

## A quick guide to libel laws in England and Wales

Libel laws in England and Wales are notoriously complicated and restrictive. Sense About Science launched our campaign to Keep Libel Laws out of Science in June 2009, when we became aware of the extent to which our libel laws were chilling scientific discussion and open debate. We were surprised to hear how our libel laws were chilling discussion in so many different areas, but coming to the libel laws as scientists, we had a steep learning curve. We were helped in this by many fantastic lawyers and experts, and we thought we should share what we have learnt.

Our libel laws will be changing soon: because of the huge groundswell of public support for libel reform, the Government has published a draft defamation bill – the first attempt to reform our libel laws in over a century. In the meantime...

### Defamation, slander and libel – what's the difference?<sup>1</sup>

- **Defamation** is the term applied to all public statements that can damage the reputation of another individual or party.
- **Slander** is defamation in an impermanent form, and usually refers to speech.
- **Libel** is defamatory material in a permanent recorded form - in a newspaper, a book, on a TV or radio programme, a website, a blog, a drawing, or even a letter sent from one individual to another.

### Where did the libel laws come from?

English libel law was invented by the judges of the Queen's Bench as an alternative to duelling, to allow gentlemen to defend their reputations without resorting to violence. Like trespass and negligence, libel is a form of civil law. Civil law is concerned with the rights and duties of citizens, unlike criminal law, which addresses offences against society, such as murder or assault.

Problems with the libel laws have been recognised for centuries – the *Guardian's* first ever editorial in 1821 included a call for libel law reform.<sup>1</sup> Supporters for libel reform over the years have included EM Forster and HG Wells in the 1920s.

### How does the law develop?

Laws are made by Parliament. Prior to the Government's recent draft defamation bill, the last attempts by Parliament to reform the libel laws were through acts in 1952 and 1996. Laws also develop through the influence of past judgements in court: this is known as common law. Each judgement sets a precedence and in most areas of law, the influence of one ruling tends to be diluted by many other rulings. However, in libel law, few cases make it to trial and only three judges currently hear libel cases in England and Wales. This has meant relatively few opportunities for common law to develop, and a small number of rulings have had a disproportionately large influence on the shape of the law. As a result, problems with out-of-date laws endure.

## Why are our libel laws so problematic?

### Libel laws are complicated and unpredictable

There are several defences that can be used in a libel action. These are complicated, and some have developed through common law and some are set out in legislation. There is often great uncertainty about how a case will progress, and which defences will be allowed. Preliminary arguments just about this can last several years and cost thousands of pounds, even before a trial starts.

### Defences available in libel actions<sup>2</sup>

**Justification:** a defendant must show that the substance and fact of what they have written is true. However, a judge decides what the words meant, and therefore what a defendant must prove to be true – sometimes not what a defendant expects.

**Fair comment:** a defendant must show that their writing was an expression of opinion based on facts, made without malice or disregard for the truth.

**Privilege:** Under certain situations, communications are protected from libel actions to allow people the confidence to speak without restraint. **Absolute privilege** protects, for example, MPs speaking in Parliament and people speaking in a court of law. **Qualified privilege** covers exchanges “*for the common convenience and welfare of society*”, and includes employment references, banking enquiries and confessions to a priest.

**The Reynolds Defence:** a form of qualified privilege, developed through common law to protect responsible journalism. The defence is meant to allow the reporting of facts which are uncertain, but whose reporting is in the public interest. However, this defence is notoriously difficult to use successfully, and contains what has been interpreted as a ‘check list’ to show responsible journalism. Required steps include contacting the other party to ask for their side of the story, and being able to demonstrate steps taken to verify a story.<sup>3</sup>

### Laws are biased towards the claimant

Libel cases are easy to bring, but difficult to defend. Claimants do not need to show that what has been communicated is false or damaging for a case to proceed; instead the burden of proof rests with the defendant to show their words are defensible. Because libel cases are extremely costly and defences are uncertain, the majority of those threatened with a libel suit will back down rather than try to defend their words, meaning cases rarely reach court.

- Solicitors estimate that 90% of libel cases in England and Wales are won by the claimant<sup>4</sup>.
- Of 154 libel proceedings identified in Justice Jackson’s 2010 review of costs in civil litigation, none were won by the defendants.<sup>5</sup>
- The number of libel proceedings involving media companies where cases were settled by a statement in open court, instead of parties following a case through to its end in court, rose from 21% in 2004 to 61% in 2008.<sup>6</sup>

**CASE STUDY<sup>7,8,9</sup>:** Simon Singh is a science writer who was sued for libel in 2008 after criticising claims made by the British Chiropractic Association (BCA) that chiropractic could be used to cure childhood conditions such as colic and asthma. Instead of engaging in open scientific debate, the BCA sued Simon personally for libel. The case lasted over two years and cost Singh an estimated £70,000 to defend; even though it never reached a proper trial, lengthy preliminary arguments were fought over meaning.

## Costs are high

Damages awarded in libel cases are capped at £200,000<sup>5</sup>. However costs incurred in a libel trial can be extremely high and the losing party is required to pay the winner's costs as well as their own. This means that individuals and organisations can face bankruptcy if they take on and lose a libel action<sup>10,11</sup>. So why are costs in libel trials so high?

- Complicated libel laws mean cases are rarely resolved quickly, ratcheting up costs.
- Libel trials are heard in London before the High Court, and need specialist lawyers. City legal rates are extremely high in comparison to rates in a county court.
- In cases fought under 'no win no fee' Conditional Fee Arrangements (CFAs), lawyers of the winning party can charge what are known as 'Success Fees' and up to double their fees.

Research by Oxford University has shown that libel cases in England and Wales are 140 times more expensive than their counterparts in Europe<sup>10</sup> and costs can run into the millions. The 2010 Jackson Review<sup>5</sup> identified that the average cost for the twenty most expensive trials was over £750,000, whilst the most expensive libel action in England and Wales cost in excess of three million pounds.

Even if a defendant wins their case they are unlikely to recover all their costs – let alone compensation for loss of time and earnings. It is hardly surprising that many threatened with libel are unwilling to take on the huge risks involved.

**CASE STUDY<sup>6,9</sup>: Science journalist Ben Goldacre was sued for libel in 2007 along with the *Guardian*, over an article in which he criticised the activities of vitamin pill salesman Matthias Rath. Rath was promoting vitamin pills as a cure for AIDS in South Africa and denouncing conventional therapies as toxic and harmful. Although Rath eventually dropped his libel suit, the case cost the *Guardian* £535,000 to defend and lasted 19 months. Only £365,000 of this was ever recovered from Rath which meant that for Goldacre and the *Guardian*, the cost of winning was £170,000: only slightly less than the cost of the average house!**

## Libel laws are out of date

The internet has irreversibly changed the way we access and publish information, but with parliament last modifying our libel laws in 1996 and our current definition of a publication dating from 1848, development of the libel laws has not kept up. It may be clear to us that an investigative report in a newspaper and anonymous comments on a blog are very different in nature, but under current libel laws, both are held to the same conditions. Website hosts and internet service providers are forced to assume editorial responsibilities in the same manner as traditional outlets such as newspapers and magazines.

A ruling made in 1848 states that libel suits can be brought for a year after material is published. However, when it comes to online writing, each click on an article or download of a webpage is defined as a new publication. This means that all online writing remains potentially liable as long as it is accessible. Newspapers and journals are forced to consider the libel laws when making their archives available online, as they are technically re-publishing material. As a result, many editors leave gaps in their archives where material is controversial.

## Libel tourism is chilling voices worldwide

The claimant-friendly nature of our libel laws means that foreign claimants are encouraged to try to take their cases here. A wide jurisdiction means that claimants can initiate cases on the weakest of grounds and over a quarter of High Court libel cases from 2005-2009 had some form of foreign involvement<sup>13</sup>. In 2010 the US Congress passed the SPEECH Act to 'protect citizens against foreign libel rulings contrary to US constitution and laws'<sup>14</sup>. This followed a number of libel cases against American writers, including a New York based author who was sued by a Saudi businessman in London, even though only 23 copies of her book were sold in the UK.<sup>7</sup>

**CASE STUDY<sup>7</sup>:** In 2007, Ukrainian businessman Rinat Akhmetov brought a libel suit in the UK against an internet news site *Obozrevatel*, over articles published about his younger years. The site is based in the Ukraine and publishes in Ukrainian and has a very small readership in the UK. Akhmetov was awarded damages of £50,000 and costs. That same year, Akhmetov also sued the *Kyiv Post*, an Ukrainian paper with around 100 UK subscribers, over allegations of corruption. The newspaper apologised as part of an undisclosed settlement in 2008. In 2010, the *Kyiv Post* blocked access to all web traffic originating from the UK in protest against the English libel laws.

## What next?

We continue to be surprised by the number of people who experience libel threats, and last year, we put together a guide to libel for online writers and communities: [So you've had a threatening letter. What can you do?](#) The Government published their draft defamation bill in March 2011 and this is currently undergoing scrutiny. You can see all the [latest news from the Libel Reform Campaign here](#) as we work with groups and people affected by the laws to make sure reforms introduced in the final bill address the current problems and protect open discussions and debate.

## Bibliography and further reading:

<sup>1</sup> *Libel Reform, 190 years overdue*, Robert Sharp, Liberal Conspiracy, 2011

<sup>2</sup> *A Rough Guide To English Defamation Law*, Robert J Dougans, 2010

<sup>3</sup> *Judgments - Jameel and others (Respondents) v. Wall Street Journal Europe Sprl (Appellants)*, 11 October 2006, Paragraph 56

<sup>4</sup> *Through the looking glass*, Floyd Abrams, Index on Censorship, June 15 2009

<sup>5</sup> *Civil litigation costs review*, Lord Justice Jackson, January 14 2010

<sup>6</sup> *Defamation cases increase by a third*, Issued on behalf of Sweet & Maxwell by Mattison Public Relations, July 2009

<sup>7</sup> *Free Speech Is Not For Sale – the impact of English libel law on freedom of expression*, English PEN and Index on Censorship, November 10 2009

<sup>8</sup> *On libel, the really big battle awaits*, Simon Singh, *The Guardian*, April 19 2010

<sup>9</sup> *Simon Singh and the silencing of the scientists*, Sarah Boseley, *The Guardian*, February 25 2010

<sup>10</sup> *Comparative Study of Costs of Defamation Proceedings Across Europe*, University of Oxford, December 2008

<sup>11</sup> *Will British libel law kill net free speech?* Emily MacManus, *Open Democracy*, March 27 2009

<sup>12</sup> *Government to cap legal bills in libel cases*, Frances Gibbs, *The Times*, February 24 2009

<sup>13</sup> Research carried out by the Libel Reform Campaign, February 2010

<sup>14</sup> **H.R. 2765: Securing the Protection of our Enduring and Established Constitutional Heritage Act**