the Plaintiffs’ conditions of work, other than pay, to be generally “bad,” for its restaurant workforce.⁵¹⁷

It is not at all clear how Justice Bell arrived at his conclusion with respect to the correct label to attach to McDonald’s working conditions. His conclusion was seemingly based upon a subjective determination that even the conditions in the restaurants from which evidence was forthcoming were not really terrible, together with the fact that there was evidence from a relatively small number of restaurants.⁵¹⁸ He also suggested that his conclusion was affected by his consideration of the success of the restaurants, which he believed could not have been achieved without a “reasonably happy” workforce. He asserted that:

I take full account of the indomitability of the human spirit in the face of adversity, but I find it difficult to see how either Plaintiff

she is not paid for the balance of the shift. This practice is most unfair as it deprives crew, mostly young of pay for time which they have set aside to earn money at McDonald’s.

Id.

⁵¹⁴ He commented that:

I had no direct evidence of the extent to which it happens, if it happens at all, in the U.S. However, it is the kind of systemic practice which is passed from an international holding company to its national offshoot, and on that basis I find that it probably happens in the U.S. too.

Id.

⁵¹⁵ *Id.*

⁵¹⁶ See *supra* text accompanying notes 497-98.

⁵¹⁷ *Steel*, Summary of Judgment (Employment practices), at *5.

⁵¹⁸ See *supra* note 501 and accompanying text.

could have grown so fast in countries where there is a high expectation of living and working conditions if McDonald's working conditions had been truly and generally bad.⁵¹⁹

Justice Bell seems to have ignored the fact that in both England and the United States there is a large underclass who live in poverty, are poorly educated and have few options for making a living. Indeed, his conclusion is inconsistent with his acknowledgment elsewhere that "people will put up with quite a lot if they need the money badly enough or they are in a job of limited, anticipated duration."⁵²⁰

The pamphlet included the statement that McDonald's is "only interested in recruiting cheap labour—which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already."⁵²¹ Justice Bell found this statement to be false. He asserted that McDonald's is "also keen to have people who will work well and appear cheerful to please their customers."⁵²² Again, he was interpreting the pamphlet in an exaggerated manner. Of course McDonald's wants the best employees in the cheap labor pool they can get. But they do not want expensive employees, regardless of how cheerful they may be. The phrase "only cheap labor" refers to that obvious fact. It will be recalled that Justice Bell had previously concluded that the statement regarding bad pay in the U.K. was justified.⁵²³

Justice Bell seemed to believe that the fact that McDonald's treats minorities and women the same as other employees was a refutation of the exploitation allegation.⁵²⁴ However, equal treatment is irrelevant because it is not reasonable to interpret the pamphlet as contending that McDonald's treats minorities and women differently than others. The obvious meaning is that these groups are much more likely than others to be in the cheap labor pool that McDonald's will exploit. Furthermore, whether McDonald's labor practices are exploitative or not is a value judgment, which should not be the basis for liability. Views on political, sociological and economic policies may lead one individual to see a practice as exploitative that seems acceptable to others.

Probably many, and perhaps even most people would agree with Justice Bell's conclusion that overall working conditions at McDonald's are not "bad." But whether these conditions are bad, good or mediocre is a value judgment that he should not have made. Responding to one employee's

⁵¹⁹ *Steel*, Summary of Judgment (Employment practices), at *5.

⁵²⁰ *Steel*, Pt. 3 (Employment practices), at *85

⁵²¹ Appendix at 143.

⁵²² *Steel*, Summary of Judgment (Employment practices), at *2.

⁵²³ See *supra* text accompanying notes 498-99.

⁵²⁴ See *Steel*, Summary of Judgment (Employment practices), at *2.

testimony that working at McDonald's was sometimes like being in hell, Justice Bell disagreed, asserting that it was not "Dante's Inferno."⁵²⁵ But liability for defamation should not turn on quibbles about degrees of unpleasantness, or anyone's judgment as to whether working at McDonald's is or is not like being in Dante's Inferno.

Justice Bell's analysis of the issue of working conditions seems questionable even under English law. Liability turned on statements that should have been considered opinions—opinions for which there was ample factual support. Thus, the statements in the pamphlet regarding working conditions should have been protected as "fair comment."⁵²⁶ Certainly the European Court of Human Rights would interpret the statements as value judgments on a matter of public importance which could not be the basis for liability consistent with Article 10.⁵²⁷ In a U.S. court they would be considered statements that were not "provable as false."⁵²⁸ Furthermore, disagreement over use of the words "bad" and "exploitative" would not be the basis for the fault required in most European countries⁵²⁹ or the reckless disregard standard required in the U.S.⁵³⁰

Another basis for protection of the defendants' expression by the European Court would be the difficulty the defendants would have in proving the working conditions that were pervasive in the thousands of McDonald's restaurants.⁵³¹ Of course, in a U.S. court, the plaintiffs would have the burden of proving by "clear and convincing evidence" that conditions were not "bad."⁵³²

H. CRUELTY TO ANIMALS

The title of the fourth section of the pamphlet was: "In What Way are McDonald's responsible for torture and murder?"⁵³³ The substance of the section dealt with cruelty to animals and the manner in which animals used for food products by McDonald's are raised and slaughtered. Employing a rather abrupt change in analytical technique, Justice Bell concluded that the charges were justified, even though some of the specific allegations were found to be untrue. The defendants' success in showing justification was due in large part to Justice Bell's uncharacteristic adoption of a moderate interpretation of the comments in the pamphlet. The plaintiffs claimed that

⁵²⁵ *Steel*, Section 10 (Employment practices), at *50.

⁵²⁶ *See supra* text accompanying notes 184-96.

⁵²⁷ *See supra* text accompanying notes 134-52.

⁵²⁸ *See supra* text accompanying notes 213-19.

⁵²⁹ *See supra* note 24.

⁵³⁰ *See supra* notes 177-79 and accompanying text.

⁵³¹ *See supra* text accompanying notes 126-27.

⁵³² *See supra* text accompanying notes 175-76.

⁵³³ Appendix at 141.

the defamatory sting of the comments regarding animals was that they were “utterly indifferent” to the welfare of the animals which are used to produce their food.”⁵³⁴ But Justice Bell instead found the overall sting of the allegations to be the milder assertion that U.S. and U.K. McDonalds are “culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.”⁵³⁵

Given the rather inflammatory language used by the defendants in the leaflet,⁵³⁶ it is somewhat puzzling that Justice Bell chose to interpret the sting of the statements in such a mild way. This is not to say that his interpretation was incorrect; indeed, the better argument would be that he had interpreted the other sections of the leaflet in too extreme a manner. He largely ignored the hyperbole in the leaflet in this section, while taking it very seriously in other sections. The difference is particularly striking when his interpretation of the language in the leaflet dealing with disease is compared to that dealing with cruelty to animals.⁵³⁷

Furthermore, Justice Bell found sufficient evidence to support his interpretation of the general sting of the section, even though he found some of the specific allegations in the section to be false and others involved proven practices he found not to be cruel. Those practices found to be “cruel” included “the restriction of movement of laying hens in the U.K. and the U.S.

⁵³⁴ *Steel*, Section 8 (The rearing and slaughter of animals), at *2.

⁵³⁵ *Id.* at *51. Justice Bell distinguished between suppliers in those industries over which McDonald’s should have expected to have some control and others over which they would not have expected to have such control. He explained:

The Plaintiffs’ immediate suppliers of broiler meat and eggs both in the U.S. and the U.K. and probably elsewhere, rear and slaughter their own animals. They are carefully chosen, designated suppliers. It seems to me that McDonald’s must be taken to be culpably responsible for any cruel practices of such immediate suppliers. I believe that the same applies where the immediate supplier obtains meat from a limited number of rearing and slaughtering sub-suppliers whom the immediate supplier could reasonably supervise and whose practices could be modified at the Plaintiffs’ insistence. This is the position with regard to those who rear and slaughter pigs in the U.K.

Id. at *7-8. Justice Bell however, concluded that pig rearing in the U.S. and cattle rearing in both the U.S. and the U.K. were different in that they were large industries and were “well established before McDonald’s came along, and they consist of very large numbers of individual farmers.” *Id.* at *51. Therefore he determined that there was no evidence that McDonald’s had control over their practices.” *Id.* at *8, and plaintiffs thus were not “culpably” responsible for their actions. *Id.* at *8.

⁵³⁶ See Appendix at 141.

⁵³⁷ For instance, compare Justice Bell’s assertion that “the allegation of responsibility for ‘murder’ is clearly just a reference in strong terms to the mass killing of animals,” *Steel*, Section 8 (The rearing and slaughter of animals), at *4, with his interpretation of the allegation that there is a “link” to heart disease and cancer. Interpreting the latter section, Justice Bell referred to cartoons with the captions “‘if the slaughterhouse doesn’t get you the junk food will’” and arches labeled “‘McCancer,’” “‘McDisease’” and “‘McDeadly.’” See *supra* notes 393-94 and accompanying text. Consistent with some of his other interpretations Justice Bell might have referred to the terms “murder” and “torture” to support plaintiffs’ interpretation that McDonald’s was “utterly different” to the welfare of animals. *Steele*, Section 8 (The rearing and slaughter of animals) at *2.

throughout their lives and of broiler chickens in their last days, and of some sows for virtually the whole of their lives in the U.K.⁵³⁸ He also found that a “small proportion” of the chickens used by U.S. and U.K. McDonald’s had their throats cut while fully conscious.⁵³⁹ Despite the small percentage subjected to this cruel practice, the absolute quantity was large enough to justify the allegation in the leaflet that the practice is frequent.⁵⁴⁰ He also found that other evidence of cruelty to chickens involving practices not specifically mentioned in the leaflet supported his conclusion that the general sting of this section was justified.⁵⁴¹

However, Justice Bell found the allegation in the leaflet that cattle struggle to escape while waiting to be killed and become “frantic as they watch the animal before them...being prodded, beaten, electrocuted and knifed” to be untrue.⁵⁴² He also found that unlike the treatment of some chickens, cattle and pigs are not conscious when they are slaughtered as had been charged in the leaflet.⁵⁴³ In addition, he found the allegations that hens and pigs were not in the open air and got no sunlight to be true, but the practices were not, in his view, cruel.⁵⁴⁴

Most judges in the U.S. might see the question whether depriving animals of light and fresh air is cruel to be a value judgment. However, Justice Bell determined that the entire message with respect to cruelty to animals was “a statement of pure fact or alleged fact rather than comment.”⁵⁴⁵ By labeling the allegations of cruelty to animals “facts” rather than “value judgments” or “opinions,” one would have thought it would be difficult for the defendants to sustain their burden of proof, just as it had been when he

⁵³⁸ *Steel*, Section 8 (The rearing and slaughter of animals), at *50. The pamphlet asserted that “[S]ome [animals] especially chickens and pigs spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement.” Appendix at 141.

⁵³⁹ The pamphlet asserted that “frequently animals [have] their throats cut while still fully conscious.” Appendix at 141.

⁵⁴⁰ See *Steel*, Section 8 (The rearing and slaughter of animals), at *50-51.

⁵⁴¹ He referred to “calcium deficit resulting in osteopaenia in battery hens, the restriction of broiler breeders’ feed with the result that they go hungry although bred for appetite, leg problems in broilers bred for weight, rough handling of broilers taken for slaughter and pre-stun electric shocks suffered by broilers on the way to slaughter.” *Id.* at *51.

Defendants were able to use this evidence to show justification because plaintiffs had “alleged a general charge” in their interpretation of this section of the leaflet. *Id.* at *4. Even though Justice Bell rejected their interpretation of the sting of the comments, see *supra* text accompanying notes 534-37, he found that his milder interpretation was encompassed in plaintiffs’ interpretation. Therefore, defendants were not limited to proving specific allegations, but could use other evidence that supported the overall sting that McDonald’s was responsible for cruelty to animals. See *id.*

⁵⁴² See *Steel*, Section 8 (The rearing and slaughter of animals), at *50. Justice Bell did acknowledge that “many cattle are frightened by the noise and unfamiliar surrounding of the abattoirs [and] some...are urged on by electric prods.” *Id.*

⁵⁴³ See *id.* at *50-51.

⁵⁴⁴ See *id.* at *50.

⁵⁴⁵ *Id.* at *3-4.

determined that the question whether working conditions were “bad” was factual.⁵⁴⁶ But Justice Bell, ignoring the subjectivity of these labels, took on the difficult task of trying to determine whether they were true facts or allegations of facts which were not proven to be true, and he reached differing conclusions on the topics of working conditions and treatment of animals.

With respect to both practices some of the specific allegations had been proven and some were not,⁵⁴⁷ and some of the proven allegations had been found to be insufficient for the negative label attached in the leaflet.⁵⁴⁸ Despite these similarities, in his analysis of the section on cruelty to animals he found sufficient practices to be both true and cruel to justify the general “sting” of the section. However, he found insufficient practices were proven which justified the label “bad” with regard to working conditions. His differing conclusions might be explained by the fact that evidence of the treatment of animals by the relatively few major suppliers of some important food products was more readily accessible than evidence of working conditions from a large number of the thousands of McDonald’s restaurants.⁵⁴⁹ Thus Justice Bell’s differing conclusions regarding the two sections of the leaflet may in part be due to the allocation of the burden of proof to the defendants. On an issue for which that burden is for logistical reasons extremely difficult to satisfy, such as determining working conditions at thousands of sites, the defendants are at a severe disadvantage.

Although a distinction could be made based on the availability of evidence, Justice Bell’s conclusions regarding the defendants’ satisfaction of their burden of proof depended in large part on subjective questions: how “cruel” is “cruel” and how “bad” is “bad?” There was certainly evidence of pervasive working conditions that could hardly be called pleasant.⁵⁵⁰ It would not have been much of a stretch to accept the label “bad” as applied to such conditions. Furthermore, surely some would contend that the rather standard practices applied in the industry to animals used for food should not be considered “cruel.” Certainly it is difficult to compare some of the working conditions of McDonald’s employees to the living and dying conditions of

⁵⁴⁶ See *supra* text accompanying notes 493-97.

⁵⁴⁷ See *supra* text accompanying notes 538-43 (cruelty to animals), 497-98, 512-513 (working conditions).

⁵⁴⁸ See *supra* text accompanying note 517 (working conditions), note 544 (cruelty to animals).

⁵⁴⁹ For a discussion of this issue in the context of working conditions see *supra* text accompanying notes 501-02.

⁵⁵⁰ Justice Bell described the work as:

hard...sometimes noisy and hectic [with] occasional long, extended shifts, instances of autocratic management, lack of third party representation in cases of grievance and occasional requests to go home early without pay for the balance of the shift if business is slack.

animals used by McDonald's for food products. But one might think that the difficulty would have made Justice Bell conclude that the application of the label "bad" to working conditions, or "cruel" to the treatment of animals, were value judgments and thus "fair comment."

Justice Bell's summary of the testimony on working conditions and on cruelty to animals included remarks that suggest that the practices in both areas reflect an overriding concern for the bottom line. This similarity suggests that his distinction between the "cruel" treatment of animals and the not so "bad" treatment of workers is tenuous at best. Commenting on the practices of suppliers of chickens, he observed that he could:

only think that since the higher the stocking density the greater the income, unless it causes a significant number of birds to fall ill, [the supplier's] stocking density is what they think they can manage in order to make more money without matching loss.... Concern for the bird did not seem to enter the equation.⁵⁵¹

Similarly, he commented with respect to what he considered to be a proven unfair employment practice that "it shows where the ultimate balance lies in [U.K. McDonald's] judgment, between saving a few pounds and the interest of the individual, often young employee."⁵⁵² Whether or not such a pervasive attitude is common in the real world of business is beside the point. Surely Morris and Steel, using their value systems, were entitled to apply pejorative adjectives to describe both business practices without facing an action for libel on either question.

The defendants fared better with respect to the statements regarding cruelty to animals than with respect to some of the other allegations for several reasons. First, the defendants' burden of proof was manageable due to the nature of the subject matter. Contrary to their task in justifying other sections of the pamphlet, they did not have to compile information from thousands of restaurants⁵⁵³ or data on thousands of ranches on a distant

⁵⁵¹ *Steel*, Section 8 (The rearing and slaughter of animals), at *21-22. Justice Bell also found that McDonald's printed policy statements on the treatment of animals were for the most part extremely general, and were meant for public relations purposes rather than for the instruction of suppliers. See *id.* at *8-11. One of the more specific statements found in one document asserted that "chickens have the freedom to move around at will." *Id.* at *22. This he found to be "palpably untrue of the last few days, at least, of their lives." *Id.*

⁵⁵² *Steel*, Summary of Judgment (Employment practices), at *4. Justice Bell was referring to the practice of sending employees home early when business was slow. See *supra* text accompanying note 514. However, his comment seems to reflect more generally on the attitude of McDonald's toward its employees. However, Justice Bell did not refer to this general attitude in assessing whether other employment practices were "bad."

⁵⁵³ See *supra* text accompanying notes 501-02 (working conditions).

continent.⁵⁵⁴ They also did not have to prove the probability of one side of an ongoing scientific controversy,⁵⁵⁵ or establish the content of disposable material that no longer existed.⁵⁵⁶ Rather, the defendants were able to obtain information on a relatively small number of large suppliers of animal food products, ascertain their practices and some standard industry practices.⁵⁵⁷ Certainly this task was not simple, but the difficulties were minor compared to those faced in dealing with other subjects in the pamphlet.

However, the primary reason why the defendants succeeded in proving justification was Justice Bell's rejection of plaintiff's extreme interpretation of the allegations in the pamphlet, and his adoption of the more moderate interpretation that McDonald's was responsible for cruelty to animals.⁵⁵⁸ Contrary to his interpretation of the language in other sections,⁵⁵⁹ he largely ignored the hyperbole. Thus, the defendants' burden of proof was less formidable than the burden they faced in defending other sections of the pamphlet. It is not clear why Justice Bell chose such a moderate interpretation of this particular section when he rejected such an approach in nearly all of the other sections.

Defendants also benefited from Justice Bell's willingness to find justification to support the label "cruel," even though he had not found justification for the label "bad" to describe working conditions.⁵⁶⁰ Both issues should have been dealt with as matters of opinion, which were not provable as false. Instead, he treated them as facts, but surprisingly found one fact to be true and the other to be false. In rejecting the one label and accepting the other, Justice Bell may well have been reflecting his own value system. It is certainly questionable whether such value choices are consistent with free and open expression in a democratic society.

Justice Bell's analysis of the material on cruelty to animals was much more consistent with the approach that both the European Court of Human Rights and a court in the United States would be likely to adopt than

⁵⁵⁴ See *supra* text accompanying notes 240-48, 312-21 (dispossession of small farmers and purchase of beef from rain forest land).

⁵⁵⁵ See *supra* text accompanying notes 414-73 (health risks of McDonald's food).

⁵⁵⁶ See *supra* text accompanying notes 329-358 (use of recycled material).

⁵⁵⁷ Defendants' witnesses included former employees of some suppliers and animal rights activists who had general knowledge of industry practices. See *Steel*, Part 8 (The rearing and slaughter of animals), at *11. According to Justice Bell defendants' ability to obtain evidence was augmented by plaintiff's calling a number of witnesses with information on their supplier's practices. Justice Bell commented that "there was less dispute about what went on than about how it affected the animals and whether it was cruel or inhumane." *Id.* at *12.

⁵⁵⁸ See *supra* text accompanying notes 535-36.

⁵⁵⁹ See, e.g., *supra* text accompanying notes 232, 266-74, 290-97 (McDonald's is to blame for starvation); 334-36, 338-42 (meaning of word "recycled"); 373 (McDonald's is to blame for litter); 384 (linked means causally linked); 390-91 (diet means only more than just occasionally); 424-32 (serious risk of food poisoning); and 455-56 (antibiotics, hormones & pesticides cause serious danger to health).

⁵⁶⁰ See *supra* text accompanying notes 517 (working conditions) and 538-41 (cruelty to animals).

was his approach to the other sections of the pamphlet. The European Court's preference for an interpretation that will result in protection of expression on matters of public interest, especially when the expression can be seen as a value judgment, would lead to protection of the expression at issue.⁵⁶¹ In the United States, the question of cruelty to animals would be found not "provable as false."⁵⁶² Furthermore, given that justification could be shown for the bulk of the specific practices alleged, a court would conclude that the defamatory sting of the pamphlet was true. But were a court to consider the minor factual inaccuracies significant, the overall accuracy of the facts should foreclose any finding of fault—whether the negligence required by some European courts⁵⁶³ or the reckless disregard required in the United States.⁵⁶⁴

I. SUMMARY OF TRIAL COURT OPINION

As discussed in the foregoing pages, some of the negative factual allegations addressed in the McDonald's trial were false,⁵⁶⁵ others were true.⁵⁶⁶ The truth or falsity of some of the allegations is unclear, because they are the subjects of ongoing scientific debate,⁵⁶⁷ or because the defendants' lacked access to the factual data necessary to establish truth.⁵⁶⁸ Still other allegations were matters of opinion or value judgments,⁵⁶⁹ which are

⁵⁶¹ See *supra* text accompanying notes 135-42.

⁵⁶² See *supra* text accompanying notes 213-19.

⁵⁶³ See *supra* text note 24.

⁵⁶⁴ See *supra* notes 177-79, 224-27 and accompanying text.

⁵⁶⁵ See *e.g.*, *supra* notes 234-36 and accompanying text (plaintiffs purchased land and evicted farmers); notes 256-57 and accompanying text (plaintiffs imported beef into the U.S.); notes 307-09 and accompanying text (plaintiffs used poison to destroy rainforests).

⁵⁶⁶ See *e.g.*, *supra* notes 259, 290 and accompanying text (plaintiffs imported some staples, tea and coffee); notes 370-71 and accompanying text (plaintiffs failed to pick up litter from the vicinity of their restaurants); note 382 and accompanying text (plaintiffs sold food that caused heart disease); notes 413-17 and accompanying text (plaintiffs purposely misled customers about the nutritional value of their food); notes 497-98 and accompanying text (plaintiffs paid workers in the U.K. "badly"); notes 535-41 and accompanying text (plaintiffs treated animals cruelly).

⁵⁶⁷ See, *e.g.*, *supra* notes 404-06 and accompanying text (plaintiffs food causes cancer); and notes 455-69 and accompanying text (plaintiffs food causes health dangers from antibiotics, hormones, and pesticides).

⁵⁶⁸ See, *e.g.*, *supra* notes 239-49, 313-18 and accompanying text (plaintiffs purchased beef from sources that disposed small farmers and destroyed rainforests); notes 258-62 and accompanying text (plaintiffs imported staples from Third World countries); notes 279-87 and accompanying text (plaintiffs increased demand for beef world-wide); notes 333, 343-58 and accompanying text (plaintiffs made false representations about the use of recycled materials and only used tiny amounts); and notes 500-16 and accompanying text (plaintiffs treated their workers "badly").

⁵⁶⁹ See, *e.g.*, *supra* notes 266-300 and accompanying text (plaintiffs are to blame for starvation and exploitation in the Third World); notes 362-63 and accompanying text (plaintiffs used only tiny amount of recycled material); note 373 (plaintiffs are to blame for litter); notes 424-32 and accompanying text (plaintiffs cause a serious risk of food poisoning); notes 479-83 and accompanying text (plaintiffs cover-up the poor quality of their food); notes 455-56 and accompanying text (antibiotics, hormones and pesticides seriously endanger health); notes 494-95 (plaintiff's employees receive "low" pay); notes 500-516 and accompanying text (plaintiffs treat

incapable of proof, and seemingly under English law should have been protected as “fair comment.”

Justice Bell’s interpretation of the pamphlet made the defendants’ task particularly difficult. On some crucial points he seemed to exaggerate the critical nature of the allegations,⁵⁷⁰ and he interpreted some allegations of opinion or value judgments as statements of fact.⁵⁷¹ There is a serious question whether the few false statements of actual facts in the pamphlet significantly harmed McDonald’s reputation more than the combination of the statements that were true and the statements that should have been interpreted as protected opinions.

Perhaps under English law there were sufficient grounds to find defendants liable for defamation based on some of the allegations in the pamphlet.⁵⁷² However, some of the grounds for liability seem at least questionable, even under English law. The defendants would have had a better chance of success in most other European countries; and in a case before the European Court of Human Rights their case would have been even stronger. A contrary result would have been assured in a court in the United States. Indeed, it is doubtful that McDonald’s could have won its libel case in any mature western democracy other than England. Although England is not alone in Europe in allocating the burden of proof to the defendants in defamation cases, the combination of that allocation of proof with the strict liability standard applicable in England and the denial of legal aid made a successful defense, in this complex and multifaceted litigation impossible.

V. ADDENDUM: THE APPELLATE DECISION

The English Appellate Court decided the defendants’ appeal on March 31 of 1999.⁵⁷³ The full opinion was released during the summer. The Appellate Court left most of Justice Bell’s conclusions and analyses in place, but did disagree with the application of the law in a few instances, resulting in a reduction in the damages by approximately one third. This addendum will focus on those issues that the author views as most important for understanding the Appellate Court decision, the current status of defamation

workers badly); notes 521-25 and accompanying text (plaintiffs exploit minority workers); and notes 544-48 and accompanying text (plaintiffs treat animals cruelly).

⁵⁷⁰ See, e.g., *supra* note 559.

⁵⁷¹ See, e.g., *supra* note 569.

⁵⁷² See, e.g., liability for the specific statements regarding the purchase of land and dispossession of small farmers, and for being directly involved in destroying rainforests seemed to be correct applications of English law. See *supra* note 565.

⁵⁷³ *Steel v. McDonald’s Corp.*, QBENF 97/1281/1, Pt. 3 (General Law), at 19 (C.A. 1999) [hereinafter *Steel II*].

law in England, and the consistency of the Appellate Court decision with the jurisprudence of the European Court of Human Rights.

Section A will address the Appellate Court's discussion of English defamation law. Section B will discuss the application of that law to the facts of *McDonald's*. However, to avoid repetition with the discussion of the trial court decision in Part IV of this article, only those parts of the Appellate Court opinion in which there was a significantly different analysis from that of the trial court will be addressed. Section C will consider the extent to which the *McDonald's* decision as modified by the Appellate Court opinion is consistent with the jurisprudence of the European Court of Human Rights.

A. ENGLISH DEFAMATION LAW

Appellants challenged numerous aspects of English defamation law. This article will focus on four issues that the author views as most import for understanding the Appellate Court decision and the status of defamation law in England. First, the question of the relevance of the European Convention on Human Rights to U.K. domestic law will be addressed. Second, the question whether McDonald's status as a huge multinational corporation should affect the application of English law will be examined. Third, the question whether the burden of proof of falsity should be shifted to the plaintiffs will be discussed. Lastly, the issue of the applicability of the defense of qualified privilege will be considered.

1. *The European Convention on Human Rights*

One of the more interesting aspects of the Appellate Court opinion is that Court's approach to the relevance of the European Convention on Human Rights. As discussed in Section I above, the U.K. has been one of the few countries to fail to incorporate the Convention into domestic law.⁵⁷⁴ Therefore, domestic courts have not been compelled to apply the Convention, and their treatment of the relevance of the Convention has varied a good deal.⁵⁷⁵ However, the most common approach has been that the Convention should be considered only to help interpret domestic law when it is ambiguous.⁵⁷⁶ That conclusion has ordinarily been combined with the observation that the law in question is not ambiguous.⁵⁷⁷ Therefore, the Convention to date has played a very minor role in English courts.

⁵⁷⁴ See *supra* note 55.

⁵⁷⁵ See *supra* notes 57-60 and accompanying text.

⁵⁷⁶ See *supra* note 58.

⁵⁷⁷ See *supra* note 60.

The Human Rights Act of 1998, which will be implemented on October 2, 2000,⁵⁷⁸ created a mechanism to gradually incorporate the Convention into domestic law.⁵⁷⁹ The *McDonald's* appeal makes clear that the Appellate Court will not expedite that process prior to implementation by explicitly giving greater attention to the Convention than has been the practice in earlier cases. Nevertheless, as will be seen in Section B below, the Court's analysis of those parts of the trial Court opinion that it overruled suggests sensitivity to some of the themes that have been important in the European Court of Human Rights' jurisprudence. The Appellate Court's rejection of some of the trial court's more extreme interpretations of the language of the pamphlet,⁵⁸⁰ and the classification of another part of the pamphlet as opinion rather than an allegation of fact⁵⁸¹ is quite consistent with the approach of the European Court of Human Rights.⁵⁸² Although these interpretations were not linked by the Appellate Court to the Convention, that Court's knowledge of Convention jurisprudence may have been one motivating factor. However, as will be seen, the issues on which the Appellate Court reached a different conclusion from the trial court were rather obviously the weakest aspects of the trial court's judgment. As argued in Section IV above, the trial court's treatment of those issues appeared to be inconsistent with English libel law, unaffected by the Convention. Also, as will be discussed in Section C below, those aspects of the trial court opinion left in place by the Appellate Court, although less extreme, still should be vulnerable to challenge under the Convention.

The Appellate Court began its discussion of the relevance of Article 10 of the European Convention by reiterating comments in previous cases to the effect that English libel law was entirely consistent with the U.K.'s obligations under Article 10 of the Convention.⁵⁸³ Also, the Court was "inclined to agree" with the trial court "that the relevant English law was clear and that [therefore] recourse to the Convention was unnecessary and inappropriate."⁵⁸⁴ But despite these assertions, the Appellate Court did examine the jurisprudence of the European Court in light of the facts in *McDonald's*. The Appellate Court's discussion of the European Court's jurisprudence will be discussed below in Section C, which considers the consistency of the *McDonald's* opinion with the jurisprudence of Article 10.

⁵⁷⁸ See *supra*, note 61.

⁵⁷⁹ See *supra* note 62 for an explanation of the mechanisms in the Human Rights Act which are intended to ultimately incorporate the Convention into domestic law.

⁵⁸⁰ See *infra* text accompanying notes 611-16, 636-43.

⁵⁸¹ See *infra* text accompanying notes 627-33.

⁵⁸² See *supra* text accompanying notes 142-43.

⁵⁸³ *Steel II*, Pt. 3 (General Law), at 19.

⁵⁸⁴ *Id.*

2. Large Multinational Corporations under English Defamation Law

Appellants argued that under English law large multinational corporations should not be able to sue for defamation. They pointed out that corporations like McDonald's would not be unduly disadvantaged by the inability to sue for defamation because they would still be able to sue for "malicious falsehood."⁵⁸⁵ This tort is quite similar to the law of defamation as applied to "public figures" in the United States, in that the plaintiffs have the burden of proof of falsehood, and "malice" is a required element.⁵⁸⁶

Appellants reasoned that corporations like McDonald's:

have the resources to influence the lives of a huge number of people. [Therefore they] should be open to uninhibited public scrutiny and criticism, especially on issues of public interest such as diet and health, advertising, the environment, employment conditions and animal welfare. They should be in the same position as local authorities, bodies such as English Coal Corporation and political parties. There are features of 'multinationals' which should distinguish them from other trading and non-trading corporations. Their activities are world-wide and their commercial power and influence is often as great as government organizations.

Appellants argument was based in part on the 1992 House of Lords decision, *Derbyshire County Council v. Times Newspapers Ltd.*⁵⁸⁷ In that case the Lords held that a democratically elected local authority could not sue for libel. However, respondents in the *McDonald's* appeal fairly captured the rationale of *Derbyshire*, explaining that the case stood for the proposition that "to permit an institution or organ of government to sue for libel was contrary to its public interest in a democracy, since it would place an undesirable fetter on the freedom of people to criticize their democratically elected representatives."⁵⁸⁸ The Appellate Court in *McDonald's* rejected Appellants' attempt to rely on *Derbyshire*, explaining that McDonald's was not an elected body and that there was no principled way to draw the line between powerful and weaker corporations.⁵⁸⁹

⁵⁸⁵ *Id.* at 4.

⁵⁸⁶ "Malice" is defined in terms nearly identical to the definition of that term in *New York Times v. Sullivan* and its progeny. See *supra* text accompanying note 179; SCOTT-BAYFIELD, *supra* note 14 at 109 for the English definition.

⁵⁸⁷ App. Cas. 534 (1993).

⁵⁸⁸ *Steel II*, Pt. 3 (General Law), at 4.

⁵⁸⁹ See *id.* at 7.

3. *The burden of proof*

Appellants argued that England should adopt the U.S. rule allocating the burden of proof of justification to the plaintiffs rather than to the defendants in defamation actions.⁵⁹⁰ The Appellate Court concluded that they did not have the authority to change clear English law.⁵⁹¹ Alternatively, Appellants argued that the defendants should not have the burden of proof of truth “on scientific matters or questions of subjective opinion,”⁵⁹² particularly when they were not the authors of the material. They pointed out that the pamphlet was an “amalgam of allegations” made by others and that because they were poor and not represented by counsel they were not able to bring to court sufficient evidence to support the allegations.⁵⁹³ Appellants argued that Article 10 of the European Convention would dictate such a result, so that it should be sufficient “that defendants reasonably believed that the words complained of were true.”⁵⁹⁴ The Appellate Court did not respond to this argument at this point in the opinion, but did address the argument in the later part of their opinion that focused on Article 10.⁵⁹⁵

4. *Qualified Privilege*

Appellants argued that the defense of qualified privilege in English law should be extended to a publication contributing “to a public debate about the power and responsibility of powerful corporations.”⁵⁹⁶ The privilege should apply when the defendants’ material was untrue but was published “in good faith.”⁵⁹⁷ The Appellate Court explained that the “the nature and extent of the defense of qualified privilege has been explained in *Reynolds v. Times Newspapers Ltd.*,⁵⁹⁸ and that the issue had not arisen at [the *McDonald’s*] trial since *Reynolds* had not been decided.”⁵⁹⁹

⁵⁹⁰ Respondents contended that despite the fact that the burden of proof had not been allocated to them they had accepted that burden in proving falsity and had succeed in doing so as to the parts of the pamphlet for which Appellants had been found liable. The Appellate Court said that this argument had “some general force.” *Id.* at 12. Respondents probably did prove the falsity of some of the allegations in the pamphlet. The allegations regarding starvation and destruction of rainforests, as discussed above, presented Respondents strongest claims. See *supra* text accompanying notes 233-36, 305-09.

⁵⁹¹ See *Steel II*, Pt. 3 (General Law), at 12.

⁵⁹² *Id.*

⁵⁹³ See *id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ See *infra* text accompanying note 653.

⁵⁹⁶ *Steel II*, Pt. 3 (General Law), at 13.

⁵⁹⁷ *Id.*

⁵⁹⁸ 3 W.L.R. 862 (1998).

⁵⁹⁹ *Steel II*, Pt. 3 (General Law), at 13. It is not entirely clear why the fact that *Reynolds* was decided after the trial was important. However, the probable explanation is that the *dicta* in that case implied that the defense might be available in a broader range of cases than had been assumed under prior law. However, the *Reynolds* court rejected the defense, so that case is not precedent

The defense of qualified privilege has three parts. The defendants must establish that they have a “duty” to publish and that the audience has an “interest” in the information. Furthermore, the circumstances must be such so as to make the publication “in the public interest.”⁶⁰⁰ The Appellate Court in *McDonald’s* made clear that “in appropriate cases” the “general public” may have an “interest” in the material.⁶⁰¹ Also, the “duty” to publish may flow to the “general public.”⁶⁰² The Court quoted *Reynolds* for the proposition that the first and second parts of the test should “in modern conditions...more readily be held to be satisfied.”⁶⁰³ Therefore, the Appellate Court rejected respondents’ narrow definition of duty as limited to the press, noting that in modern society groups with special interests play an important role in informing the public.⁶⁰⁴

Although appellants were able to satisfy the first and second elements of qualified privilege, they could not satisfy the third element of the test. A court must look to a number of different factors in applying the “circumstances” element. These include: the authority of the source,⁶⁰⁵ whether an opportunity to rebut has been given, and whether the statement has been “checked.”⁶⁰⁶ Applying these elements to the facts of *McDonald’s*, the Court accepted respondents’ description of the source as coming from “bitter opponents” with “no status so as to command respect by virtue of...character or provenance.”⁶⁰⁷ Furthermore, the pamphlet was not balanced and respondents had not been given an opportunity to respond.⁶⁰⁸ The respondents pointed out that “the only cases in which qualified privilege has succeeded where the publication was to the world at large was where there were reports of a properly constituted body of investigators and where opportunity had been given to the plaintiff to rebut what was alleged.”⁶⁰⁹

for such a change in the law. For a discussion of the traditional approach to qualified privilege see SCOT-BAYFIELD *supra* note 14 at 73-80.

⁶⁰⁰ *Steel II*, Pt. 3 (General Law), at 14.

⁶⁰¹ *Id.*

⁶⁰² *Id.*

⁶⁰³ *Id.* at 15, quoting 909E.

⁶⁰⁴ *See id.* at 17.

⁶⁰⁵ The Appellate Court explained that

[T]he higher the status of a report, the more likely it is to meet the circumstantial test. Conversely, unverified information from unidentified and unofficial sources may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publisher undertakes a heavy burden in showing that the publication is fairly warranted by any reasonable occasion or exigency.

Id. at 14.

⁶⁰⁶ *Id.* at 15, quoting 909E.

⁶⁰⁷ *Id.* at 17.

⁶⁰⁸ *See id.*

⁶⁰⁹ *Id.* at 17. Quoting a 1984 case, *Blackshaw v. Lord*, [1984] QB 1, 27, the Appellate Court explained that “there may be extreme cases where the urgency of communicating a warning is so

B. THE APPLICATION OF ENGLISH LAW

To avoid repetition with the body of this article, only those areas of the Appellate Court opinion in which there was a substantial difference between the Appellate Court and the Trial Court in the application of the law will be discussed.

1. *The Health dangers of McDonald's food*

The Appellate Court disagreed with the Trial Court on the question whether the defendants had proven the truth of their claims regarding the connection between McDonald's food and heart disease. Thus, with respect to this claim the Appellate Court found that the defendants had established the defense of justification. That Court did not find that justification was established with respect to the connection to cancer. However, the Appellate Court's analysis was sufficiently different from the trial court on that issue to merit consideration.

a. Heart Disease

The Appellate Court's conclusion that the defense of justification had been established was primarily due to that Court's rejection of Justice Bell interpretation of the alleged defamatory statements. According to the Appellate Court, Justice Bell was in error in finding in his final judgment that the pamphlet should be interpreted to mean that eating McDonald's food "more than just occasionally" is a serious health hazard.⁶¹⁰ The Appellate Court's reasoning had two parts. First, the Court explained that Justice Bell had interpreted the meaning of the health allegations in a preliminary finding requested by both parties prior to the completion of the evidentiary phase of the trial. In that finding he had concluded that the proper meaning was:

McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt...and low in fibre, vitamins and minerals, and because eating it may well make your diet high in fat, sugar, animal products and salt...and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result.⁶¹¹

great, or the source of the information so reliable, that the publication of suspicion or speculation is justified, for example, where there is a danger to the public from a suspected terrorist or the distribution of contaminated food or drugs." *Id.*

⁶¹⁰ *Steel II*, Pt. 11 (Nutrition), at 8.

⁶¹¹ *Id.* at 3.

Justice Bell's interpretation was appealed by the defendants prior to resuming the evidentiary phase of the trial. The Appellate Court, in that first appeal, upheld Justice Bell's interpretation. However, the Appellate Court in the final appeal explained that in his final judgment Justice Bell elaborated on his initial definition that had been upheld in the earlier appeal by adding the caveat "more than just occasionally."⁶¹² This elaboration was found by the Appellate Court to be prejudicially inconsistent with Justice Bell's previous interpretation. Indeed, the Appellate Court was quite adamant in criticizing Justice Bell's elaboration. That Court asserted that "[t]here is arguably a degree of absurdity if, when a court has determined the meaning of a defamatory publication, the court then needs to determine the meaning of the meaning. The fact remains that the determined meaning is to be applied, not altered."⁶¹³

Such a prejudicial alternation of an interpretation upheld in a previous appeal should have alone been sufficient to find that Justice Bell was in error. However, the Appellate Court did not stop at this finding. That Court also explained why the addition of the caveat "more than just occasionally" was not a reasonable interpretation of the language. Using the same argument suggested in Section IV of this article,⁶¹⁴ the Appellate Court explained that "the word 'diet' in the determined meaning...imports the concept of people whose regular diet has the ingredients described," not the concept of people who merely eat McDonald's food "more than just occasionally."⁶¹⁵

After rejecting Justice Bell's elaboration, the Appellate Court went on to examine the evidence offered by the defendants and the plaintiffs and Justice Bell's findings of fact on the connection between heart disease and the kind of food sold by McDonald's. According to the Appellate Court, Justice Bell was in error because "the unelaborated meaning as upheld by the Court

⁶¹² *Id.*

⁶¹³ *Id.* at 8.

⁶¹⁴ See *supra* text accompanying notes 389-96.

⁶¹⁵ The Appellate Court also rejected a rather odd argument that Justice Bell had accepted in support of his interpretation of the health hazard statements. Justice Bell found that "only a small proportion of people eat McDonald's food several times a week." *Steel II*, Pt. 11 (Nutrition), at 8. The Appellate Court correctly explained that this finding of fact was irrelevant to the degree of risk to health involved in eating McDonald's food. The Appellate Court explained that:

An assessment of the extent of the risk involved in taking a particular course of action does not depend on how many people in fact take that risk. The quality of food of a particular type and the possible effects of eating it with any specified frequency do not depend on how many people in fact eat it with that frequency. The proposition "arsenic is very poisonous" is not rendered untrue because very few people take arsenic.

of Appeal is, for heart disease, substantially justified by the judges' findings."⁶¹⁶

b. Cancer

Although the Appellate Court ultimately sustained Justice Bell's judgment that the defense of justification had not been established on the issue of cancer, that Court did examine the issue in considerable depth. The Appellate Court essentially concluded that the defendants had come close to establishing justification, but had not quite met their burden of proof. But because they had come so close, the Appellate Court said that this should be taken into account in assessing those damages that were tied to the cancer allegations.⁶¹⁷

The Appellate Court seemed particularly impressed by the pronouncements of various International and National Health Organizations and officials such as the World Health Organization, the National Cancer Research Council, the U.S. Surgeon General, the English Nutrition Foundation's Task Force on Unsaturated Fatty Acids, and the Chief Medical Officer of Scotland. Warnings of the cancer risk associated with consumption of fat had been given by all of these sources.⁶¹⁸

The Appellate Court explained that their extensive discussion of the evidence on the issue of cancer was in part due to "the public importance of the health issues involved."⁶¹⁹ This discussion was not necessary to the Appellate Court's legal conclusion. Presumably the purpose was to make clear that in upholding Justice Bell's judgment on the cancer issue the Court did not mean to convey the idea to the public that there was no reason to be concerned about the consumption of fat as a cancer risk. The Appellate Court explained that:

[O]n the evidence, warnings given to the public about the real possibility of a causal link between a diet high in "total fat and

⁶¹⁶ *Id.* at 14.

⁶¹⁷ The Appellate Court explained that, "[T]he defense of justification for the cancer part of the defamatory meaning should fail but, since the appellants went some way along the road to success here, they would be entitled to the benefit of the principles stated by Neil L.J. in *Pamplin v. Express Newspapers* 1 W.L.R. 116 at 120 (1988) that, where a defense of justification fails, 'nevertheless the defendant may be able to rely on such facts as he has proved to reduce the damages, perhaps almost to vanishing point.'" The Appellate Court assumed that Justice Bell had taken the *Pamplin* principle into consideration in assessing damages based on the cancer allegations because he had referred to the holding in that case when he assessed damages. See *Steel II*, Pt. 16 (Damages), at 7.

⁶¹⁸ See *Steel II*, Pt. 11 (Nutrition), at 14, 21, 22. Justice Bell had also referred to most of these warnings in his judgment. However, Justice Bell did not give major significance to these statements because they failed to establish that fat "causes" cancer, and he had interpreted the health hazards statements in the pamphlet to mean that a "link" to cancer was a "causal link." See *supra* text accompanying note 384.

⁶¹⁹ *Steel II*, Pt. 11 (Nutrition), at 21.

saturated fat,” and cancer of the bowel and breast, provided they are expressed in appropriate language, could not form the basis for defamation proceedings and we did not wish to leave this part of the case without expressing that view.⁶²⁰

Nevertheless, the Appellate Court found lack of justification on the cancer issue because that Court accepted the definition of “linked” to mean “causally linked.”⁶²¹ However, it should be stressed that the Appellate Court did have some doubts as to whether Justice Bell’s interpretation of the word “linked” was correct. The interpretation had been in part based on the further language in that section of the pamphlet that the assertions were “accepted medical fact” not a “cranky theory.”⁶²² The defendants had explained that these assertions simply meant that “reputable public bodies or a reputable body of medical opinion hold that view.”⁶²³ The Appellate Court asserted that “[w]e have to say that we have considerable sympathy with these submissions, given the wide range of medical opinions to which we have been referred.”⁶²⁴

Despite the “sympathy” expressed by the Appellate Court for the defendants’ interpretation of the word “linked,” that Court never attempted to resolve the dispute over the meaning of the term. The Appellate Court’s ultimate acceptance of Justice Bell’s interpretation of the word “linked” was based on a rule of English appellate procedure. The Appellate Court explained that the initial appeal on the question of the meaning of the health hazard allegations had included a challenge to Justice Bell’s interpretation of the word “linked.” However, prior to the hearing on this earlier appeal, the defendants dropped all issues regarding Justice Bell’s interpretation except one – that Justice Bell had chosen “a meaning which was more severe than that pleaded in the Statement of Claim.”⁶²⁵ The Appellate Court had rejected the only ground asserted in the appeal and never had occasion to reach the merits of the remainder of the defendants’ claims.

In the final appeal, appellants asserted that they had assumed that all their other grounds of appeal on the question of interpretation would be preserved despite their having dropped them from the initial appeal. Unfortunately, they were wrong regarding the procedural rule on this question.⁶²⁶ Thus, the issue of whether Justice Bell properly interpreted the

⁶²⁰ See *id.* at 23.

⁶²¹ *Id.* at 21.

⁶²² Appendix at 139.

⁶²³ *Steel II*, Pt. 11 (Nutrition), at 21.

⁶²⁴ *Id.* at 6. But at another point the appellate court said that it also saw “the force of” the respondents’ response that appellants could have used more qualified language and thereby avoided a defamatory implication. *Id.* at 21.

⁶²⁵ *Id.* at 6.

⁶²⁶ See *id.* at 7.

word “linked” to mean “causally linked” was never addressed on the merits in either appeal. It seems that the defendants’ failure to establish justification on the issue of cancer may well have been the result of their misunderstanding of the rules of procedure in English Courts—an understandable error given that they were both lay persons.

2. *Pay and Working Conditions*

The Appellate Court found that Justice Bell had erred in interpreting the material on pay and working conditions as statements of fact rather than comment. It will be recalled that Justice Bell had found that the defendants had proven the truth of the assertion in the pamphlet that pay at McDonalds U.K. was “bad.”⁶²⁷ However, he concluded that the defendants had introduced insufficient evidence regarding pay in the U.S. for him to be able to determine whether U.S. McDonalds also paid low wages.⁶²⁸ In addition, Justice Bell had concluded that the defendants had not proven the truth of their allegations that working conditions were “bad” in either the U.K. or in the U.S.⁶²⁹ It was asserted in this article that the statements regarding low pay and bad working conditions were all subjective value judgments and therefore the defense of fair comment should have caused Justice Bell to find for the defendants on this issue.⁶³⁰ The Appellate Court analyzed the issue similarly, with one slight difference. That Court saw the statements regarding pay and working conditions as combined, explaining that “[i]t is a composite expression of deductive opinion to the effect that the workers’ employment package is a poor package.”⁶³¹ The Appellate Court viewed the description of this package in the pamphlet as having “a strong element of subjective evaluation,”⁶³² and even the statements regarding pay alone contained “an element of evaluation.”⁶³³

The Appellate Court considered at some length the evidence of low pay and working conditions that Justice Bell had found inadequate to prove the truth of what he saw as the alleged factual assertions of low pay in U.S. McDonald’s and bad working conditions in the U.K. and U.S. McDonald’s.⁶³⁴ But the Appellate Court’s examination of the evidence was for the purpose of determining whether there were sufficient facts proven to support the comments. That Court found that there were such facts—some in the pamphlet itself and others “unstated in the leaflet but well known as

⁶²⁷ See *supra* notes 497-98 and accompanying text.

⁶²⁸ See *supra* note 499 and accompanying text.

⁶²⁹ See *supra* notes 500-20 and accompanying text.

⁶³⁰ See *supra* text accompanying notes 523, 525-26, 545-46, 552, 560.

⁶³¹ See *Steel II*, Section 13 (Employment), at 19.

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ See *id.* at 14.

applying generally to the catering industry.”⁶³⁵ According to the Appellate Court:

[s]ince we have concluded that the main defamatory sting of this part of the leaflet is comment, the critical question is, not the factual question which the judge asked and answered, but the different question whether the comment was objectively fair, that is whether upon the relevant factual substratum an honest or fair-minded person could hold that view.⁶³⁶

The Appellate Court also disagreed with Justice Bell’s analysis of the statement in the pamphlet that “the truth is McDonald’s are only interested in recruiting cheap labour.”⁶³⁷ Justice Bell interpreted this passage to mean that McDonald’s was interested in nothing else.⁶³⁸ The Appellate Court, however, interpreted the passage in a similar manner to that suggested in Section IV of this article.⁶³⁹ According to the Court, “[i]t is over literal to emphasize the word “only” in the sentence.... The word is, we think, used more loosely for colloquial emphasis...and does not import the suggestion that McDonald’s are interested in nothing else.”⁶⁴⁰

The Appellate Court further rejected Justice Bell’s interpretation of the assertion in the pamphlet that McDonald’s were “exploiting disadvantaged groups.”⁶⁴¹ Adopting a meaning suggested earlier in this article,⁶⁴² the Appellate Court found that the words do not mean that the exploitation is deliberate.⁶⁴³

3. Damages

The Appellate Court’s disagreement with Justice Bell’s judgment on the issues of the risk of heart disease and on the issue of working conditions led that Court to reduce the damage award by one-third.⁶⁴⁴ However, most of

⁶³⁵ *Id.* at 19.

⁶³⁶ *Id.* at 23. Justice Bell had found the evidence that McDonald’s U.S. paid on average only somewhat more than the minimum wage was inadequate evidence to prove that the pay was low. For instance, the federal minimum wage in the U.S. for 1991 was \$4.25 per hour and McDonald’s U.S. paid on average \$5.00 per hour. The appellate court explained that Justice Bell had concluded that he “did not have any feel for U.S. wages and living costs” so that he could determine whether such wages were low. *Id.* at 22. The appellate court disagreed. *See id.*

⁶³⁷ Appendix at 143.

⁶³⁸ *See supra* text accompanying notes 522-23.

⁶³⁹ *See supra* text accompanying notes 523-24.

⁶⁴⁰ *Steel II*, Section 13 (Employment), at 14.

⁶⁴¹ *See supra* text accompanying notes 522-24.

⁶⁴² *See supra* text accompanying note 524.

⁶⁴³ *See Steel II*, Section 13 (Employment), at 15.

⁶⁴⁴ *See Steel II*, Section 16 (Damages), at 7. In the initial damage award, defendant Morris had been found liable for 30,000 pounds and Defendant Steel for £27,500. The Appellate Court reduced the award against Morris to £20,000 and against Steel to £18,000. The difference was due to

the reduction was due to the Appellate Court's conclusion that appellants had established the defense of justification regarding the risk of heart disease. Because the Appellate Court concluded that Justice Bell had "taken account of the fact that the evidence 'did disclose unsatisfactory aspects of working conditions,'" even though he did not find that they were "bad," the reduction in the award based on the Appellate Court's finding that the statements regarding working conditions were "fair comment" was small.⁶⁴⁵

C. THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS APPLIED TO THE MCDONALD'S APPELLATE COURT OPINION

It order to assess the applicability of the jurisprudence of Article 10 of the Convention to the *McDonald's* case as modified by the Appellate Court opinion, it is helpful to first examine that Court's analysis of this issue. As discussed in Sections I and VI A above, English courts have given little attention to the Convention for two reasons. First, unlike nearly every other signatory country, it is not directly applicable in U.K. domestic law.⁶⁴⁶ Second, English judges have taken the position that there is no difference between English law and Convention jurisprudence; therefore, even if the Convention were applicable, there is no reason to seriously examine the jurisprudence of the European Court when deciding English cases.⁶⁴⁷ The Appellate Court in *McDonald's* repeated both themes,⁶⁴⁸ but nevertheless went on to examine Article 10 jurisprudence in some depth.

The Appellate Court first considered Appellants' unsuccessful 1993 application to the European Commission on Human Rights. It should be recalled that the major focus of the 1993 application had been the denial of legal aid or simplified procedures.⁶⁴⁹ However, the Appellate Court stressed the language in the Commission decision most relevant to a challenge to the English substantive law of libel. Addressing the argument in the current appeal that "it was contrary to Article 10 for corporations such as McDonald's to be able to maintain actions for libel," the Appellate Court acknowledged that the question had not been raised in the 1993 application to the Commission.⁶⁵⁰ Nevertheless, the Court concluded that the Commission's "explicit decision that there was no appearance of a violation of Article 10 in the context of the parties' disparate abilities to conduct the litigation strongly

Steel's involvement in the distribution of the pamphlet for a shorter period of time than Morris. The defendants were, however, jointly and severally liable. *See id.*

⁶⁴⁵ *Id.*

⁶⁴⁶ *See supra* notes 55, 574-77 and accompanying text.

⁶⁴⁷ *See supra* note 57.

⁶⁴⁸ *See Steel II*, Pt. 3 (General Law), at 19.

⁶⁴⁹ *See supra* notes 76-86 and accompanying text.

⁶⁵⁰ *See Steel II*, Pt. 3 (General Law), at 20.

suggests that the Commission considered these proceedings to be” consistent with Article 10.⁶⁵¹

The Appellate Court did not assert that the Commission decision stands for the broad proposition that the application of the substantive law of libel to the particular case was consistent with the Convention. As discussed in Section II above, such a use of the Commission decision would have been inappropriate, as it was not known at the time of the application to the Commission how that law would be applied to the facts of *McDonald’s*.⁶⁵² The Appellate Court condensed the various Article 10 arguments made by appellants in the current appeal to the following:

The appellants rely on article 10 for a variety of submissions. In essence, however, they are all to the same effect, viz: that the English law of defamation should be interpreted or, if necessary, adjusted so that by one means or another it provides a defense for appellants such as they are to claims by respondents such as McDonald’s for libel in publications such as the leaflet where the libels are untrue defamatory statements of fact which the appellants nevertheless believed to be true.⁶⁵³

The Court then described appellants’ reliance on the jurisprudence of the European Court of Human Rights as “a synthesis of a number of general observations made in individual Convention cases.”⁶⁵⁴ The Appellate Court commented further “that the synthesis is loosely structured and without a clear analysis of how English law should be interpreted, or adjusted to achieve the submitted conclusion.”⁶⁵⁵ No doubt Appellants’ use of the Convention jurisprudence would have had more “structure” had they been represented by counsel. However, even with legal representation, the case by case, ad hoc balancing approach used by the European Court⁶⁵⁶ often does make it difficult to reach conclusions regarding specific changes in domestic laws required by the Convention.

In Section II above, several European Court of Human Rights cases that were relevant to an Article 10 analysis of *McDonald’s* were discussed. The Appellate Court also discussed those cases, pointing to their distinguishing features and minimizing or ignoring the similarities to *McDonald’s*. The Court first distinguished *Castells v. Spain*,⁶⁵⁷ asserting

⁶⁵¹ *Id.*

⁶⁵² See *supra* text accompanying notes 77-78, 87-93.

⁶⁵³ See *Steel II*, Pt. 3 (General Law), at 20.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

⁶⁵⁶ See *supra* notes 73, 117-22 and accompanying text.

⁶⁵⁷ 14 Eur. H.R. Rep. 445 (1992).

that the case was specifically limited to criticism of the government.⁶⁵⁸ Addressing the most relevant case, *Hertel v. Switzerland*,⁶⁵⁹ the Appellate Court pointed out that Hertel's paper was not the basis of the action but rather the basis was the journal's "over-simplified and exaggerated ...conclusions and added images which associated the use of microwave ovens with death."⁶⁶⁰ Certainly the Appellate Court was correct that this was one of the factors referred to by the European Court of Human Rights in the finding of a violation of Article 10. However, that Court did not treat that aspect of the case as significantly more important than other aspects.

Seemingly acknowledging the multifaceted mode of analysis employed by the European Court, the Appellate Court discussed several other rationales from the European Court of Human Rights' decision in *Hertel*. The *McDonald's* Appellate Court quoted *Hertel* for the proposition that "[I]t is...necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's pure "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health."⁶⁶¹ However, the Appellate Court oddly ignored the applicability of this argument to *McDonald's*.

The Appellate Court also stressed that *Hertel* had criticized microwaves generally, not an individual manufacturer, thus making his statements "more clearly a contribution to a general public debate."⁶⁶² The Appellate Court used this distinction to argue that in *Hertel* the European Court had found that the scope of the injunction was not "proper and necessary."⁶⁶³ The Appellate Court's point is somewhat difficult to follow in that the microwave industry's concern had been the economic effect on the sale of all brands of microwaves. A better distinction would have been to focus on comments in *Hertel* to the effect that the wording of the injunction might not leave Hertel room to advance his views in academic circles.⁶⁶⁴

Attempting to further distinguish *Hertel* from *McDonald's*, the Appellate Court described Hertel's own work as "a reasoned research study."⁶⁶⁵ However, this description clashes rather dramatically with the European Court's comments that "[I]t matters little that his opinion is a minority one and may appear to be devoid of merit."⁶⁶⁶ The Appellate Court also failed to stress the comments in *Hertel* regarding the importance of open

⁶⁵⁸ See *Steel II*, Pt. 3 (General Law), at 20.

⁶⁵⁹ See *supra* text accompanying notes 94-116 for a discussion of *Hertel*.

⁶⁶⁰ *Steel II*, Pt. 3 (General Law), at 21.

⁶⁶¹ *Id.* at 21, quoting *Hertel* at 23.

⁶⁶² *Id.*

⁶⁶³ *Id.*

⁶⁶⁴ See *Hertel* at ¶ 50.

⁶⁶⁵ *Steel II*, Pt. 3 (General Law), at 21.

⁶⁶⁶ *Hertel*, ¶ 50.

debate on matters of importance to the public.⁶⁶⁷ Likewise, the Appellate Court did not focus on the problem of restricting speech in a “sphere in which it unlikely that any certainty exists”⁶⁶⁸—a problem that is particularly relevant to the statements in the pamphlet regarding health concerns.

Certainly *Hertel* does not inevitably lead to the conclusion that *McDonald’s* should be found to violate Article 10. However, the Appellate Court downplayed the relevance of *Hertel*, particularly with regard to the European Court’s discussion of the proper treatment of matters of scientific dispute. All the health allegations in the pamphlet, including the connection to heart disease, cancer, food poisoning, pesticides, antibiotics, and hormones are in this category. As seen above, the Appellate Court only reversed one of the trial court’s conclusions on liability for the statements regarding health,⁶⁶⁹ despite the existence of what appeared to be a good deal more scientific support for all of the allegations than those involved in *Hertel*.

The Appellate Court also addressed *Thorgier v. Iceland*⁶⁷⁰ which involved allegations of police brutality against unnamed members of a police department.⁶⁷¹ The Court acknowledged that the European Court in *Thorgier* had refused to “distinguish between political discussion and discussion of other matters of public concern.”⁶⁷² But the Appellate Court did not focus on that issue or on the importance given in *Thorgier* to the fact that the petitioner was merely relating information given to him by others. Rather than giving attention to these aspects of *Thorgier* that were quite analogous to *McDonald’s*, the Appellate Court stressed that in *Thorgier* the “aim” of the statements were seen as “encouraging public investigation...not to defame the police force.”⁶⁷³ For that reason the Appellate Court said the statements “bore on matters of serious public concern.”⁶⁷⁴

The connection of “aim” to whether the expression bears on “matters of serious public concern” is not obvious. In one sense it seems that appellants intended to defame McDonald’s, but their ultimate aim was to protect the public from what they saw as the evils that McDonald’s and companies like them were causing. In that sense the motives of the appellants in *McDonald’s* were quite similar to those of the petitioners in both *Hertel* and *Thorgier*. Certainly Appellants’ motives had nothing to do with personal gain or even personal animosity. Furthermore, in nearly any contentious political or public policy debate one side will aim to discredit the opposition.

⁶⁶⁷ See *Hertel*, ¶ 47.

⁶⁶⁸ *Hertel*, ¶ 50.

⁶⁶⁹ See *supra* notes 611-16 and accompanying text.

⁶⁷⁰ 14 Eur. H.R. Rep. 843 (1992).

⁶⁷¹ See discussion of *Thorgier*, *supra* notes 126-27 and accompanying text.

⁶⁷² *Steel II*, Pt. 3 (General Law), at 22.

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

Indeed, in the purely political context the aim of one candidate is often quite selfish, yet the European Court would surely not refuse protection for such expression due to the self-interest of the speaker.⁶⁷⁵

Appellants attempted to use *Thorgier* for the proposition that because they were “reporting what had been said by others [i]t would be unreasonable to require that the truth...be established.”⁶⁷⁶ Indeed, Appellants asserted that their case was particularly strong because, unlike “*Thorgier*, the pamphlet had been written by others.”⁶⁷⁷ The Appellate Court repeated but did not respond to that allegation. Instead that Court asserted rather obliquely that “*Thorgier* was decided mainly on the facts.”⁶⁷⁸ The Court also stressed that the case involved “a criminal sanction.”⁶⁷⁹ But the European Court had merely pointed out that “the conviction and sentence were capable of discouraging open discussion of matters of public concern.”⁶⁸⁰ If a conviction requiring a fine of 10,000 Icelandic Kronars, the equivalent of less than \$250,⁶⁸¹ would discourage open discussion on matters of public concern, certainly the specter of a civil lawsuit by one of the largest corporations in the world must be even more of a discouragement. The fact that the lawsuit would be tried in a jurisdiction giving the highest damage awards in Europe, and denying legal aid to indigent defendants, must also be factored in when considering the relative discouragement to discussion on matters of public concern involved in *Hertel* and *McDonald’s*.

The Appellate Court cited an earlier English Appellate Court opinion which had explained *Thorgier* as standing for the “unreasonableness of requiring the defendant to prove the truth of a statement which did not implicate any specific officer.”⁶⁸² Certainly the European Court in *Thorgier* stressed the “unreasonable, if not impossible task” of proving truth.⁶⁸³ But

⁶⁷⁵ Motive is relevant in English law to the issue of “malice,” which defeats a defense of “fair comment.” See *supra* note 195 and accompanying text. In the United States motive is seemingly no longer an important factor in a defamation action. Malice under the *New York Times* standard is defined as “reckless disregard of the truth,” which is not the same as the common law meaning in either the U.S. or England. Although ill will may be relevant to “reckless disregard,” it is certainly not the determining factor. See discussion of reckless “disregard of the truth,” *supra* notes 177-79 and accompanying text.

Motive did play an important role in the European Court’s finding that the broadcast of racist speech in *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser.A), 19 E.H.R.R. 1 (1994), could not be criminally prosecuted. The journalist’s intent had been to expose rather than to propagate the expression.

⁶⁷⁶ *Steel II*, Pt. 3 (General Law), at 22.

⁶⁷⁷ *Id.*

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *Thorgier*, at 867, ¶ 68.

⁶⁸¹ The \$250 figure is based on the exchange rate of 41.06 Kronars per dollar on June 16, 1986, the date the fine was assessed. The Cultural Counselor of the Icelandic Embassy, Maria Gylfadottir, obtained the exchange rate information for the author from the Central Bank of Iceland.

⁶⁸² *Steel II*, Pt. 3 (General Law), at 22, quoting *Reynolds* at 906.

⁶⁸³ *Thorgier* at 866, ¶ 66.

the unreasonableness of the task was not simply due to the unnamed perpetrators; rather, the European Court's discussion of the task focused primarily on the fact that the applicant was writing about what others had said.⁶⁸⁴ Seemingly acknowledging that the English Appellate Court in the earlier case had over simplified the significance of *Thorgier*, the *McDonald's* Appellate Court concluded that:

In our view, *Thorgier* illustrates particular circumstances in which restrictions on freedom of expression may offend article 10, but it does not support a general principle that those who publish what has been said by others should be immune from proceedings for defamation whatever the circumstances. We consider that these Convention cases generally illustrate how article 10 is to be applied in particular cases, but that they give no support for any submission that the composite balance of the English law of libel contravenes the article.⁶⁸⁵

The Appellate Court went on to explain why the "composite" balance of the English law of libel does not conflict with Article 10. The Court stressed that defenses of fair comment and qualified privilege are available in appropriate circumstances.⁶⁸⁶ That Court also explained that:

The English law of defamation is itself a mature body of law developed over several centuries in a democratic society with the very purpose of providing a proper and necessary balance between freedom of expression and protection of reputation. This means that an inquiry to determine what the English law of defamation is or ought to be asks the very same questions as an inquiry to determine

⁶⁸⁴ The European Court in *Thorgier* explained that:

With regard to the other factual elements contained in the articles, the Court notes that these consisted essentially of references to "stories" or rumors"—emanating from persons other than the applicant.... As was pointed out by the Commission, it has not been established that this "story" was altogether untrue and merely invented. Again, according to the first article, the applicant had found out that most people knew of various stories of that kind, which were so similar and numerous that they could hardly be treated as mere lies.... In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offense under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the...police had committed a number of acts of serious assault...as well as forgery and other criminal offenses. In so far as the applicant was required to establish the truth of his statements, he was in the Court's opinion, faced with an unreasonable, if not impossible, task.

Id. at 866, ¶ 65.

⁶⁸⁵ *Steel II*, Pt. 3 (General Law), at 23.

⁶⁸⁶ *See id.*

whether the English law of defamation is in accordance with article 10.⁶⁸⁷

When evaluating the *McDonald's* Appellate Court's bold defense of English libel law, several important factors should be recalled. First, the U.K. is one of the few countries in Europe to have a strict liability standard for libel.⁶⁸⁸ Second, damage awards for libel are much higher in English courts than anywhere else in Europe⁶⁸⁹—so much so that the plaintiffs from around the world bring suit in England, sometimes on the basis of the distribution of a handful of publications in a foreign language.⁶⁹⁰ Third, despite its “mature body of law developed over several centuries in a democratic society,” the U.K. has had to defend against charges of violation of the Convention in cases before the European Court of Human Rights more frequently than all but one other signatory country.⁶⁹¹ Several of these cases involved violations of Article 10,⁶⁹² despite the English Courts' frequent comments that their law is totally consistent with that provision.⁶⁹³

The Appellate Court's assertion that the English law of defamation is clearly consistent with Article 10 is subject to serious question. Nevertheless, that Court did point to some significant distinguishing factors between *McDonald's* and the Convention jurisprudence relied upon by appellants. Given the European Court's ad hoc balancing analysis, it is quite possible that a violation of the Convention will not be found by that Court should the case end up in Strasbourg. However, that result would primarily be because the Appellate Court itself overturned the weakest links in the trial court opinion. These reversals were discussed in Section B above. Had the Appellate Court left standing liability for defamation with respect to these issues, it would have been blatantly obvious that “the composite” of English law as applied in *McDonald's* did not provide adequate breathing space for criticism and comment as required by Article 10.

The Appellate Court's opinion in *McDonald's* is significantly less oppressive to freedom of expression than the trial court opinion. However, the remaining liability is probably still more restrictive of expression than would be expected under the defamation law of most other European countries. Furthermore, a reasonable case can be made that the holdings are inconsistent with important principles established in the European Court of Human Rights' jurisprudence. Should the European Court of Human Rights

⁶⁸⁷ See *id.*

⁶⁸⁸ See *supra* note 24 and accompanying text.

⁶⁸⁹ See *supra* notes 25, 35-38 and accompanying text.

⁶⁹⁰ See *infra* note 745 and accompanying text.

⁶⁹¹ See *supra* note 56 and accompanying text.

⁶⁹² See *supra* note 54.

⁶⁹³ See *e.g. supra* note 57.

find that some or all of the bases for liability left in place by the Appellate Court violate the Convention, that Court could approach an analysis in several different ways. As noted frequently in this article, the European Court's jurisprudence has to date been applied in an ad hoc manner. When a violation is found the Court ordinarily simply lists those aspects of the case that make the burden on expression seem particularly severe.⁶⁹⁴ Usually the Court does not even indicate which of the listed factors are more significant than others.⁶⁹⁵ Absolute rules, such as those developed by the U.S. Supreme Court, are rare.⁶⁹⁶

Applying the jurisprudence of the European Court of Human Rights to the issues in *McDonald's* would be very complex because the pamphlet contains so many different allegations. As pointed out in Section IV above, the arguments for a finding of a violation of the Convention regarding some of the bases for defamation liability are a good deal stronger than others. Also, for Morris and Steel to show that their liability for defamation is entirely inconsistent with the Convention they could not simply look to one of the principles relied upon in previous cases, or even to a given set of principles. Some of these principles are relevant to some of the bases for liability, while other principles are relevant to other bases. It will be recalled that the trial in this case was the longest in English history and resulted in a 750 page trial court opinion.⁶⁹⁷ It is quite likely that if the European Court of Human Rights ultimately decides this case their judgment will be the longest in the history of that Court's jurisprudence.

Finding a violation of the Convention with respect to some of the allegations in the pamphlet would require the European Court to take general principles discussed in prior cases and apply them to fact situations that are significantly different from those to which the principles were originally applied. Certainly there would be nothing shocking or unusual in such a progression. This process is common to judicial bodies charged with the application of rights' guarantees, and is not new to the European Court of Human Rights.⁶⁹⁸ European civil libertarians would no doubt applaud such

⁶⁹⁴ See, e.g., *Hertel* ¶ 48-50, *Thorgeir* ¶ 63-68.

⁶⁹⁵ See *id.*

⁶⁹⁶ An exception is found in *Castells v. Spain*, 14 Eur. H.R. Rep. 445 (1992), in which the Court asserted that in a criminal defamation case proof of truth must be an available defense.

Were the European Court to impose a rule that must be applied in defamation actions under Article 10, the Court might require some element of fault. Such a rule would be consistent with the law in most European countries. See *supra* note 24. However, that rule would be totally inconsistent with hundreds of years of English defamation law. Therefore, this approach would entail a very controversial step. The European Court has not to date suggested that fault is a necessary factor in a defamation or insult cases.

⁶⁹⁷ See *supra* text accompanying notes 5-6.

⁶⁹⁸ See, e.g., *Judgments in the Cases of Lustig-Prean and Beckett v. The United Kingdom and Smith and Grady v. The United Kingdom*, (Nov. 2, 1999) <<http://www.dhcour.coe.fr/eng/PRESS...20Court/Lusting-Prean%20epresse.htm>> the recent controversial decision by the

an expansion of protection. Although the expansion would bring the protection afforded by Article 10 closer to the very speech protective stance of the U.S. Supreme Court, U.S. jurisprudence would remain considerably more speech protective.

Summarizing the manner in which the European Court could proceed to find that Morris and Steel's liability for defamation is entirely inconsistent with the Convention is difficult due to the multifaceted aspects of the case described above. The attempt to do so below will be organized by reference to principles the European Court has looked to in previous cases in which violations have been found.

As noted in Section II above, the European Court has expressed concern regarding the difficulty defendants may have in proving the truth of statements that are the basis for a legal action against them. This has been a factor in several different kinds of cases. The most extreme form of difficulty was faced by the defendant in *Castells v. Spain* which involved liability for insult under a statute that did not even have the possibility of a defense of truth. Therefore, other than the general language supporting a dialogue on questions of public concern, *Castells* is not of much help to Morris and Steel.

The most relevant case to Morris and Steel's argument regarding difficulty of proof is *Hertel v. Switzerland*, discussed extensively in Section II above.⁶⁹⁹ The general remarks of the Court regarding the importance of an open public dialogue on matters of public importance are applicable to all of the allegations of defamation in *McDonald's*. However, the most helpful aspect of the Court's opinion in *Hertel* regards the difficulty of proving the truth of matters of scientific controversy.⁷⁰⁰ Indeed, the Court went so far as to comment that even allegations that may appear to be "devoid of merit" must be protected in the scientific area in which "it is unlikely that any certainty exists."⁷⁰¹ All of the health allegations in the pamphlet involved matters that lacked certainly, some had a great deal of respectable scientific support, and all had at least a modicum of respectable scientific support, unlike the statements involved in *Hertel*. Thus, Morris and Steel would seem to be on very firm ground in arguing that none of the allegations regarding danger to health from their products should be the basis for defamation liability consistent with Article 10. The policy concern to encouraging dialogue on these issues is particularly strong. When a huge corporation, with ample resources to respond to critical allegations regarding dangers to

European Court of Human Rights finding that the U.K. had violated Article 8 (respect for private and family life) by an absolute ban on homosexuals in the military.

⁶⁹⁹ See *supra* text accompanying notes 94-116.

⁷⁰⁰ See *supra* text accompanying notes 111-12.

⁷⁰¹ *Hertel*, ¶ 50.

health from their product uses the law to squelch such discussions in order to avoid a possible loss of profits, the issue is framed quite starkly⁷⁰²

The more difficult question facing the European Court would be how far to extend the general concern for difficulty of proof of truth outside the area of scientific controversy. In *Thorgier*, in which difficulty of proof was an important factor,⁷⁰³ there was no issue of scientific controversy, and the allegations were factual, so that it cannot be said that it was actually impossible to prove their truth. The European Court could find important and relevant the difficulty defendants had in getting access to factual information, such as the Third World sources of McDonald's products, and the actual effect of McDonald's practices on the people and the environments in those countries. The defendants' lack of resources and representation could be found to be relevant to that question. If so, the Court could either consider this factor to be just one of a number of relevant concerns, or the Court could agree with appellants that a large multinational corporation should not be able to sue for libel. Alternatively, the Court might adopt the U.S. rule, at least in such one-sided contests as that in *McDonald's*, that the plaintiff should have the burden of proving falsity.⁷⁰⁴

In *Thorgier*, the Court simply stressed that because the defendant was reporting what a number of other persons had said about the conduct of the police it would have been very difficult for him to determine the truth. The question of how the issue of difficulty of proof is developed by the European Court would be particularly important to the way that Court would treat those allegations in the pamphlet that appeared to be allegations of fact, but at least based on the evidence adduced at trial, were either untrue or could not be proven by the defendants to be true. The clearest examples of such

⁷⁰² A similar problem was involved in another high profile English case, *Upjohn Company v. Oswald*, Q.B. (May 27, 1994) available in LEXIS, England and Wales Reported and Unreported Cases. The case involved allegations of manipulation of data on studies dealing with the safety of the sleeping drug Halcion. Upjohn successfully sued a U.S. scientist for defamation based on statements made in the New York Times. The BBC was also found liable in the case based on statements made in a television broadcast. Upjohn, a U.S. company, never sued in the United States for the statements made by the U.S. scientist in the New York Times. See discussion in *Chips are down at McDonald's* THE GUARDIAN 19, March 15, 1994.

⁷⁰³ See *supra* notes 126-27, 671-84 and accompanying text. Morris and Steel had argued that *Thorgier* should be interpreted to stand for that proposition that there should be an absolute rule that repeating what has been said by others cannot be the basis for defamation. Such a rule would provide more protection for expression in many instances than that given under the constitutional standards established by the U.S. Supreme Court. See *supra* notes 177-79 and accompanying text. It seems unlikely that the European Court would go this far. In addition to the quite extreme protection for expression such a rule would provide, as discussed above, the European Court rarely establishes absolute requirements in applying Article 10. See *supra* notes 695-97 and accompanying text.

⁷⁰⁴ See *supra* notes 174-76 and accompanying text.

allegations were those involving McDonald's alleged purchase of land⁷⁰⁵ and their destruction of rainforests.⁷⁰⁶

The European Court might deal with the specific allegations regarding the purchase of land and the destruction of rainforests by concluding that even if they are factually untrue, or at least unproven, the defendants also alleged more general and indirect activities on the part of McDonalds that ultimately result in the same harm to the environment and indigenous people. Therefore, the general "sting" of these allegations were true, even though some of the specific factual allegations were untrue. Thus it would be an undue burden on expression under Article 10 for the defendants to be liable for defamation for the few specific untrue statements. Although the suggested analysis might be generally consistent with the Court's tendency to interpret expression in a manner that results in protection under Article 10,⁷⁰⁷ the Court has not to date used such an analysis. Furthermore, many people would probably believe that purposely and directly burning rainforests and displacing indigenous people through the purchase of land is significantly more reprehensible than simply engaging in business activities that have the effect of causing others to do so. Thus, the European Court might view the suggested analysis as insufficiently protective of McDonald's reputation.

Both the trial and appellate courts did consider some of the general allegations that were either explicitly in or implied from the language of the pamphlet regarding the indirect effects of McDonald's business practices on rainforests and indigenous people. Both courts found these allegations to be unproven.⁷⁰⁸ At least in part the courts' conclusions that these more general allegations had not been proven were related to another troubling aspect of the litigation—the trial court's interpretation of the statements in the pamphlet in an unnecessarily negative manner, and the Appellate Court's affirmation of most of those interpretations.⁷⁰⁹

The difficulty faced by a defendant in proving truth is necessarily connected to the question of how the alleged defamatory statements are interpreted. The European Court has been sensitive to the problem of domestic courts interpreting allegedly defamatory language in an extreme manner. Improper interpretation may occur in two ways. First, a court may interpret a factual allegation in a more extreme manner than is reasonable under the circumstances. The defendants therefore must prove the truth of extremely negative allegations that may not be true, and even if true, are much more difficult to prove than the milder criticisms actually made. The

⁷⁰⁵ See *supra* text accompanying notes 234-36.

⁷⁰⁶ See *supra* text accompanying notes 307-09.

⁷⁰⁷ See *supra* text accompanying notes 142-43.

⁷⁰⁸ See *supra* notes 239-48, 266-96, 312-21 and accompanying text.

⁷⁰⁹ See *supra* text accompanying notes 266-96.

McDonald's trial court opinion offers several examples of such excessively derogatory interpretations. As discussed above, the Appellate Court did overturn one of those interpretations; that Court concluded that the interpretation of the statements connecting McDonald's food to heart disease was too extreme and that the less extreme, correct interpretation had been proven to be true.⁷¹⁰ However, in some other instances the Appellate Court left standing such extreme interpretations.⁷¹¹

A second way in which a court may improperly interpret statements alleged to be defamatory is to label statements of opinion as statements of fact. By definition it is impossible to prove the truth of an opinion. The European Court has been very sensitive to this form of improper interpretation. *Lingens v. Austria* is particularly relevant in this regard, as the Court stressed the impossibility of proving the truth of a value judgment or an opinion. As discussed in Section IV, several of the allegations that served as a basis for defamation liability in the trial court opinion were labeled as allegations of fact, even though they should have been seen as opinions. As discussed in Section B above, the Appellate Court agreed with respect to the allegation regarding the "bad" pay and working conditions, reversing the trial judge as to liability on that point. But the Appellate Court left standing liability on several other statements that likewise appeared to be opinions.⁷¹² These aspects of the case, together with the allegations relating to scientific controversy discussed above,⁷¹³ appear to be particularly vulnerable under the jurisprudence of the European Court of Human Rights.

D. SUMMARY OF APPELLATE COURT DECISION

The Appellate Court's opinion in the *McDonald's* case was a substantial improvement over Justice Bell's trial court opinion. However, not unexpectedly, the Appellate Court did not initiate any dramatic innovations in English defamation law. Those aspects of the trial court opinion that were overturned appeared to be vulnerable under English defamation law. The Appellate Court's refusal to anticipate the changes that the European Convention might require when incorporated fully into domestic law under

⁷¹⁰ See *supra* text accompanying notes 611-16.

⁷¹¹ See, e.g., text accompanying notes 266-300 (McDonald's connection to Third World starvation); 266-74 (McDonald's general effect on market for beef); 424-32 (serious risk of food poisoning); 455-56 (effects on health of hormones, antibiotics and pesticides in McDonald's food); and 384, 622-27 (McDonald's food's "link" to cancer).

⁷¹² See, e.g., text accompanying notes 266-300 (McDonald's is to "blame" for starvation); 362-63 (plaintiffs used only tiny amounts of recycled material); 424-32 (plaintiffs cause a serious risk of food poisoning); 455-56 (antibiotics, hormones and pesticides seriously endanger health); 479-83 (plaintiffs cover-up the poor quality of their food).

⁷¹³ See *supra* text accompanying notes 111-12, 662-69.

the Human Rights Act of 1998 was consistent with the doctrine of Parliamentary supremacy that all English courts must respect.⁷¹⁴

The problem with the Appellate Court opinion was not the conclusion that the Convention was inapplicable in the case before them. Rather, the difficulty for freedom of expression in England in the future stems from the fact that the Appellate Court nevertheless went on to discuss and purported to apply the Convention jurisprudence to the facts of *McDonald's*. Certainly all of this discussion was *dicta*, but quite dangerous *dicta*. That gratuitous discussion could well be an obstacle to an objective application of Convention jurisprudence once incorporation into domestic law occurs. The Appellate Court might have aided the process of eventual integration of Article 10 into domestic law by frankly acknowledging that the Convention at least casts some doubt on the application of the rigid rules of English defamation law in the *McDonald's* case. If the Appellate Court was not willing to deviate that far from the verbiage of prior cases,⁷¹⁵ it would have been better to simply refuse to apply Article 10 jurisprudence given the existence of unambiguous English domestic law.⁷¹⁶

It must be conceded that an acknowledgment by the Appellate court of some inconsistency between domestic law and Article 10 might have been deterred by the difficulty in deciding just how English law would have to be changed to be consistent with the Convention. As discussed above, this difficulty is related to the European Court of Human Rights' analytical method, which is to balance the interests of the speaker and the state on a case by cases basis.⁷¹⁷ This method has the advantage of flexibility, and may make it easier for courts to find just results in specific cases. Also, by refusing to impose absolute rules, such as those mandated by the United States Supreme Court, the European Court is recognizing that various countries may have different ways of arriving at a proper balance between freedom of expression and the states' legitimate interests. The Court's flexible, multifaceted approach would be subject to criticism in a domestic legal system, because the uncertainty of application could "chill" protected expression. However, the approach is much more acceptable, and perhaps even desirable, for an international court attempting to accommodate its jurisprudence to diverse legal systems designed to deal with social and historical realities of many countries.

The English Appellate Court was quite right to address the question of consistency with Article 10 by looking to the "composite" of English defamation law.⁷¹⁸ However, that Court's conclusion that the "composite" is

⁷¹⁴ See GLENDON, *supra* note 9, at 468-73.

⁷¹⁵ See *supra* note 57.

⁷¹⁶ See *R. v. Secretary of State for the Home Dep't*, *supra* note 58.

⁷¹⁷ See *supra* text accompanying notes 74, 117-22.

⁷¹⁸ See *supra* text accompanying notes 685-87.

consistent with the Convention is open to serious doubt—particularly in a case like *McDonald's*.⁷¹⁹ Defendants like Morris and Steel being sued by a plaintiff like McDonald's were doomed to failure under English law. Had they had a right to counsel, or been relieved of the burden of proof, or been liable only on the basis of fault, or even faced the modest damages available in other European countries, their situation would have been quite different. More importantly, the potential for “chilling” the expression of other non-mainstream voices in England in the future would also be less ominous.

If the European Court of Human Rights finds a violation of the Convention in the *McDonald's* case, it probably will not dictate precisely what changes are necessary in English law. The task would be one that Parliament and the English courts would need to work out to alter the “composite” of English laws that today place a heavy weight on the scale in favor of plaintiffs in defamation cases. It is certainly not necessary that England's law be in accordance with the constitutional protections given defamation in the United States. But the *McDonald's* litigation makes clear that some additional weight placed on the scale in favor of expression in defamation actions should be seriously considered. Alteration of the English law of defamation should be high on the agenda of those responsible for assuring that the Human Rights Act of 1998 is more than a mere formality.

VI. CONCLUSION

Critics have asserted for many years that English defamation law has negatively affected the free flow of information and opinions.⁷²⁰ The escalating damage awards and very high attorney fees in England have exacerbated the problem.⁷²¹ For English media, these realities have severely inhibited investigative reporting when the targets of the reports are known to have ample resources to pursue a defamation action.⁷²² Commentators contend that wealthy multinational corporations may not even need to threaten to sue in order to chill media criticism in England.⁷²³ Conversely,

⁷¹⁹ See *supra* text accompanying notes 655-713.

⁷²⁰ See *supra* text accompanying notes 47-48.

⁷²¹ See *supra* notes 25-38 and accompanying text.

⁷²² The Guardian newspaper declared that “[I]t's partly because of the libel laws that investigative journalism is all but dead in Britain.” *Libel Laws Mean No One Messes With Big, Litigious Companies; Free Speech Comes Dear*, GUARDIAN (London), Oct. 8, 1998, at 22 [hereinafter *Libel Laws*].

⁷²³ See Dipankar De Sarkar, *Media—Britain: McDonald's Libel Case Reopens Censorship Debate*, INTER PRESS SERVICE, Jan. 17, 1999, at 7. De Sarkar describes one incident in which a radical magazine destroyed one edition out of fear that it would be sued for an article titled the “The Monsanto Files,” even though no threat to sue had been made by Monsanto. *Id.* Monsanto has been described as the “new McDonald's” due to its use of civil suits to “intimidate critics.” *Libel Laws*, *supra* note 722, at 22.

there is apparently little concern when those without funds are the targets of negative reporting.⁷²⁴

The *McDonald's* case takes the previously recognized chill on expression a step further in England by inhibiting the expression of political and social activists who seek to challenge the practices of wealthy interests such as multi-national corporations. This chill is worsened by the rule that denies legal aid to parties to a defamation action.⁷²⁵ Had Morris and Steel been parties to any other kind of civil action, they would have been entitled to such aid. The exception for defamation is intended to prevent frivolous actions.⁷²⁶ However, the exception makes little sense when the defendants rather than the plaintiffs are seeking such aid. Without the availability of legal aid, activists of modest means must know that they will have little chance of successfully defending themselves, particularly when sued by a wealthy plaintiff. This knowledge is a strong incentive to keep quiet.

The constitutional strictures imposed on the substantive law of defamation in the United States⁷²⁷ would seemingly give substantial protection to expression challenging wealthy interests. This might explain why McDonald's has not sued activists distributing the offending pamphlets in the United States. It must be acknowledged, however, that the nature of defamation litigation in the United States often has different, although quite severe ramifications for criticism of wealthy interests.⁷²⁸ The Supreme Court has foreclosed the possibility of mandated rights of reply—at least in the

It is not always rich corporations that chill investigative reporting. The Police Federation has apparently been quite successful in preventing reports of police corruption in England. In an article discussing one case in which the Guardian was successful in defending a libel action brought by several policemen and financed by the Police Federation, a spokesman for the Guardian commented that:

Against all the odds, we won today's case. So why the gloom: Because our victory today was all thanks to the perspicacity and common sense of the jury and no thanks at all to the court, the judge or the law. We risked hundreds of thousands of pounds on the verdict of the jury today. How many smaller papers will take that risk?... [M]any editors reading of today's judgment will think twice in future. The next time they learn of the wrongdoing in the police they will remember the hundreds of thousands of pounds the Guardian risked and they will instruct their reporters to forget stories about police corruption.

Alan Rusbridger, *Gloom That Clouds Our Vital Victory; The Case for Press Freedom*, ASSOCIATED NEWSPAPERS LTD., EVENING STANDARD, Feb. 7, 1997, at 4.

⁷²⁴ A Guardian article described a radio reporter's "meek" interview of the CEO of a large corporation that had been suspected of unethical conduct. The article contrasted that interview to the same reporter's "blithely [repeating] a police allegation that protesters...had booby-trapped houses they have occupied." According to the Guardian article, those police allegations had been "proved again and again to be untrue." *Libel Laws*, *supra* note 722 at 22.

⁷²⁵ See *supra* text accompanying notes 44-46.

⁷²⁶ REPORT OF THE COMMITTEE ON DEFAMATION, *supra* note 45 at 160-161.

⁷²⁷ See *supra* text accompanying notes 177-79.

⁷²⁸ See, e.g., BARBARA DILL, LIBEL LAW DOESN'T WORK, BUT CAN IT BE FIXED?, IN AT WHAT PRICE? LIBEL LAW AND FREEDOM OF THE PRESS 35 (1993).

print media.⁷²⁹ Thus damages are currently the sole means of redress in U.S. defamation actions, and those damages can be higher than in any other country in the world.⁷³⁰ Even though ultimate success is extremely unlikely, the mere possibility of huge damage awards in those rare successful cases can chill expression. The protracted nature of litigation in the United States and the very high attorneys' fees that must ordinarily be paid by even successful defendants add to the chill.⁷³¹ Indeed, commentators have coined the word "SLAPPS" ("Strategic Lawsuits Against Public Participation"), as a term of art to describe the practice of threatening or bringing legal actions against political and social activists in order to silence criticism of wealthy interests.⁷³²

A very high profile company like McDonald's would probably not be able to use the SLAPP strategy to silence critics in the U.S. The inevitable negative publicity that would accompany such a use of frivolous litigation should certainly be a deterrence. Indeed, the McDonald's case seemingly would illustrate to companies like McDonald's that even in England, where they might win in court, the negative publicity of such David vs. Goliath contests makes litigation a bad idea. However, this pragmatic concern may do little to protect the marketplace of ideas in England. The repressive defamation laws make it likely that the mere threat of litigation, or even the possibility of a threat will usually be sufficient to silence critics.⁷³³

Political and social activists may find the greatest protection for their expression in Continental Europe. In those countries some degree of fault on

⁷²⁹ See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (law granting political candidates right to equal space to reply to campaign attacks published by newspapers violates first amendment.). However, a right to reply when individuals were subjects of attack in the broadcast media was found consistent with the first amendment in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁷³⁰ See *supra* note 40.

⁷³¹ In the U.S. if allegations are deemed sham or frivolous, courts may award attorneys' fees to the successful defendants. See Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROB. 506, 514. (1988). Of course, the stringent first amendment limitations on substantive libel law in the United States makes it more likely that defamation actions would fall into those categories than in other countries where the laws are less speech protective. However, unsophisticated political activists may not be aware of the likelihood that they will receive their attorneys' fees. Also they would have to pay their attorneys until the court ultimately orders reimbursement from the plaintiffs. The emotional and time commitments entailed in defending such suits must also be considered as a chilling factor. See *supra* note 49. Such considerations would rarely be a deterrent to a wealthy plaintiff who would simply delegate the matter to a law firm or in house counsel.

⁷³² See Canan & Pring, *supra* note 731.

Although defamation is the most common cause of action used in SLAPPS, accounting for 27% of the claims in one survey, other claims include "business torts, conspiracy—and secondarily — judicial process abuse, constitutional rights, and nuisance." *Id.* at 511.

Persons who are the targets of SLAPPS are sometimes able to "SLAPP-back," suing the initial plaintiffs for abuse of process. ANDREW ROWELL, *GREEN BACKLASH* 181 (1996).

⁷³³ See *supra* text accompanying note 3 and notes 4, 724 and accompanying text.

the part of the defendants is ordinarily required for liability.⁷³⁴ But more importantly, even if the defendants are found liable they face only the obligation of giving a right of reply or paying a low damage award or fine.⁷³⁵ Also, access of defendants to legal representation⁷³⁶ may more than compensate for the seemingly rigid speech protective substantive defamation laws formulated by the U.S. Supreme Court in interpreting the First Amendment. Furthermore, decisions of the European Court of Human Rights have been modifying the most restrictive aspects of defamation and insult law in Continental Europe. That Court's protection for opinions and value judgments has effectively required the equivalent of a "fair comment" defense,⁷³⁷ and has made it very difficult to hypothesize a fact situation in which liability under "insult" laws would be consistent with Article 10 of the Convention.⁷³⁸ Given the European Court's preference for interpreting expression as opinions rather than statements of fact,⁷³⁹ the protection afforded is intensified. Furthermore, the European Court has even protected false factual expressions in situations in which verification of truth was extremely difficult.⁷⁴⁰ The concern for difficulty of determining objective truth is an excellent argument for the protection of the speech of activists who often have little access to the kind of scientific information that would enable them to make a serious judgment as to the truth of the allegations they are propagating.

It was clear from the beginning of the *McDonald's* litigation that ultimately the U.K. could be answerable to the European Court in Strasbourg if, after exhausting their appeal rights in England,⁷⁴¹ the case was not reversed. If the appellants ultimately petition the European Court of Human Rights, that Court might decide to stay its hand in light of the recent enactment in the U.K. of the Human Rights Act. This could give English courts an opportunity to take the jurisprudence of the European Court of Human Rights more seriously and develop greater protection for expression without that protection being imposed upon them. Given the English public's frequently expressed dislike at being dictated to by international organizations

⁷³⁴ See *supra* note 24.

⁷³⁵ See *supra* note 25.

⁷³⁶ See discussion of legal aid in some Western European countries in Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L.REV. 474 (1985).

⁷³⁷ See *supra* text accompanying note 142.

⁷³⁸ See *supra* notes 117-51 and accompanying text.

⁷³⁹ See *supra* text accompanying note 142.

⁷⁴⁰ See *supra* text accompanying notes 126-27.

⁷⁴¹ See *supra* text accompanying note 66. In an E-mail communication on December 12, 1999, David Morris stated that they had sought leave to appeal from the Law Lords and was awaiting a response. He also stated that they plan to petition the European Court of Human Rights if the response from the Law Lords does not vindicate their position.

dominated by Continental Europe,⁷⁴² the European Court might determine that the wisest course would be to give England time to adjust its jurisprudence to the Convention through the domestic court system, even if the process may be slow.

On the other hand, the European Court of Human Rights may have an impetus to hear the *McDonald's* case in order to use it as a vehicle for a decision that would require changes in substantive English defamation law. Critics of English law have pointed to the growing practice of defamation plaintiffs choosing England as a venue for law suits based on expression that was initiated elsewhere, but which was distributed, often in very small quantities, in England.⁷⁴³ If this trend continues, the chill on expression caused by English defamation law may be exported to many other countries. One commentator has suggested that "European defamation policy could be indirectly 'Anglicized,' since European publications may be compelled to satisfy a 'lowest common denominator'" of English law.⁷⁴⁴

⁷⁴² See Sarah Lyall, *Rights Panel for Europe Stirs Anger in England*, N.Y. Times, May 6, 1996, at A4.

⁷⁴³ See Vick & Macpherson, *supra* note 24.

⁷⁴⁴ See *id.* at 936. This is also a problem for the United States. The New York Supreme Court has refused to enforce an English libel judgment because the application of English law was inconsistent with the first amendment. See *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (Sup.Ct. 1992); Note, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protection of Free Speech in the United States and Great England*, 16 FORD. INT'L L.J. 895 (1993). Of course if a U.S. resident has assets in England enforcement of the judgment in the United States would not be necessary.

The European problem has been exacerbated by a 1995 decision of the European Court of Justice, *Shevill v. Presse Alliance* W.L.R. 499 (1995), which probably inadvertently enhanced the benefits of choosing England as a forum for expression disseminated in more than one European country. See Vick and Macpherson, *supra* note 24, at 937. Vick and Macpherson explained that in *Shevill* the European Court of Justice decided that jurisdiction over a defamation action involving a newspaper article distributed in several states could be heard in "either...the member state where the publisher of the offending publication is established, or in any member state in which the plaintiff is known and the offending publication was distributed." *Id.* at 936. In *Shevill* only five copies of the French language publication were distributed in Yorkshire where the plaintiff lived and there was no evidence that anyone in the U.K. read, understood, or connected the publication to the plaintiff. Furthermore, only 300 copies were distributed in the U.K, while over 250,000 copies were distributed elsewhere in Europe, mostly in France. See *id.* at 977.

Although under *Sheville* plaintiffs are limited to damages suffered in the forum country, multiple suits in various countries are possible. See *id.* at 980. Furthermore, in England damages are presumed once a publication is deemed defamatory. See *id.* at 977. Vick and Macpherson suggest that the plaintiff's choice of England as a forum in *Shevill* "speaks volumes about the unpredictability and frequent excessiveness of English libel awards (and the leverage this confers to plaintiffs in settlement negotiations)." *Id.*

Vick and Macpherson made a further observation particularly relevant to the *McDonald's* litigation.

[A] claimant whose primary motivation is to harass rather than win vindication will find the *Shevill* formula conducive to that end.... [The European Court of Justice] failed to appreciate that many claimants, particularly prominent or wealthy individuals and companies using libel litigation (or its threat) to deter scrutiny of their conduct, will be drawn to English courts regardless of how tenuous the connection between a defamatory publication and England.

The European Court of Human Rights has been nudging Europe toward greater protection for expression for several decades. That Court's jurisprudence is requiring governments to rely less on restrictions and more on a free exchange of ideas.⁷⁴⁵ Commentators who oppose restrictions on expression often use the metaphor of a "marketplace of ideas."⁷⁴⁶ Conversely, those who favor some restrictions on expression challenge the efficacy of that metaphor, particularly in our modern media dominated society where wealth and political power have a near monopoly on that "marketplace."⁷⁴⁷ However, such arguments for speech restrictions have no force when the expression suppressed is that of non-mainstream activists without wealth or political power who are challenging the interests of the status quo. When the suppressed expression is criticism of a wealthy and powerful entity such as government or a multi-national corporation, such suppression makes no sense at all.

Surely rules that would leave wealthy and powerful targets of criticism to using a small portion of their ample resources for responding to untrue criticisms are much more in keeping with the goal of finding truth than is repression of such criticisms.⁷⁴⁸ Indeed, such rules would probably be quite sufficient in most instances to permit the wealthy and powerful to drown out the puny attempts by non-mainstream critics to compete for public attention in "the marketplace of ideas." But such critics would at least have the possibility that their views would enter that "marketplace." The tactics used by McDonald's and other wealthy interests⁷⁴⁹ to suppress such views shows that when they can use the law to prevent even that slight chance of disturbance of their dominance of the "marketplace of ideas" they will do so.

All over the world corporations are becoming larger, wealthier and increasingly multi-national. Economic power is often translated into political power, with obvious ramifications for effects on public policy. In such an

Id. at 986.

The court that decided *Sheville*, the European Court of Justice, is the court for the European Union. It is not connected with the European Court of Human Rights which adjudicates claims of violations of the European Convention on Human Rights. See Meade, *supra* note 52.

⁷⁴⁵ See *supra* text accompanying notes 68-153.

⁷⁴⁶ The term "marketplace of ideas" seemingly grew out of Justice Holmes famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J. dissenting). ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). See discussion in TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (1988).

⁷⁴⁷ *Abrams*, *supra* note 746.

⁷⁴⁸ Commentators assert that when wealthy interests use the law to move political debates into the courtroom they are privatizing and containing a dispute. Cannon & Pring, *supra* note 731, at 515. Another commentator explained that "[l]egal power provides both the opportunity and the means to accomplish the effective denial of the reality of conflicts by making it impossible or inordinately difficult for them to be articulated and managed." *Id.* (quoting Austin T. Turk, *Law as a Weapon in Social Conflict*, *THE SOCIOLOGY OF LAW: A CONFLICT PERSPECTIVE* 213, 227 (Robert M. Rich & Charles E. Reardon ed., 1978)).

⁷⁴⁹ See, e.g., *supra* note 723.

era the availability of vehicles for questioning the activities of both government and of business are vital.

APPENDIX: MCLIBEL FACTSHEET⁷⁵⁰

What's wrong with McDonald's?



**Everything they don't
want you to know.**



This leaflet is asking you to think for a moment about what lies behind McDonald's clean, bright image. It's got a lot to hide. "At McDonald's we've got time for you" goes the jingle. Why then do they design the service so that you're in and out as soon as possible? Why is it so difficult to relax in a McDonald's? Why do you feel hungry again so soon after eating a Big Mac? We're all subject to the pressures of stupid advertising, consumerist hype and the fast pace of big city life—but it doesn't take any special intelligence to start asking questions about McDonald's and to realize that something is seriously wrong.

The more you find out about McDonald's processed food, the less attractive it becomes, as this leaflet will show. The truth about hamburgers is enough to put you off them for life.

⁷⁵⁰ This pamphlet is reproduced solely for the purpose of reference and discussion. Neither WILJ nor the author endorse or attest to the accuracy of the contents of the pamphlet. The defendants in the libel action which is the subject of this article were unable to prove at trial the truthfulness of many of the assertions contained in the pamphlet.

The layout and content of the original factsheet may differ slightly from this reproduction due to editorial concerns of the Journal.

WHAT'S THE CONNECTION BETWEEN MCDONALD'S AND STARVATION IN THE 'THIRD WORLD'?

THERE's no point in feeling *guilty* about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc., that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.

HUNGRY FOR DOLLARS

McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.

The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA—the wealthiest.*

ECONOMIC IMPERIALISM

Some 'Third World' countries, where most children are undernourished, are actually exporting their staple crops as animal feed—i.e. to fatten cattle for turning into burgers in the 'First World'. Millions of acres of the best farmland in poor countries are being used for *our* benefit—for tea, coffee, tobacco, etc.—while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat.

A typical image of 'Third World' poverty—the kind often used by charities to get 'compassion money'. This diverts attention from one cause: exploitation by multinationals like McDonald's.



GROSS MISUSE OF RESOURCES

GRAIN is fed to cattle in South American countries to produce the meat in McDonald's hamburgers. Cattle consume 10 times the amount of grain and soy that humans do: one calorie of beef demands ten calories of grain. Of the 145 million tons of grain and soy fed to livestock, only 21 million tons of meat and by-products are used. The waste is 124 million tons per year at a value of 20 billion US dollars. It has been calculated that this sum would feed, clothe and house the world's entire population for one year.



FIFTY ACRES EVERY MINUTE

EVERY year an area of rainforest the size of England is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia—where there are now about 100,000 beef ranches—torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours.

WHY IS IT WRONG FOR MCDONALD'S TO DESTROY RAINFORESTS?

AROUND the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of all Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.

PET FOOD & LITTER

McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fat-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes 800 square miles of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of 'developed' countries.)

COLONIAL INVASION

Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforests off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit.

It's no exaggeration to say that when you bite into a Big Mac, you're helping the McDonald's empire to wreck this planet.

WHAT'S SO UNHEALTHY ABOUT MCDONALD'S FOOD?

MCDONALD's try to show in their "Nutrition Guide" (which is full of impressive-looking but really quite irrelevant facts & figures) that mass-produced hamburgers, chips, colas, milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals—which describes an average McDonald's meal—is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in England, heart disease alone causes about 180,000 deaths.

FAST = JUNK

Even if they like eating them, most people recognize that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name "fast-food". This is not just because it is manufactured and serve up as quickly as possible—it has to be eaten

quickly too. It's sign of the junk-quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.

PAYING FOR THE HABIT

Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk it is hardly possible to chew it. Even their own figures show that a "quarter-pounder" is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction—a 'craving'. That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers.

GETTING THE CHEMISTRY RIGHT

McDONALD's stripey staff uniforms, flashy lighting, bright plastic decor, "Happy Hats" and muzak, are all part of the gimmicky dressing-up of low-quality food which has been designed down to the last detail to look and feel and taste exactly the same in any outlet anywhere in the world. To achieve this artificial conformity, McDonald's require that their "fresh lettuce leaf," for example, is treated with twelve different chemicals just to keep it the right colour at the right crispness for the right length of time. It might as well be a bit of plastic.

HOW DO McDONALD'S DELIBERATELY EXPLOIT CHILDREN?

NEARLY all McDonald's advertising is aimed at children. Although the Ronald McDonald 'personality' is not as popular as their market researchers expected (probably because it is totally unoriginal), thousands of young children now think of burgers and chips every time they see a clown with orange hair.

THE NORMALITY TRAP

No parent needs to be told how difficult it is to distract a child from insisting on a certain type of food or treat. Advertisements portraying McDonald's as a happy, circus-like place where burgers and chips are provided for everybody at any hour of the day (and late at night), traps children into thinking they aren't 'normal' if they don't go there too. Appetite, necessity and—above all—money, never enter the "innocent" world of Ronald McDonald.

Few children are slow to spot the gaudy red and yellow standardized frontages in shopping centres and high streets throughout the country. McDonald's know exactly what kind of pressure this puts on people looking after children. It's hard not to give in to this 'convenient' way of keeping children 'happy', even if you haven't got much money and you try to avoid junk-food.

TOY FOOD

As if to compensate for the inadequacy of their products, McDonald's promote the consumption of meals as a 'fun event'. This turns the act of eating into a performance, with the 'glamour' of being in a McDonald's ('Just like it is in the ads!') reducing the food itself to the status of a prop.

Not a lot of children are interested in nutrition, and even if they were, all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous—and their parents know it's not even cheap.

RONALD'S DIRTY SECRET

ONCE told the grim story about how hamburgers are made, children are far less ready to join in Ronald McDonald's perverse antics. With the right prompting, a child's imagination can easily turn a clown into a bogeyman (a lot of children are very suspicious of clowns anyway). Children love a secret, and Ronald's is especially disgusting.

IN WHAT WAY ARE MCDONALD'S RESPONSIBLE FOR TORTURE AND MURDER?

THE menu at McDonald's is based on meat. They sell millions of burgers every day in 35 countries throughout the world. This means the constant slaughter, day by day, of animals born and bred solely to be turned into McDonald's products.

Some of them—especially chickens and pigs—spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement. Their deaths are bloody and barbaric.

MURDERING A BIG MAC

In the slaughterhouse, animals often struggle to escape. Cattle become frantic as they watch the animal before them in the killing-line being prodded, beaten, electrocuted, and knifed.

A recent English government report criticized inefficient stunning methods which frequently result in animals having their throats cut while still fully conscious. McDonald's are responsible for the deaths of countless animals by this supposedly humane method. We have the choice to eat meat or not. The 450 million animals killed for food in England every year have no choice at all. It is often said that after visiting an abattoir, people become nauseous at the thought of eating flesh. How many of us would be prepared to work in a slaughterhouse and kill the animals we eat?



WHAT'S YOUR POISON?

MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, feces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet.

WHAT'S IT LIKE WORKING FOR MCDONALD'S?

THERE must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300 %). It's not unusual for their restaurant-workers to quit after just four or five weeks. The reasons are not had to find.

NO UNIONS ALLOWED

Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked—as many have been—for attempting union organization.

McDonald's have a policy of preventing unionization by getting rid of pro-union workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

TRAINED TO SWEAT

It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff—just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in England, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further. They say they are providing jobs for school-leavers and take them on regardless of sex or race. The truth is McDonald's are only interested in recruiting cheap labour—which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already.

EVERYTHING MUST GO

WHAT's wrong with McDonald's is also wrong with all the junk-food chains like Wimpy, Kentucky Fried Chicken, Wendy, etc. All of them hide their ruthless exploitation of resources, animals and people behind a facade of colourful gimmicks and 'family fun. The food itself is much the same everywhere—only the packaging is different. The rise of these firms

means less choice, not more. They are one of the worst examples of industries motivated only by profit, and geared to continual expansion.

This materialist mentality is affecting all areas of our lives, with giant conglomerates dominating the marketplace, allowing little or no room for people to create genuine choices. But alternatives do exist, and many are gathering support every day from people rejecting big business in favour of small-scale self-organization and co-operation.

The point is not to change McDonald's into some sort of vegetarian organization, but to change the whole system itself. Anything less would still be a rip-off.

WHAT CAN BE DONE

STOP using McDonald's, Wimpy, etc., and tell your friends exactly why. These companies' huge profits—and therefore power to exploit—come from people just walking in off the street. It does make a difference what individuals do. Why wait for everyone else to wake up?

YOUR INFLUENCE COUNTS

Research has shown that a large proportion of people who use fast-food places do so because they are there—not because they particularly like the food or feel hungry. This fact alone suggests that hamburgers are part of a giant con that people would avoid if they knew what to do. Unfortunately we tend to undervalue our personal responsibility and influence. This is wrong. All change in society starts from individuals taking the time to think about the way they live and acting on their belief. Movements are 'just ordinary people' linking together, one by one....

MAKE CONTACT, SHARE IDEAS

YOU might not always hear about them, but there are many groups campaigning on the issues raised here—movements to support the struggles in the 'Third World', to fight for the rights of indigenous peoples, to protect rainforests, to oppose the killing of animals etc.

Wherever there is oppression there is resistance: people are organizing themselves, taking courage from the activities of ordinary, concerned people from all round the world, learning new ways and finding new energy to create a better life. The apathy of others is no reason to hang around waiting for someone to tell you what to 'do'. You need no special talents to join in your local pressure group, or start one up—existing groups will give information and advice if necessary.

THERE'S A DIFFERENCE YOU'LL ENJOY: NO MORE MEAT!

KICKING the burger habit is easy. And it's the best way to start giving up meat altogether. Vegetarianism is no longer just a middle-class fad: last year the number of vegetarians in England increased by one-third. Most supermarkets now stock vegetarian produce, and vegans—who eat no animal products at all—are also being catered for. In short, the 'cranky' vegetarian label is being chucked out, along with all the other old myths about 'rabbit food'.

Why not try some vegan or vegetarian recipes, just as an experiment to start with? When asked in a survey, most vegetarians who used to eat meat said they had far more varied meals after they dropped meat from their diet. Another survey showed that people on a meatless diet were healthier than meat-eaters, less prone to 'catch' coughs and colds, and with greatly reduced risk of suffering from hernia, piles, obesity and heart disease.

LIBERATION BEGINS IN YOUR STOMACH

THERE are loads of cheap, tasty and nutritious alternatives to a diet based on the decomposing flesh of dead animals: fresh fruit of all kinds, a huge variety of local & exotic vegetables, cereals, pulses, beans, rice, nuts, whole grain foods, soya drinks etc. All over the country whole food co-operatives are springing up. Now is a really good time for change.

A vegan England would be self-sufficient on only 25% of the agricultural land presently available. Why not get together with your friends and grow your own vegetables? There are over 700,000 allotments in England—and countless gardens.

The pleasure of preparing healthy food and sharing good meals has a political importance too: it is a vital part of the process of ordinary people taking control of their lives to create a better society, instead of leaving their futures in the cynical, reedy hands of corporations like McDonald's.

WHO MADE THIS LEAFLET?

THE LONDON GREENPEACE GROUP has existed for many years as an independent group of activists with no involvement in any particular political party. The people—not 'members'—who come to the weekly open meetings share a concern for the oppression in our lives and the destruction of our environment. Many opposition movements are growing in strength—ecological, anti-war, animal liberation, and anarchist-libertarian movements—and continually learning from each other. We encourage people to think and act independently, without leaders, to try to understand the

causes of oppression and to aim for its abolition through social revolution. This begins in our own lives, now.

