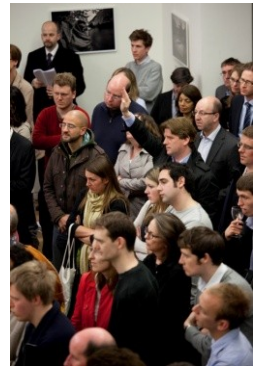


Defamation Bill 2012

Briefing for second reading debate on 12th June 2012



Freedom to criticise and question in strong terms and without malice is the cornerstone of argument and debate, whether in scholarly journals, on websites, or in newspapers. The libel laws of England and Wales discourage argument and debate and merely encourage the use of the High Court to silence critics. They are damaging freedom of expression and the open exchange of information not just in England and Wales but worldwide.

The Libel Reform Campaign was founded by Index on Censorship, English PEN and Sense About Science in December 2009 to obtain major changes in the English libel laws. 60,000 individuals, 60 civic society organisations and hundreds of prominent individuals support the campaign.

All three main political parties made a commitment to reform the libel laws in their 2010 general election manifestos and the coalition Government agreement included a pledge to **reform** the legislation.

We are delighted that the Government has published a Defamation Bill. However, we are concerned that if the Defamation Bill is merely **codification** of current common (case) law, the Government is in danger of being seen to fail to deliver on its promises.

Excellent work has been done by the House of Commons Culture, Media and Sport select committee, the Ministry of Justice working group and the cross party Joint Scrutiny Committee and in particular by Lord Lester of Herne Hill whose Private Member's Bill led the way in framing new legislation. The Defamation Bill contains welcome proposals on:

- a single publication rule, preventing perpetual liability due to internet publication
- measures to protect foreign defendants from actions brought in London
- clarification of and improvement to, the defence of honest opinion
- streamlining procedure by restricting the use of juries in most cases; and
- an additional protection for a limited number of scientific publications.

Here we set out our position on four main areas of concern:

- the absence of any new or effective public interest defence
- the need for an effective early hurdle to stop trivial cases chilling free expression
- the lack of restrictions on corporations and other “non-natural persons” using the libel law to deter legitimate debate and criticism; and
- the need to provide more protection for internet hosts and intermediaries.

The absence of a new and effective public interest defence

Clause 4 of the Defamation Bill is the codification of the existing and inadequate “Reynolds” defence for responsible publication. It is not a public interest defence.

The current law chills speech on matters of public interest and expressions of opinion. The existing Reynolds defence is unpredictable because there is uncertainty about how the list of circumstances that establish responsibility will be applied when a case reaches court. Recent efforts by judges to discourage the use of the circumstances as an exhaustive list would continue to be undermined by the presumption that publication is irresponsible unless the defendant can prove otherwise. This lack of certainty makes the prospect of defending a claim on the basis of Reynolds privilege a very risky one with the threat of the huge expense of a full court case.

Protection of free speech in an open society recognises that open debate and the search for truth requires the publication of uncertain or one-sided material and that the law should err on the side of publication, while ensuring that untrue statements are suitably corrected. The public interest defence needs to be clear and simple, and available and of benefit to writers such as **Dr Simon Singh** and **Dr Ben Goldacre** (who were both seeking to discuss misleading claims in health care) which is not the case under the current common law, nor under the proposed statutory defence.

What is needed:

We recommend an additional defence, inserted before clause 4, which protects genuine public interest statements made in good faith. Our clause provides that statements, which cannot be shown to be true, are promptly clarified or corrected with adequate prominence thus delivering an appropriate remedy to the claimant with no need for the expense of a full trial. Such a defence already exists for many publications such as the reporting of any public meeting or press conference. Currently, beyond the Offer of Amends defence which involves damages and admitting liability, there is nothing to encourage newspapers or any publisher to publish a clarification and they are forced to rely on a Reynolds defence. This new defence would encourage prompt and suitably prominent clarifications which is what most complainants want.

We also call for changes to clause 4 of the Defamation Bill to shift the burden of proof to the claimant to show that the publication (on a matter of public interest) was irresponsibly published. We also believe the nature of the publication should always be taken into account so that small or solo publishers (such as bloggers) are not held to the same standard in running a defence as a newspaper.

The need for an effective early hurdle to stop trivial cases chilling free expression

Clause 1 of the Defamation Bill includes a test for serious harm to be shown.

The state of the current law allows the chilling of free expression by trivial and vexatious claims or their threatened use. We need an effective early hurdle to prevent time-wasting and bullying claims by litigants. A clear threshold would prevent vexatious use of the law to silence legitimate criticism, but would not prevent claims from individuals whose psychological integrity has been violated by a libellous statement. It would also prevent libel tourism in cases where publishers are sued in London while the majority of the publication and damage has been outside the UK.

What is needed:

There should be a clear and effective hurdle in order to deter trivial and hopeless claims but it is also important to avoid unnecessary prolonged preliminary legal arguments so as not to “front-load” costs for either the claimant or the defendant.

We welcome the “serious harm” test in clause 1 of the Bill as this requires the claimant to show that damage to their reputation is more than non-trivial. This however seems to merely restate the existing common law position in the Thornton case and on its own does not represent an effective barrier to abusive claims. We have further proposals to provide a proper barrier for frivolous or bullying claims which a defendant can call on without significantly front-loading costs.

The Bill should set out that the extent of publication in the jurisdiction must be sufficient to represent a real and substantial tort (to avoid claimants citing a handful of website hits or books being purchased in England and Wales). As Lord Lester’s Bill (clause 13 (2)) set out, harm to reputation from publication in the jurisdiction must be judged having regard to the extent of publication elsewhere.

The court must have the ability and the willingness to take an early view on the question of serious harm and extent of publication. Claims should be struck out if there is no real prospect of vindication or that any vindication obtained – such as it is – is not “worth the candle” (i.e. is likely to be disproportionate to the cost of achieving it).

Corporations and non-natural persons

The Defamation Bill does not include any measures to restrict corporations' and other "non-natural person's" use of the libel laws.

- **the law can be used by companies to "manage their brand"**
- there is a problem with the inequality of arms between wealthy and powerful corporate claimants and defendants
- organisations use threats of costly libel actions and lengthy proceedings to close down criticism of their products or practices
- the law as it stands gives even more power to those who already hold the most power in society, and stifles criticism or investigation of corporations and other organisations
- public organisations cannot sue in libel (the "Derbyshire" principle) and so are placed at an unfair disadvantage compared to private providers of public services who can deter criticism by threatening a libel action. We support the Derbyshire principle being brought into statute and made applicable to all non-natural persons who perform a public function when the allegedly defamatory statement relates to that function.

What is needed: Restrictions should be introduced for corporate claimants and other non-natural persons. Non-natural persons do not have psychological integrity or feelings, and cannot therefore benefit from the development of an Article 8 'right to reputation' in Strasbourg case law. So while we recognise that non-natural persons do need a remedy for damage to reputation under Article 10 (2), it is lawful, reasonable and appropriate to give non-natural persons different remedies from those needed by natural persons who have Article 8 rights as well. There is widespread popular support for restricting corporations from using the libel law.

We believe that all non-natural persons suing in libel should have to show actual (or likely) financial harm and show malice, dishonesty or reckless disregard for the truth. Non-natural persons also have other remedies to respond to criticism they think is unfair:

- using existing malicious falsehood legislation
- libel actions by company directors (or equivalent) in their own name (especially relevant for small businesses) where the defamation causes serious reputational harm
- a free-standing remedy of obtaining a declaration of falsity could be made available for this purpose
- other remedies have recently been made available, such as the Business Protection from Misleading Marketing Regulations 2008 (BPRs) which deal with false advertising claims amongst other issues.

Defence for operators of websites

Clauses 5 and 10 of the Defamation Bill include some measures to protect innocent internet publishers from liability, but the detail will be in regulations which the Government has not yet published.

The current law does not reflect the nature of 21st-century digital publication. The internet is the front line for free speech today. We are witnessing an unprecedented revolution in communication. However, under the current law internet intermediaries (including ISPs, search engines, web hosts, social networks and discussion boards) are not adequately protected.

The main problem under the current law is that parties who were not responsible for composing, writing, editing or approving allegedly defamatory content may be sued for libel. The law encourages private censorship by bodies which are neither authors nor traditional publishers, and thus not in a good position to defend the defamatory words, in response to the threat of a libel action. Powerful interests regularly threaten internet intermediaries because this is an effective tool of “reputation management,” that is taking down criticism about a product or service.

The bill appears to require complainants to take action against the author or editor of an internet article where that person is identifiable, contactable and willing to defend the action. This is welcome. However, in other cases, clause 5 of the bill is a statute which fails to match the existing common law protection established in a series of recent cases.

What is needed

The Bill must also:

- align English libel law with the later E-Commerce Directive and the associated UK Regulations which is a far more effective protection of innocent intermediaries
- ensure that web-hosts are only liable if they do not take down undefended words which have been found by a court – even on a cursory examination - to be libellous not merely alleged to be defamatory. This requires a cheap and fast court-based filter of complaints
- ensure that the protection for web hosts is not lost by them “post-moderating” user content, which is good practice and should be encouraged
- ensure that any new scheme does not cut across the existing voluntary scheme where obvious libels (as with other breaches of terms of service of web services) can be removed expeditiously, through flag and alert reporting systems
- clarify that the presence of a bare link to libellous material is not in itself sufficient to import liability to the author.