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RESPONSE

The effects of the English libel laws on the freedom to publish – a view from the publishing industry

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Freedom of expression is among the fundamental freedoms which lie at the heart of liberal democratic societies. Without it, creativity is stifled, knowledge hoarded rather than disseminated, and opinions remain unshared and untested. Society, culture and the economy are rendered poorer as a result. There are other important features of liberal democracy, including the right to freedom from false accusation, be it malicious or accidental. Libel law rightly provides a robust support for this right.

Libel and freedom of expression are always likely to find themselves in some tension as one person's freely expressed view is another person's unjustified calumny; but in the United Kingdom, this tension is exacerbated – indeed, perhaps occasionally deliberately manipulated – by those whose commercial interests are threatened by the free exchange of ideas about them. These people hide behind the cloak of libel in a clear attempt to suppress legitimate debate and the airing of opinion. The current structure of English libel law allows this to happen in that it sets the debate about libel with the wrong tests and at the wrong level. The result is an unbalanced and distorted system in which the risk of litigation is borne almost entirely by the publishing sector because of the absence of any meaningful disincentives to bringing a libel action. This imposes significant financial burdens and – most disturbingly of all – leads to a level of self-censorship, borne out of the fear of costly anticipated libel actions.

The Publishers Association recently ran a survey on the impact of libel on publishers.[1] The survey found that:

- 100% of the responding publishers had modified content or language before publication because of the risk of libel action;
- 60% had avoided publishing anything about people or companies who had sued for libel in the past;
- 40% had withdrawn a publication as a result of threatened libel action;
- a third avoided publishing on controversial subjects; and
- a third had refused work from authors for fear of libel actions.

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There is clear evidence that Peter Wilmshurst's experience of the libel law chilling publishing practice is not an isolated occurrence – indeed, our research appears to demonstrate that it is commonplace for freedom to publish in the UK to be curbed by the financial threat of libel action from another party.

UK publishing is one of the most respected industries in the world. Indeed, in academic, professional, scientific and educational publishing, the UK sets a global gold standard, providing the highest quality content for a variety of different markets. That this gold standard and integrity are endangered by the impact of libel threats on the freedom to publish should be of grave concern to both ministers in the UK government and those around the world who believe in the value of the highest quality scientific and academic endeavour.

The financial impact of even the threat of libel can be huge. On average, the publishers who responded to our survey spent £83,000 per company per annum on libel insurance alone, with many reporting that they simply could not afford to take the risk of fighting libel threats because of the impact on libel insurance premiums. Peter Wilmshurst also highlights the exorbitant costs of fighting a libel suit, and the huge financial burden of even winning a trial. Publishers report that dealing with the average libel threat costs £40,000, while fighting a libel suit costs, on average, £1.3m. Very few of the libel threats which publishers receive ever result in suits, and very few suits end up in court. UK courts are not deciding what should or should not be published, and what is or is not libellous. Rather financial considerations and imperatives are dictating what views and opinions see the light of day. This, more than anything else, has a chilling effect on both freedom to publish and freedom of expression within the UK.

It is not just threats from multinational corporations which have this effect. Conditional Fee Arrangements (CFAs) have ushered in an era of exorbitant legal costs across the board. Our survey revealed that the claimant's legal fees were 200 times greater than the damages actually received by the claimant after settlement. That CFAs have created an 'ambulance chasing' mentality among some sections of the legal profession is not surprising – it makes abundant commercial sense for a lawyer to seek out new business and secure high fees where this is possible – but they have also resulted in the vast majority of libel cases threatening our members being brought on extremely dubious grounds by means of costly no-win, no-fee agreements. Such agreements expose claimants to very little financial risk themselves, but defendants are left extremely vulnerable and facing prohibitively high costs in defending themselves. The lack of disincentive to bringing a libel action distorts fairness. The risk of action is borne almost entirely by the publishing community.

Those who have been defamed should have full recourse to court proceedings and there should be mechanisms in place to enable those with scant financial resources to defend themselves against falsehood. However, it is surely absurd that a system which is meant to assist justice (the original reason for creating CFAs was to give access to justice to those who could not afford legal fees) should result in a myriad of published works being withdrawn, modified or refused for publication without the facts of the cases ever being heard before a court. Defence should be open to all and should not be placed beyond any party's financial reach. The serious unintended consequences of CFAs should be addressed through a cap (or similar reform) to enable balance to be restored. The government's report on the Lord Justice Jackson Review of Civil Costs seeks to deal with these unintended consequences, and we welcome this recognition by the government that there is a problem which needs to be addressed. We look

forward to seeing the outcome of this process of deliberation and hope that there will be strong proposals in a new Draft Civil Costs Bill which put a cap on the fees which can be accrued under CFAs.

While CFAs and the financial threat of libel action clearly have a chilling effect on freedom to publish in the UK, ultimately it is the treatment of libel under UK law which has inspired the image of the UK as an easy jurisdiction in which to mount a defamation suit. It is imperative that the draft Defamation Bill, which is currently out for consultation, includes robust defences covering honest opinion and public interest, alongside proposals which allow a trial to take into consideration the substantive harm that the alleged libellous remark has caused. In addition, as publishing increasingly becomes a digital endeavour, it is essential that the 'single publication' rule proposed in the current draft of the Bill is brought into law, so that new libel actions cannot be brought each time an online article is accessed or an e-publication downloaded by a new individual.

It is clear that the libel laws of England, and the financial instruments which are in place to enable individuals to access justice, must be reformed and I look forward to being part of the discussions around the Civil Costs Review and the draft Defamation Bill, leading towards this goal over the coming months. They impose significant barriers to the freedom to publish in the UK. This impinges upon freedom of expression, endangers the integrity of scientific research, and very often hampers the release of information which the public interest demands should be made available in full.

Note

1. The Publishers Association member survey on the impact of libel on publishers' businesses was conducted by the Publishers Association in October 2010. Respondents represent 80% of the Publishers Association's membership by turnover, which is equivalent to 65% of the total UK consumer trade, academic and educational publishing industry.