Think again

The law of defamation may not be perfect but the recent campaign for its reform is not based on careful consideration, says **William Bennett**

THE SUNDAY TIMES has condemned English defamation law as "draconian". There is not a single newspaper which disagrees with this damning verdict. A number of NGOs, most notably English PEN and the Index on Censorship, have made similar pronouncements. Jonathan Heawood, director of English PEN, stated: "Our libel laws allow people accused of funding terrorism or dumping toxic waste in Africa to silence their critics while 'super injunctions' stop the public from even knowing that such allegations exist." This quotation is prominently displayed on the web page which takes viewers to a petition supporting urgent reform of the libel laws (http://www.libelreform.org/#). If accepted at face value, who would not go on to sign such a petition?

Defamation law ought to be subject to scrutiny and it is by no means perfect; however, the criticisms made of it do not appear to be based on a careful evaluation. For instance, the quote above has no basis. It is nigh on impossible to obtain an interim injunction preventing a publisher from publishing defamatory material if the publisher asserts (not proves) that it has a defence. There are no super injunctions (injunctions which forbid the publication of the fact of an injunction) in defamation because there are no injunctions in defamation to attach them to. Our libel laws do permit people who have been accused of dumping toxic waste or of funding terrorism to sue in defamation. They will only win their claim if the publisher fails to back up its allegations by proving that they are substantially true *and* if the publisher has no Reynolds privilege defence. Would it be preferable to live in a society in which an individual wrongly accused of funding terrorism as a result of shoddy journalistic investigation had no means of vindicating his reputation?

A Reynolds privilege defence will succeed if the allegation in issue concerns a matter of public interest and the person who researched the story behaved responsibly in reaching the conclusions set out in it. If pleaded as the only defence, it allows a defendant to win a defamation claim without the truth of the allegations ever being in issue.

Science writer Simon Singh: justice at too great a cost

Thus, where this is the only defence relied upon, a claimant will have no opportunity to secure a finding that the allegation was false. His or her reputation will be left permanently damaged and the defendant will be under no obligation to publish any form of clarification pointing out that it had decided not to stand by the truth of its allegations.

Consider the position where at trial the defendant relies on the defences of justification and Reynolds. If the justification defence fails, this will mean that the allegation in issue has been found on the evidence to be untrue. But if the Reynolds defence succeeds, the defendant will nevertheless win the action and the claimant will have to pay most of the defendant's costs. The defendant will be under no obligation to publish any sort of statement pointing out that the relevant allegation had been found to be untrue. This could hardly be described as 'pro-claimant'.

The fair comment defence

Contrary to what the reform campaign is saying, no one could use defamation law to restrict the dissemination of ideas. Ideas are not actionable because they do not defame anyone. Furthermore, anyone is free to make strident defamatory comments so long as those comments could have been derived by an honest person from true facts. There is not even a requirement that the comment be in any sense reasonable. This is the defence of fair comment. It was applied recently in favour of the science writer Simon Singh when the Court of Appeal concluded that his accusation that the British Chiropractic Association had happily promoted bogus treatments was

a comment/opinion rather than a statement of fact. It was unfortunate that the judge at first instance was found to have erred by finding against Mr Singh on this issue but, ultimately, in applying the law, Mr Singh's statement was found to be defensible as comment. Mr Singh understandably feels aggrieved that he was sued in the first place and that he had to go to the Court of Appeal to reverse the first instance decision but ultimately the 'system' worked. His criticism that it provides justice at too great a cost is wholly justified and this failing needs to be remedied.

Other aspects of the law are hardly draconian. The limitation period in defamation actions is, at one year, shorter than the three to six-year periods which apply to most other causes of action. The Defamation Act 1996 provides that on a plethora of occasions certain reports will be protected by a privilege defence. The same Act introduced the offer of amends procedure, which gives a defendant who has made an honest mistake the chance to admit liability prior to the service of a defence. If it does so the damages payable by it will be discounted. Thus a defendant has the option to get out of litigation relatively cheaply if it is willing to accept that it got its story wrong. The offer of amends procedure has saved media defendants huge amounts of money, and undoubtedly encouraged freedom of speech. There is no equivalent procedure in any other area of law.

What other protection under the law could defendants reasonably have? In regard to the justification defence, would critics of the law adopt a system whereby a claimant could not vindicate his reputation even though his accuser is unable to prove that the allegation was substantially true? In regard to Reynolds privilege, which part of the defence would be dispensed with or diluted: the need for the information in issue to be in the public interest and/or the requirement that the allegation sued upon had resulted from the exercise of responsible journalism?

Rights of the accused

Freedom of speech campaigners have focused solely upon the freedom of speech of accusers and have given little weight to the rights of those accused. They appear ready to crush the rights of the individual in favour of the 'greater good' provided by an almost absolutist position on freedom of speech. This stance ignores an important practical reality. A newspaper has the power to exercise its freedom of speech by alleging to the population at large that an individual has, to take Mr Heawood's example, funded terrorism (an accusation which has falsely been made to devastating effect against a number of British muslims since 9/11). On the other hand, the person defamed has no means of exercising his or her freedom of speech to counter the accusation in any meaningful way. Even if able to deny it to the public at large, the fact is that people will assume that there is truth in the allegation. Why else would the newspaper have chosen to make it? A claimant's denial, even if published, has limited impact because a denial of the commission of a wrongful act is as likely to be made by an innocent person as by a guilty person; it is just as likely to be made by a Jonathan Aitken as it is by a Robert Murat. It is thus necessary in certain circumstances for the law to intervene in order to redress this imbalance, to stop one party's power to exert its right to freedom of speech being used against a person who has no effective means of defending him or herself.

> **"The strength of a nation's privacy law also has an impact upon freedom of speech"**

In the light of the well-publicised criticisms of defamation law, the Ministry of Justice set up a Libel Working Group to consider "whether the law of libel, including the law relating to 'libel tourism', in England and Wales was in need of reform and, if so, to make recommendations as to solutions". It was largely comprised of those who have been vocal in their criticism of defamation law. It included Mr Heawood.

Libel tourism

Proof of the pro-claimant bias of English defamation law has been said to be the phenomenon of 'libel tourism'. Foreign defamation claimants are said to have been flocking to the High Court to sue foreign defendants because England offers a claimant the best chance of brow-beating a defendant and quashing the right to freedom of speech. The working group defined a libel tourism case as one where usually both parties will be domiciled outside of the jurisdiction. The statistics compiled in support of its report revealed that in 2009 there were no such cases.

Certainly, two newspaper proprietors voted with their feet when choosing a jurisdiction. In 2005, the owners of *The Daily Telegraph* and *The Sunday Telegraph*, Sir David and Sir Frederick Barclay, chose to sue *The Times* for defamation in France (circulation 3,500) rather than this jurisdiction (circulation over 600,000). They could have sued in either. In France, the publication of a libel is a criminal offence. Therefore, a losing defendant is saddled with a criminal conviction (one of the defendants was the editor of *The Times*). Furthermore, the Barclays sought a remedy available in France and a number of other jurisdictions: a right of reply (*droit de réponse*). This remedy is unavailable here because English law will not permit a court to interfere with a newspaper's editorial independence. The strength of a nation's privacy law also has an impact upon freedom of speech. In this respect, a number of other jurisdictions, most notably France, offer a far more welcoming embrace to claimants than they would receive in England.

The report's conclusion in regard to libel tourism was modest: that there ought to be a tightening of the Civil Procedure Rules so that inappropriate claims could be stopped at an earlier stage.

The report did not conclude that the Reynolds defence was too weak but recommended that the Ministry of Justice investigate the introduction of a statutory public interest defence which would at least clarify whether, where the defence is finely balanced, the court ought to give precedent to the defendant's article 10 right to publish over the claimant's article 8 right to reputation.

The campaign for reform of the law of defamation has not abated and the three main parties have not hesitated to pledge in their manifestos to review the law with a view to changing it.

The real crux of the problem is not the law but the excessive costs of deploying it – and Parliament should abolish the right to jury trials in defamation. Such reform, particularly if implemented in conjunction with the proposals set out in Lord Justice Jackson's recent review of civil litigation costs, would dramatically cut the cost of defamation litigation. In turn this would promote freedom of speech in a way which would not compromise the rights of those defamed.

Cutting the costs of libel cases

The right to jury trials in defamation cases is not a price worth paying.

See William Bennett's article in next week's issue of *Solicitors Journal* (25 May 2010)

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