English libel law is not fit for purpose

The libel laws of England and Wales are outdated, unfair and too expensive. They are being used by rich and powerful bullies to shut down critical discussions of products, medicine, corporations and community issues. The UK Government published a draft Defamation Bill in March 2011 in response to a public campaign objecting to the stifling of these discussions. The proposals in the draft bill need to be strengthened and clarified to ensure final legislation fully protects citizens' rights and the public interest.

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English libel law is notoriously expensive, complicated and out of date. It is stifling public debate and freedom of expression. While human rights groups have for a long time protested that English libel law is among the most restrictive in the world, it is only recently that its impact on academic discussions has come to light, helping to catalyze a public campaign and significant support for reform among policy-makers.

The laws are unbalanced against defendants. Anyone can take a libel case against you without having to prove they were damaged by your writing, and then it falls to you to defend yourself. Most cases are won by claimants[1], but the majority of libel threats made against individuals, NGOs and newspapers are settled before they reach court.

The defences available in libel law are complicated and inadequate. The courts are unpredictable when establishing what a defendant's words mean and whether they are expressions of fact or opinion, so there is great uncertainty about whether a publisher would win a case if they wanted to defend it. There is also no reliable defence available for writing on matters in the public interest.

The complexity of the laws means trials are long and complicated and need specialist legal teams. In England and Wales libel cases are heard in the High Court in London where litigation is especially expensive. Lawyers tell us cases rarely come in below £150,000 and often cost half a million. All of these problems mean the laws are having a chilling effect on free speech in the UK and around the world.

Recent landmark cases and reports from parliamentary inquiries have highlighted all this but in fact the problems with the laws have been recognized for nearly a century. In the 1930s, the Porter Committee[2] concluded that 'The law and practice in actions for defamation are said to be: unnecessarily complicated; unduly costly; such as to make it difficult to forecast the result of an action both as to liability and as to the measure of damages; liable to stifle discussion upon matters of public interest and concern; and too favourable to those who, in colloquial language, may be described as 'gold-digging' plaintiffs'.

The complexity of the current laws is a legacy of piecemeal reforms over the past century that aimed to patch up weaknesses. Recommendations from the Porter Committee became the Defamation Act 1952, although, according to Lord Porter, these were 'watered down to a very great extent'. Further tweaking occurred in 1975 and 1991, and the last time Parliament looked at the laws was in drafting the Defamation Act 1996. Moreover, there has been insufficient opportunity for case law to develop as most defendants settle before getting to court to avoid risk of ruin.

Many people will be aware of the case of science writer Simon Singh who was sued for libel in 2008 by the British Chiropractic Association (BCA) for an article[3] he wrote in the *Guardian* on the lack of efficacy of chiropractic for childhood ailments. We know about Simon's case because he was one of the rare defendants who stood up to a threat. The BCA eventually dropped the case[4] but the damage was done – Simon had run up costs of £200,000 (of which he will probably get no more than 70% back) and spent two years defending his short article when he should have been writing his next book.

Simon's case acted as a lightning rod for hundreds of other scientists, journalists and

academics who told us about their run-ins with the laws and prompted us all to say 'enough'. We launched a campaign to 'Keep Libel Laws out of Science' in June 2009. At the same time, free speech organization 'Index on Censorship' and author's group 'English PEN' were conducting a year-long investigation into the impact of the laws on free expression. They published their *Free Speech is not For Sale* report in November 2009, which concluded that English libel law imposes unnecessary and disproportionate restrictions on free speech in the UK and around the world. In December 2009, Index on Censorship, English PEN and Sense About Science joined together to form the 'Libel Reform Campaign' with the support of a cross-party parliamentary group of MPs convened by Dr Evan Harris.

Since then we have been inundated with stories of the impact of the laws on different sectors of society. The cost of the laws to us as consumers, readers, patients and citizens is becoming clear and is shocking.

As consumers we expect the information in the public domain to be impartial and complete but this is not always the case. The editor of *What Satellite and Digital TV?* magazine told us they do not cover the poor manufacturing standards of set-top boxes from big companies because just one libel threat could cause the magazine to fold. The Consumers' Association and their magazine *Which?* regularly battle legal threats, sometimes unsuccessfully, to be able to print critical reviews of double glazing companies, debt management firms and unsafe child safety seats.

Readers are missing out too. Lord Bew, editor of an Oxford University Press history of Ireland, cannot write on recent events in Northern Ireland in case one of the subjects sues him or his publisher for libel, so he has been forced to leave chunks of history unrecorded in his book. His are not the only publishers feeling the costs of the libel laws. A Publishers Association survey[5] in 2010 found that every one of their members who responded had been negatively affected by libel actions or threats. Almost half of book publishers had withdrawn a book in response to a threat, most of them had refused to publish work to avoid perceived libel risk and they all had been forced to modify content ahead of publication.

As patients we expect health professionals making decisions about our treatments to have access to complete information but the peer-reviewed medical literature has felt libel chill. Dr Fiona Godlee, editor-in-chief of the leading medical journal the *BMJ*, told us the BMJ Group of medical journals has had to refuse to publish scholarly articles purely because of legal advice. As one example, the journal *Archives of Disease in Childhood* turned down a series of case reports illustrating clinical signs suggestive of child abuse. The editor was keen to publish, but the legal advice was that there was a small possibility that cases might be identifiable and thus there was a risk of libel action. The paper was later published in an American journal.

Dr Godlee said in an editorial[6] calling for reform of the laws that 'scientific claims [must] be exposed to critical scrutiny before they are accepted' but these discussions are chilled too. A survey of GPs in January last year by the magazine *Pulse*[7] found 80% of the doctors who responded said that fear of being sued for libel by a large company was restricting open discussion of the potential risks of drug treatments. Dr Peter Wilmshurst, a consultant cardiologist from Shrewsbury hospital and principle investigator on a clinical trial of a heart device, is being sued by the American manufacturer NMT Medical. Wilmshurst expressed concern to an American journalist at an academic conference in Canada about the way that the clinical trial data was being interpreted by the manufacturer. NMT is suing Wilmshurst for libel in London. It is worth noting that if Peter Wilmshurst had not made public his concerns he would have been in breach of the Hippocratic Oath and may have faced a GMC investigation.

Dr Philip Campbell, editor-in-chief of the leading scientific journal *Nature*, told us that the libel laws impact on the reporting of issues of importance to the scientific community, including research misconduct. He said 'either we choose not to cover a story because the impact is not worth the incredible effort and time it takes or we suffer by covering the story'. Our recent survey of medical and scientific journal editors, reported in *Serials-eNews* in January 2011[8], showed that scholarly editors consult libel lawyers for every issue and that it was the non-peer-reviewed content – the opinion and comment pieces, letters page and book reviews – that cost them the most time and money.

It is not just rarefied debates among specialists that libel laws are interfering with. The everyday discussions all of us as members of communities

and society have are under threat too. An online patient support forum for sufferers of the condition ME told us they had to bar members from sharing experiences of using some unproven treatments because the people promoting the treatments have threatened to sue. Parenting groups tell us they cannot discuss the techniques of certain childrearing gurus because they have been threatened with a libel suit before. A mother told us how she had to take down a Facebook page she had created to discuss a change in school uniform policy with other parents when the school threatened her with a libel suit.

The current libel law does this damage to society while also not doing what it was designed to do – provide a route to redress for people whose reputation has been unfairly damaged. Most individuals and organizations do not have the financial resources, or the stomach, for a two-year court battle to clear their name. Legal aid is not available in libel actions and no win/no fee arrangements are rare. Journalist and author Zoe Margolis sued the *Independent on Sunday* when they incorrectly labelled her a prostitute. The case was settled in her favour after three months but Zoe described her short time as a libel claimant against a national newspaper as one of the worst times of her life when every day she was reminded of the risks and costs of losing.

The exposure of the impact of the laws on ordinary people and citizens' rights led to MPs recently labelling libel law reform 'an issue whose time has come'. The public campaign for reform has been joined by 55,000 individuals, 60 civic society organizations and the majority of MPs in the last Parliament. At the UK general election in 2010, all three major parties included reform of the libel laws as a manifesto commitment and in March 2011 the Government published their draft Defamation Bill[9] to fulfil that promise.

The Libel Reform Campaign gave the draft bill a cautious welcome. It contains some good things, some of the proposals need strengthening and there are vital issues that were not covered by the draft. We give it about 6 out of 10 when we compare it to our blueprint for reform *What should a defamation bill contain?*[10]

The Government's draft Bill contains a requirement that a claimant cannot take a case unless they have been caused substantial harm by the publication. This would help to strike out frivolous and bullying claims to avoid the expense, and the associated chill, of an action that did not cause any harm. The draft Bill also contains a new defence for responsible publication on matters in the public interest. This is a welcome inclusion though the defence must be clearer and stronger to make it more reliable and available to independent journalists, individuals and bloggers who do not have the resources of a media organization behind them.

Two of the most vital reforms, without which the final Bill will not go far enough to give everyone confidence in their rights, have been left out of the draft but the Government is consulting on them. These are the issues of corporations using the libel laws to stop criticism of their products or services and bringing the laws up to date with the internet age.

Online writers, forum hosts and bloggers are particularly vulnerable to chill by the libel laws. They are often individuals and non-professionals who lack the backing of a large organization, familiarity with libel law and easy access to advice about handling complaints. When they write about companies, institutions and products an inequality of arms with the claimant often forces them to back down. In the current law, hosts and internet service providers can be liable for material hosted by them, often putting them in the position of judge and jury over content they know nothing about, leading to material being removed without consultation with authors.

Our blueprint for reform calls for measures to prevent bullying by corporations by restricting their ability to sue in libel. There is a huge public interest in citizens being able to comment on and criticize large corporations, especially bodies in a position of governance or regulatory authority.

The draft Bill is going through a scrutiny period now and everyone who has been affected by the laws is encouraged to let the Government know if the proposals would help them understand their rights and improve access to justice for everyone. The libel laws were developed in England in the 17th century as a gentleman's alternative to duelling to resolve disputes over reputation. The Government's draft Bill is probably our only chance this century to ensure reputations can be protected without all the costly damage to free expression and the public interest.

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