



Northern Ireland
Assembly

Research and Information Service Briefing Paper

Paper 62/14

30 May 2014

NIAR 254-14

Michael Potter

Defamation and the Dead

1 Introduction

This Briefing Paper is written in the context of the consideration by the Committee for Finance and Personnel of a proposed Private Member's Bill in relation to defamation¹. The paper supplements previous papers on this subject².

Issues that have been raised in relation to the defamation of deceased persons are considered, particularly those associated with the development of defamation legislation in England and Wales, Scotland and the Republic of Ireland.

2 Defamation and the Dead

This section briefly summarises issues in relation to deceased persons that have been raised during debates concerning defamation during the recent passage of legislation in England and Wales and the Republic of Ireland and recent consideration of the issue in Scotland.

¹ Proposed by Mike Nesbitt MLA – see minutes of evidence to the Committee for Finance and Personnel 26 June 2013, 3 July 2013 and 26 March 2014: <http://www.niassembly.gov.uk/Assembly-Business/Committees/Finance-and-Personnel/Minutes-of-Evidence/>.

² Research and Information Service Briefing Paper 90/13, *The Defamation Act 2013*, 21 June 2013: http://www.niassembly.gov.uk/Documents/RaISe/Publications/2013/finance_personnel/9013.pdf; Research and Information Service Briefing Paper 37/14, *Defamation in Scotland and the Republic of Ireland*, 21 March 2014: http://www.niassembly.gov.uk/Documents/RaISe/Publications/2014/finance_personnel/3714.pdf.

England and Wales: The Defamation Act 2013

The draft Defamation Bill was published in March 2011 for public consultation and was considered by the Joint Committee on the Draft Defamation Bill. There was no mention of defamation of deceased persons in the draft Bill³, the report of the responses to the consultation⁴ or the report of the Joint Committee⁵.

The Defamation Bill was introduced in the House of Commons on 10 May 2012 and received Royal Assent on 25 April 2013⁶. The issue of defamation of deceased persons was raised in the Second Reading on 12 June 2012 in relation to two contexts:

1. Where a recently deceased person's memory is abused through the practice of 'trolling', i.e. malicious statements on the internet⁷:

Steve Rotheram: *I broadly support the Bill, especially clause 5, which the right hon. and learned Gentleman is explaining. Can he give any comfort to the parents of Georgia Varley, a Liverpool youngster who was tragically killed and whose family and friends set up an RIP website, which trolls then used to abuse and disparage her death in a sickening and vile way? Can he outline specifically the proposals to tackle such abuse by internet trolls who hide behind the anonymity of a computer to abuse those remembered on RIP websites?*

Mr Clarke: *I cannot possibly comment on an individual case and individual possible action. I anticipate that the difficulty may be that the defaming of a deceased person always gives rise to questions of whether any action is possible. Trolling is an extremely unpleasant, curious activity which some very nasty people appear to be going into. There have already been quite a lot of prosecutions for trolling, but we think the public are entitled to proper protection against it.*

2. Defamation of deceased persons more generally⁸:

Helen Goodman (Bishop Auckland) (Lab): *The situation that my hon. Friend the Member for Liverpool, Walton (Steve Rotheram) mentioned has two aspects to it. One is the aspect of comments appearing on a website, with which my right hon. Friend has dealt, but there is also the question whether defamation can be against a deceased person. The Bill does not address that. Does my right hon. Friend believe that it should be considered in Committee?*

Sadiq Khan: *As my hon. Friend will know, it has always been the case that a dead person's estate cannot sue for defamation. It is worth the Public Bill Committee*

³ Ministry of Justice (2011), *Draft Defamation Bill: Consultation*, London: MoJ.

⁴ Ministry of Justice (2011), *Draft Defamation Bill: Summary of Responses to Consultation*, London: MoJ.

⁵ House of Lords House of Commons Joint Committee on the Draft Defamation Bill (2011), *Draft Defamation Bill*, London: Stationery Office: <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf>.

⁶ For all stages of the Bill, see the Bill web pages: <http://services.parliament.uk/bills/2012-13/defamation/stages.html>.

⁷ HC Deb 12 June 2012 Col 184: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120612/debtext/120612-0001.htm#12061240000002>.

⁸ *Ibid.*, Col 191-2.

considering the issue of deceased people's reputations and the injury that defamation causes to their family. I am not sure whether the Joint Committee did so. However, there are very good reasons why a deceased person's estate has never been able to sue for defamation.

In Committee on 19 June 2012, Helen Goodman proposed an amendment by which a close relative may bring a case if they consider the character of a deceased person has been defamed, with a time limit of one year. She cited three cases where statements about deceased persons had caused distress to the families⁹. The Government responded suggesting this would be a matter for press standards, rather than legislation¹⁰:

***Mr Djanogly:** Amendments 4 and 5 would allow certain categories of close relatives to bring defamation actions in respect of statements made about a deceased person up to a year after that person's death. A long-established principle of common law is that a deceased person cannot be defamed because reputation is personal. A defamatory statement about a deceased person accordingly does not give rise to a civil action for defamation on behalf of his or her estate. Relatives of the deceased also have no right of action, unless the words used reflect on their own reputations. That reflects the central principle in civil proceedings generally, which is that a claim for damages can be brought only by the person who has suffered the injury, loss or, in this case, damage to his or her reputation as a result of the act or omission of another person.*

The Government believe that there would be significant difficulties with attempting to allow relatives to bring defamation actions on behalf of deceased persons, even to the limited extent proposed in the amendments. As I have indicated, it would go against the long-standing and fundamental principle of the law that reputation is personal. That could create a precedent for further extensions to the law that would have a broader impact on the media and publishing industries, and create difficulties for those involved in historical analysis and debate.

In addition, practical difficulties would arise. For instance, it would be unfair to bar the defendant from using the defences that exist for a defamation action, and that could result in arguments over the truth of allegations about the deceased's character, which would inevitably be distressing for the family. My hon. Friend the Member for Ipswich, the right hon. Member for Rotherham and the hon. Member for Newcastle-under-Lyme suggest that this is more an issue for Leveson and a matter of privacy, and I believe that that is a good observation. I understand that Mr and Mrs Watson have given evidence to the Leveson inquiry.

⁹ House of Commons Public Bill Committee: Defamation Bill, 19 June 2012, Col 22:

<http://www.publications.parliament.uk/pa/cm201213/cmpublic/defamation/120619/am/120619s01.htm>.

¹⁰ Ibid., Col 25-6.

Although restricting claims to situations where the alleged defamatory statement is made within a year of the deceased's death would mitigate the broader impacts and mean that only a limited number of claims could be brought, it would not in itself prevent potentially defamatory articles about the deceased person from being published and could have the effect of simply delaying publication until the one-year period had expired. In light of those difficulties, I hope that the hon. Member for Bishop Auckland will agree to withdraw her amendment.

The proposed amendment was defeated on division¹¹.

A similar amendment was moved by Lord Hunt in the House of Lords Committee, although without a time limit¹². Similar arguments were put against the amendment, such as the difficulty of determining proof where the deceased cannot give evidence in court, with the added concern of comment on historical figures. The amendment was withdrawn.

The Defamation Act 2013 was passed without any provision for the defamation of the dead. However, the issue was raised in the Leveson Inquiry into press standards, as follows¹³:

To address the failings of this minority, Mr and Mrs Watson proposed a change in the law to allow the family of the dead to sue for libel. It is an interesting idea and one which may well have positive effects in some cases, although it would cause real complications and difficulties in others: would, say, the family of Sir Winston Churchill be able to sue if a published book was defamatory of him? Furthermore, it is a change that would not address the wider problems of the harassment by journalists and photographers of those grieving the loss of loved ones, and truthful but insensitive reporting in the aftermath of death or tragedy. To address those wider issues, it is not a change in the law but a change in culture that is required, to ensure that those who are responsible for reporting, photographing, and editing stories of death and tragedy treat those who may be grieving or in shock with the dignity they deserve. It is clearly not impossible to do so because so many, much of the time, do so. It is difficult, therefore, to see why it should not be the practice of all.

The key recommendation of the Inquiry was for a self-regulatory body for the press, although defamation of the deceased was not specifically referred to in the conclusions and recommendations¹⁴.

¹¹ For a summary, see House of Commons Research Paper 12/49, *Defamation Bill Committee Stage Report*, 31 August 2012, pp.4-5: <http://www.parliament.uk/business/publications/research/briefing-papers/RP12-49/defamation-bill-committee-stage-report>.

¹² Constitution Committee, *Defamation Bill* 17 December 2012, Col GC434-7: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121217-gc0001.htm#1212173000100>.

¹³ The Right Honourable Lord Justice Leveson (2012), *An Inquiry into the Culture, Practice and Ethics of the Press*, Volume II, London: The Stationery Office, p.658: <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

Republic of Ireland: Defamation Act 2009

The Defamation Act in the Republic of Ireland had a long development period¹⁵. The Irish Law Reform Commission reported on the civil law of defamation in 1991 and included in its recommendations¹⁶:

Defamation of the Dead

14.44

There should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication.

14.45

The right to institute such proceedings should be vested solely in the personal representative of the deceased who should, however, be under a statutory obligation to consult the immediate family of the deceased, i.e. spouse, children, parents, brothers and sisters, before the proceedings are instituted.

14.46

The period of limitation should be three years from the date of death of the allegedly defamed person.

14.47

The only remedy available should be a declaratory order and, where appropriate, an injunction.

A Legal Advisory Group on Defamation, which reported in 2003, proposed that defamation of the dead was an issue that could be dealt with by a regulatory body rather than through legislation¹⁷:

The Law Reform Commission had recommended that there should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication. While disinclined to endorse this particular recommendation, the Group notes that its essential aim -to provide some mechanism whereby the reputation of a deceased person can be vindicated -can largely be realised by way of an effective Press Council, subject to the proviso that the role assigned to such a Council has the appropriate breadth.

¹⁴ Ibid., Volume IV, p.1801.

¹⁵ See Research and Information Service Briefing Paper 37/14, *Defamation in Scotland and the Republic of Ireland*, 21 March 2014, p.3.

¹⁶ Law Reform Commission (1991), *Report on the Civil Law on Defamation*, Dublin: LRC, p.106:
<http://www.lawreform.ie/fileupload/Reports/rDefamation.htm>.

¹⁷ Legal Advisory Group on Defamation (2003), *Report of the Legal Advisory Group on Defamation*, Dublin: Department of Justice, Equality and Law Reform, p.15:
<http://www.justice.ie/en/JELR/rptlegaladgpddefamation.pdf/Files/rptlegaladgpddefamation.pdf>.

It was foreseen that such a Press Council would prepare and oversee the implementation of a Press Code of Conduct which would address¹⁸:

- *standards of journalistic ethics and practice,*
- *the accuracy of any facts or information relating to the honour or reputation of any person, or group of persons, **living or dead,***
- *unreasonable encroachment upon the privacy of any person, or group of persons, living or dead,*
- *matters to do with taste and decency, and*
- *sensitivity in dealing with vulnerable persons.*

The Defamation Bill was introduced into the Seanad on 7 July 2006 and was enacted on 23 July 2009¹⁹. Defamation of deceased persons was raised by Mr J Walsh in the Second Stage debate²⁰:

I have great difficulty with the fact that deceased people cannot be defamed. I note the Minister's comments regarding people who may have been defamed prior to their demise. We have seen such examples and it should be open to the bereaved family to pursue a case. There is another issue concerning the subsequent writing of history, but we should find a middle way. It is neither fair nor reasonable that lies should be published about somebody simply on the basis that they are dead and, therefore, cannot pursue a case for defamation.

To this Mr Norris added:

Libel is particularly painful for people in the immediate aftermath of death. Why not provide that the right not to be libelled will not be extinguished for a year after death in the interests of the family of the deceased?

Mr Dardis also raised the issue:

The family is entitled to redress in such circumstances. From what I can see from the continental experience, there is scope for redress for families. The provision in the Bill deals only with the estate of the defamed person. In other words, the deceased would have had to have initiated the proceedings before he or she died for them to continue. I am not sure about that.

Prior to adjournment, Mr Leydon concluded:

When the debate on the Bill resumes, I will appeal to the Minister to make provision to allow the next of kin take action in case of serious defamation and libel of a

¹⁸ Ibid., p.18.

¹⁹ For all stages of the Bill, see the Defamation Bill 2006 web pages:

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/4306/document1.htm>.

²⁰ Seanad Eireann Debate Vol. 185 No. 12 6 December 2006: <http://debates.oireachtas.ie/seanad/2006/12/06/00006.asp>.

deceased individual. One has nothing but one's good name and under this Bill, one can now defend one's reputation in the courts. In the case of one who has died, however, nobody can defend his or her good name.

Similar issues were raised in the later sittings of the Committee Stage (4, 5 and 11 December 2006), but there were no significant amendments moved in relation to defamation of the dead. At the Report Stage, while not introducing amendments for a case to be brought with regard to a deceased person, Deputy Brian Lenihan explained the provisions in relation to an existing case surviving the death of the person bringing the case²¹:

The provisions in section 38 are a modest advance on the current legal position whereby a cause of action ceases on the alleged defamed person's death. Subsection (2) provides that a cause of action vested in a person immediately before his death shall survive for the benefit of his estate. However, monetary damages are not recoverable. Only special damages could be recovered. Subsection (3) provides likewise in respect of the alleged defamer. Should he be deceased, the cause of action survives against his estate, which is appropriate.

The issue was again raised in Dáil Éireann by Deputy Joanna Tuffy in the following terms²²:

A family in my constituency has an issue with information published about a family member when he died. How would the family fare under the legislation given it does not provide for the defamation of the dead? That needs to be addressed. I do not necessarily mean court cases should result but a family with an issue about coverage of a deceased relative should have the opportunity to make a complaint to the press ombudsman or the Press Council. A mechanism should be in place to address their concerns or grievances.

Deputy Liam Kennedy added²³:

I wish to comment on what I term "insensitive" headlines and stories in publications. Often, these stories deal with deceased people. As many speakers stated, dead people cannot speak for themselves. Reference was made to the late Liam Lawlor, who was a Member of this House. Immediately after he was killed, a story was written about the circumstances of his death which was totally without foundation. If the story were true, I feel printing it after his burial would have been appropriate. However, it was written without any regard to the man's spouse and family.

Grieving families have enough difficulties without having to read banner headlines in the newspapers, particularly when they are untrue. If they do contain the truth, the story will still be good in a weeks' time when the person has been interred and given

²¹ Seanad Éireann Debate Vol.188 No.22, 11 March 2008: <http://debates.oireachtas.ie/seanad/2008/03/11/00006.asp>.

²² Dáil Éireann Debate Vol. 654 No. 2, 14 May 2008: <http://debates.oireachtas.ie/dail/2008/05/14/00012.asp>.

²³ Ibid: <http://debates.oireachtas.ie/dail/2008/05/14/00023.asp>.

a normal Christian burial. More and more we see during the immediate period after death reporters delving in and seeking a story.

However, Deputy Peter Kelly reiterated that these issues were to be dealt with through the regulatory body:

The concept of the Press Council is to give the public a faster and cheaper avenue to resolving grievances with newspapers than that provided by the courts. The aim of the council should be to encourage newspapers to resolve all complaints internally in the first instance. Most newspapers and magazines are well equipped to do this. I hope complaints can be resolved within six weeks once the system is fully operational. Only in cases where complainants and publishers fail to reach agreement will the Press Ombudsman or the Press Council impose any sanctions. Bereavement is one issue on which it is hoped newspapers will show more sensitivity.

The Act, as passed, did not have provisions regarding defamation of the deceased, except in relation to a case surviving the death of an individual, provided for in Section 39, explained thus in the Explanatory Memorandum²⁴:

Section 39 - Survival of cause of action on death

This section does not provide for a cause of action for defamation of a person who is already deceased. It provides that a cause of action for defamation vested in a person immediately before his death should survive the death of the person for the benefit of his estate. As a consequence, the section also provides that a cause of action in defamation should survive the death of the person alleged to have made the defamatory statement.

The section provides that, where a person who is the subject of an alleged defamatory statement and would have a cause of action, dies, within the new limited period under this Act of 1 year, that cause of action, within the limitation period now proposed, shall survive. However, the damages potentially recoverable by a person's estate shall not include general, punitive or aggravated damages, i.e. no monetary damages.

As with England and Wales, therefore, issues relating to defamation of the deceased are within the remit of the press regulatory infrastructure, the Press Council and the Press Ombudsman²⁵.

²⁴ Explanatory Memorandum to the Defamation Act 2009, pp.6-7:

<http://www.justice.ie/en/JELR/Explanatory%20Memo%20to%20Defamation%20Bill.pdf/Files/Explanatory%20Memo%20to%20Defamation%20Bill.pdf>.

²⁵ Press Council of Ireland and Office of the Press Ombudsman website: <http://www.presscouncil.ie/>.

Scotland: Death of a Good Name Consultation

In January 2011, the Scottish Government published the consultation paper 'Death of a Good Name - Defamation and the Deceased'. The need for the consultation was explained in the following terms²⁶:

The potential for defamatory material to cause distress and a sense of injustice for relatives and associates of the deceased is a powerful consideration in any country, as is the scope for the public to be misled. In addition, a number of factors suggest that this issue should now be reviewed from a Scottish perspective. These include: the apparent lack of recent attention to defamation law in Scotland; the fact that several authoritative reviews of defamation law in similar jurisdictions have recommended that there should be provision as regards the deceased; the IT-driven transformation of the publication and communications environment; the European Convention-based evolution of privacy law; the evolution and experience of mechanisms dealing with media regulation; and the attention that the Public Petitions Committee of the Scottish Parliament has devoted to the issue.

The long-running public petition referred to was in relation to the defamation of homicide victims and the ability of people convicted of murder to profit from the publication of their memoirs²⁷.

The consultation received 23 responses²⁸, which are summarised as follows²⁹:

- The response to whether there was real evidence of a significant deficiency in the law that required to be addressed was split amongst the respondents.
- The individuals and victims' organisations that responded to the consultation agreed that the law should be extended to allow close relatives to bring an action for defamation of a recently deceased person. The other respondents were unanimous in the view that the law should not be extended or adapted.
- The majority of respondents who addressed a question as to whether would it be preferable and practical to limit an extension of the law only to defamation of people who had died in defined circumstances submitted that it was unnecessary to limit any extension to those who had died in defined circumstances.
- Of the individuals who responded to a question regarding who should be entitled to bring an action, most were of the opinion that the categories of

²⁶ Scottish Government (2011), *Death of a Good Name - Defamation and the Deceased: A Consultation Paper*, Edinburgh: Scottish Government, p.8: <http://www.scotland.gov.uk/Publications/2011/01/11092246/0>.

²⁷ Petition PE 504 10 May 2002, Scottish Parliament Petitions Committee: <http://archive.scottish.parliament.uk/business/petitions/docs/PE504.htm>.

²⁸ Defamation of the Deceased Consultation Responses, Scottish Government website: <http://www.scotland.gov.uk/Topics/Justice/law/damages/defamationresponses>.

²⁹ Scottish Government (2011), *Defamation of the Deceased - Summary Analysis of Responses*, Edinburgh: Scottish Government: <http://www.scotland.gov.uk/Topics/Justice/law/damages/defamationresponses/defamationanalysis>.

relevant party entitled to bring an action for defamation should reflect the "immediate family".

- Respondents were split as to whether an apology would be an adequate remedy to a defamatory statement.
- The majority of respondents felt that it should be possible to obtain an interdict preventing the publication or further publication of the allegedly defamatory material.
- Of those who agreed with an extension of the law, opinions were divided as to any time limit, including a period of five years or no time limit at all.
- Respondents were divided as to whether current arrangements operated by Ofcom, the BBC Trust and the PCC for dealing with complaints are appropriate for dealing with the alleged defamation of the deceased in general were adequate.

In 2013, the Education and Culture Committee of the Scottish Parliament considered the Royal Charter on Self-Regulation of the Press³⁰. Specific evidence relating to defamation and the deceased arose during questions to a member of the legal profession³¹:

Clare Adamson MSP: *I have two questions. The first is a quick one about the drafting of the royal charter. Will it, in conjunction with the editors' code, prevent future defamation of a deceased victim?*

Campbell Deane (Partner, Bannatyne Kirkwood France & Co): *No, I do not think that it would.*

However, evidence from representatives of the press included the following³²:

Alan Cochrane (Scottish Editor, The Telegraph): *If there were errors in how a case was reported, they can be corrected, but I simply cannot see how we can have legal redress for the deceased. After all, the principal witness is dead. With all due respect to and sympathy for the family, I do not see how we could have such redress.*

Margaret Watson, whose daughter, Diane, was stabbed to death in a playground row at her Glasgow school 20 years ago, and who has campaigned for a change to the law told the committee³³:

³⁰ The Cross Party Charter, in response to the recommendations of the Leveson Report, was published by the Department of Culture, Media and Sport in October 2013: <https://www.gov.uk/government/publications/leveson-report-cross-party-royal-charter>.

³¹ Committee for Education, media and Sport, Official Report, 16 April 2013, p.2193: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8406&mode=pdf>.

³² Committee for Education, media and Sport, Official Report, 23 April 2013, p.2246: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8734&mode=pdf>.

³³ Ibid., p.2255.

I just feel that the press are unaccountable when they write stories about people who are deceased, whether through murder or other circumstances. The deceased's good name should not be dragged through the mud without good reason. I hope that the Scottish Parliament will ensure that a provision is put in to give some protection and rights to families who have lost someone. I hope that the Parliament will take the issue seriously.

The Cabinet Secretary for Culture and External Affairs, Fiona Hyslop, stated the Scottish Government position³⁴:

The Scottish Government's position is that we should implement the key Leveson proposal that there should be independent self-regulation where membership of the regulator is voluntary but encouraged by incentives that are triggered by the regulator being recognised as having met certain criteria.

Fiona Hyslop added that the Scottish Government had requested the following be inserted into Paragraph 8 of Schedule 3 of the Charter in respect of defamation of the deceased³⁵:

"and the need for appropriate respect and decency in reporting and commenting on the recently deceased, where the only public interest in them is in the manner and circumstances of their death, and their near relations."

In relation to legislation in this area, she added:

Fiona Hyslop: *I think that the pitfall that people are concerned about is whether we would have enshrined in law the defamation of deceased persons. There was no consensus on that point in the 2011 consultation. The Scottish Government responded by saying that we would like to see what Lord Justice Leveson said in his report, but he did not recommend legislation in this area. Therefore, there is certainly no consensus on the issue. I think that that is because of the pitfalls that you heard about in the earlier evidence session around what could be defined as defamation.*

The wording suggested by the Scottish Government does not appear in the Royal Charter.

There have been no further developments in relation to defamation of the deceased, although the establishment of a post-Leveson system for press regulation in Scotland is still under discussion³⁶.

³⁴ Ibid., p.2267.

³⁵ Ibid., p.2273.

³⁶ For example, 'Salmond warns more needs to be done on press self-regulation' in *The Herald* 24 April 2014: <http://www.heraldscotland.com/u/u/salmond-warns-more-needs-to-be-done-on-press-self-regulation.1398362653>.

Defamation in Other Jurisdictions

Some states have legislation that allows for cases to be brought in respect of defaming the dead. Examples are as follows:

- Australia - Uniform defamation laws apply across states and territories in Australia and a common Section 10 of the relevant statutes³⁷ provides for *No cause of action for defamation of, or against, deceased persons*. This provision, however, has not been included in the relevant statute passed in the Australian island state of Tasmania³⁸.

- Philippines – Article 353 of the Revised Penal Code³⁹ states:

*Definition of libel. —A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to **blacken the memory of one who is dead.***

- USA – while US law generally does not permit libel actions in respect of the deceased, some individual state statutes provide for protecting the dead and their surviving families from defamation. Examples are:

- Georgia⁴⁰:

*(a) A person commits the offense of criminal defamation when, without a privilege to do so and with intent to defame another, **living or dead**, he communicates false matter which **tends to blacken the memory of one who is dead** or which exposes one who is alive to hatred, contempt, or ridicule, and which tends to provoke a breach of the peace.*

- Idaho⁴¹:

*Libel defined. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, **tending to blacken the memory of one who is dead**, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.*

³⁷ For example, Defamation Act 2005, New South Wales Consolidated Acts:

http://www.austlii.edu.au/au/legis/nsw/consol_act/da200599/.

³⁸ Defamation Act 2005, Tasmania Consolidated Acts: http://www.austlii.edu.au/au/legis/tas/consol_act/da200599/.

³⁹ Revised Penal Code of the Philippines, Article 353:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf.

⁴⁰ Georgia Code § 16-11-40: <http://www.lexisnexis.com/hottopics/gacode/>.

⁴¹ Idaho Code § 18-4801: <http://legislature.idaho.gov/idstat/Title18/T18CH48SECT18-4801.htm>.

- Nevada⁴²:

*A libel is a malicious defamation, expressed by printing, writing, signs, pictures or the like, **tending to blacken the memory of the dead**, or to impeach the honesty, integrity, virtue, or reputation, or to publish the natural defects of a living person or persons, or community of persons, or association of persons, and thereby to expose them to public hatred, contempt or ridicule.*

3 Concluding Comments

Defamation of deceased persons is not provided for in legislation in these islands. Proposals for the inclusion of defaming the dead were debated in the development of legislation in England and Wales and in the Republic of Ireland. The main arguments against legislation were that reputation is personal, so harm cannot be shown after death, the deceased cannot give evidence in court and such legislation may inhibit comment on historical figures. In these jurisdictions there has been no change to the law, but if the family of a deceased person feels aggrieved it was suggested these issues would be dealt with through codes of practice in relation to the media. In Scotland, there does not appear to have been any further action since a consultation on the issue in 2011.

The principles regarding defamation are viewed as a balance between the contending European Convention rights of freedom expression (Article 10) and the right to enjoy a private and family life (Article 8)⁴³. The November 2013 judgement in the European Court of Human Rights of the case of Putistin v. Ukraine⁴⁴ concerned the son of Mikhail Putistin who participated in an historical event, the so-called 'death match' between the football club Dynamo Kyiv and a German military team. The newspaper *Komsomolska Pravda* published an article alleging collaboration by some of the players with the Gestapo. While the judgement stated that the case was not admissible because Mr Putistin's father was not named in the article, the concurring opinion stated:

This judgment is important in that it accepts that under certain conditions the damage to the reputation of a deceased person can affect the private life of that person's surviving family members. The judgment makes very clear, however, that such a situation will occur only in relatively exceptional circumstances.

The suggestion is therefore that some circumstances of defamation of deceased persons can breach Article 8 of the European Convention on Human Rights, the right to respect for private and family life.

⁴² Nevada Revised Statutes § 200.510: <http://www.leg.state.nv.us/NRS/NRS-200.html#NRS200Sec510>.

⁴³ See Research and Information Service Briefing Paper 90/13, The Defamation Act 2013, 21 June 2013, p.3.

⁴⁴ Application No 16882/03 Putistin v Ukraine 21 November 2013: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128204#/"itemid":"001-128204"}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128204#/).

However, a parliamentary question to the Justice Minister regarding the judgement received the following response⁴⁵:

Mr Bain: *To ask the Secretary of State for Justice what the Government's policy is on whether families of deceased persons should be able to sue under the law of defamation following recent jurisprudence on the issue in the European Court of Human Rights. [177668]*

Mr Vara: *It is a long-standing legal principle that a deceased person cannot be defamed as reputation is personal. The Government have no plans to change the law in this area. This principle is not affected by the recent European Court of Human Rights judgment in Putistin v. Ukraine, which concerned an applicant who sought redress for damage to his and his family's reputation affecting him, rather than damage to the reputation of the deceased person.*

Internationally, there are some examples of legislative provisions relating to defamation of deceased persons, including in the Philippines and some states of the USA, and potentially in Tasmania due to omission in current defamation legislation.

⁴⁵ HC Deb 28 November 2013, Col 411W:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131128/text/131128w0002.htm>.