The Case For A New Public Interest Defence

The current libel laws silence discussion on public interest matters and the Government’s Defamation Bill 2012 does not remedy this. This document contains 10 accounts from people being stifled by threats of libel action, including the consumer group who were unable to tell people about high street practices; the doctor sued for raising concerns about a faulty heart device; the parenting forum which had to ban its members from discussing child rearing advice from one guru; and the scientific journals who have had to turn a blind eye to research misconduct because of the threat of an expensive and time consuming law suit.

We have campaigned for reform of the current libel laws to protect the public interest and there is cross party support for this. The Defamation Bill is now in the House of Lords, and committee stage starts on 17th December. The Bill does not contain a usable public interest defence. Instead it contains a defence for responsible journalism with the words ‘public interest’ tacked on, a defence which is unpredictable, complex and not usable for anyone outside a large media organisation. If the Defamation Bill becomes law in its present form cases like those in this dossier will continue.

We recommend a new approach which protects genuine public interest statements while providing safeguards to ensure that statements which cannot be shown to be true, but which were made in good faith, on a matter of public interest are corrected. We hope that you will make the case for a strong public interest defence and support our proposals.

Please get in touch with any of us if you plan to speak in the debates on the Defamation Bill.

The Libel Reform Campaign

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THE REYNOLDS DEFENCE IS NOT A PUBLIC INTEREST DEFENCE

Clause 4 of the Defamation Bill 2012 is an approximate codification of the common law Reynolds defence. This is a defence for responsible journalism which asks a defendant to prove they were responsible in publishing something. It has been shown to be unusable for many contemporary authors and publishers, including NGOs, scientists and online commentators.

The Reynolds defence is unpredictable because the way in which responsibility will be tested when a case reaches court is uncertain. Defendants need a lot of specialist help to put together a defence, and they must to pull out all the stops and cover every possibility, making the defence so expensive and very time consuming that small publishers and individuals cannot contemplate using it. This also makes the defence unusable for people whose sources are unable to appear in court, for example anonymous whistleblowers and sources who risked their lives to help human rights NGOs.

The Reynolds defence is for people who can prove they prepared before they publish something in the way an investigative journalist would. When cardiologist Dr Peter Wilmshurst made comments at a conference which were published online, he did not think he was making a publication, and the Reynolds defence was unusable in this case on a matter clearly in the public interest.

All of the people who support the Libel Reform Campaign believe a strong and simple public interest defence needs to be included in the Bill to reflect the importance of free speech on matters of public interest.
“I spent almost all my free time for four years and much money defending three defamation claims brought in England by an American medical device corporation, NMT Medical Inc.

At a medical conference in the USA, I expressed concerns about the accuracy and completeness of the presentation of the results of a clinical research trial performed on patients in the UK. I was the principal cardiologist in the trial, which was sponsored by NMT and used its device. I was sued for defamation in England when some of my comments in the US were published on a US website.

My concerns about the device have been vindicated by publication of a large correction and new version of the scientific paper in which false and incomplete data had initially been reported and financial conflicts of interest had been concealed. The defamation cases ended in 2011 when NMT went into liquidation.

NMT sued me to silence me and other doctors. We now know that NMT discussed with their lawyers suing two others in the UK and verbal threats were made to another UK doctor. The action against me prevented others with concerns about the safety of devices made by NMT from voicing their concerns including making known life-threatening problems with NMT’s devices. After NMT went into liquidation we discovered that other doctors had remained silent about the failures of NMT’s devices that have led to patients in this country needing emergency cardiac surgery because of device failures. NMT had used the English defamation laws as part of a strategy to misrepresent the efficacy of their device.

Recently, on a number of occasions doctors have told me in private how their concerns about the English libel laws have prevented them reporting concerns, even when their reports would be privileged. The real cost here was to patients who continued to have NMT devices put into them during the 4 years of my case. Some needed additional corrective procedures and at least one died as a result. Some of these problems may have occurred because doctors continued to use the devices unaware that others with concerns had been successfully silenced. This is why we need a real public interest defence.”

Dr Peter Wilmshurst, cardiologist Royal Shrewsbury Hospital
Citizens Advice is a charity that aims to provide advice for the public and improve the policies and practices that affect people’s lives. In 2009 and 2010, Citizens Advice were subjected to repeated threats of libel action when it sought to cast a light on a secretive, exploitative and quite possibly illegal practice called ‘civil recovery’. This practice involves agents of household-name retailers such as Asda, Boots, Tesco and TK Maxx bombarding those who have been accused of shoplifting with legalistic letters demanding money as ‘compensation’ for the cost of dealing with the incident, and threatening civil court action if the demands are not paid promptly.

One in four of those receiving these threats are children as young as 11, and others have serious mental health problems. There is no obvious legal basis for such demands – which probably explains why the threatened court action never follows. Most worryingly of all – many of the recipients are guilty of nothing more than an innocent mistake when doing their shopping.

For this practice to remain profitable, its victims have to be ignorant of the relevant law, and of the hollow nature of the threats of court action. Citizens Advice shone a light into this shady world and when they told the civil recovery firms that it was going to publish a report, Citizens Advice was threatened with libel action. Citizens Advice used its entire year’s research and campaign contingency budget on legal advice to publish the report in 2009. The report they did publish was self-censored and not as hard-hitting as it could and should have been.

Citizens Advice is not commenting publically on this subject now. Kate Briscoe of the community legal advice forum [www.legalbeagles.info](http://www.legalbeagles.info) that publicised the threats to Citizens Advice said “We want to expose the intimidation and threats for what they are. In doing so we hope to inspire and encourage other consumer groups to stand up. We need a public interest defence.”
GLOBAL WITNESS’ STORY

“Global Witness faces many threats, but by far the most common is legal action, both in terms of libel and breach of privacy. London is not a good place to be exposing the funding of wars, corruption, and dodgy deals that leave millions of people around the world hungry, sick or dead. We regularly receive threats attempting to stop us publishing the detailed investigative reports that underpin our advocacy. Global Witness on a daily basis comes face to face with the risks of publishing on matters of public interest. These threats can be serious and aimed to stop the organisation in its tracks. Campaigns such as the work on blood diamonds, which led to a Nobel Peace Prize nomination, are continually at risk because current laws don’t adequately protect public interest reporting. Frustratingly the proposed Defamation Bill has failed to strengthen public interest reporting but it isn’t too late to address this. The Reynolds defence is unsuitable for Global Witness investigations because bringing witnesses to trial could endanger their lives. Many sources would refuse to give evidence due to the risk of injury or worse. Uncertainty around the Reynolds Defence in how the ten factors will be applied means we have to cover every eventuality.

Our reports are the result of many months of detailed research, some of it undercover, working with whistleblowers and sources. In one case we published a report on the looting of resources in Cambodia by the Prime Minister and his cronies which involved sending eighty seven detailed letters to individuals which offered them the opportunity to comment on allegations in an attempt to comply with the current libel public interest defence. These required legal input, had to be translated into Vietnamese, Khmer and Mandarin and then couriered to remote areas in Cambodia, Vietnam and elsewhere due to the vagaries of the postal services. It took a very long time and cost over £12,000. But despite these detailed and substantial measures, due to the inherent uncertainties of the defence, there is no guarantee that the publication will be protected.

I believe that responsible public interest reporting should be protected, indeed it is vital for democracy that it is.”

Charmian Gooch, co-founder and co-director, Global Witness
“Nature, the world’s most highly cited science journal, and reporter Quirin Schiermeier spent more than three years fighting a libel claim brought by the editor of the journal Chaos, Solitons & Fractals, Mohamed El Naschie. The case concerned an article published in *Nature* in November 2008 which El Naschie said had damaged his reputation. The piece alleged that El Naschie published in his own journal many research articles written by himself without proper external scrutiny - peer review – the process where scientific papers are independently checked by scientists working in the same field. *Nature* argued that the report was fair and honest, and in the public interest.

The judgement handed down described the case as a “public interest case par excellence”. *Nature* used the Reynolds defence, which contains ten factors to prove responsible journalism. Due to the uncertainty over how this list of factors would be applied once the case came to court, *Nature* had to cover every eventuality, flying in staff and ex-staff from around the world who had worked on the article as well as experts in scientific publishing, and physics.

The case cost around £1.5 million in legal fees and hundreds of hours of senior staff time due to this uncertainty. Furthermore, while the case was on going, *Nature* was unable to pursue a number of other investigations.

The Defamation Bill published by the UK government in May would not have made a difference in this case. It is essential that scientific integrity is upheld and that bad behaviour is brought to light. *Nature* has a strong record in this respect, but we are hindered due to unreasonable burdens placed on us by English libel laws.

The Defamation Bill needs a strong public interest defence that will reduce the financial and opportunity costs, uncertainties associated with the Reynolds defence."

*Tim Appenzeller, chief magazine editor, Nature*
“Mumsnet is the UK’s most popular site for women, providing advice and support to over three million monthly visitors. It provides some authored editorial content on parenting and non-parenting issues, such as childcare providers, pregnancy and relationships; but the heart of the site is its forums, on which there are around 35,000 posts every day.

On Mumsnet’s forums users discuss many aspects of their lives, enabling them to offer significant peer support to each other. We are the single largest talkboard for parents of children with special needs; the single largest talkboard for adoptive parents; and the single largest talkboard offering advice on the establishment of breastfeeding.

Members exchange experiences and talk about products and share practical advice. An example might be: ‘The brakes on [x brand] pushchairs are awful. I bought one for my first baby, and the brakes failed within two months.’

Holding websites liable for postings by users on their bulletin boards effectively curtails freedom of speech as we cannot establish the truth of many thousands of contributions occurring every hour. The internet is used for publication by millions of ordinary citizens for whom the current defences to an action of defamation have not been developed.

All of these issues are clearly matters of public interest and yet the current defence offers such uncertainty that website editors will err on the side of caution thus having a chilling effect on free speech.”

Justine Roberts CEO and Co-Founder Mumsnet
“When I was sued by the British Chiropractic Association (BCA) in 2008, it was generally regarded as an example of why English libel laws are flawed. The case took two years (and probably would have taken three years had it run its full course), it cost £500,000 for both parties (to settle damages of roughly £5,000) and for 90% of the time it looked as if I was going to lose. The fact that I eventually won should not be taken as a sign that the law works. Indeed, it has been repeatedly stated by senior politicians that the new Defamation Bill needs to prevent cases such as *BCA v Singh* from happening again. Sadly, in its current state, the Bill would have little impact on what would have happened in my and similar cases.

I was writing about a matter of public interest in a newspaper, and the proposed Defamation Bill offers me inadequate protection. If I am raising legitimate concerns about medical treatments for children, then the law must offer me some level of protection. It should not be a tool for the rich, powerful and influential to silence their critics.

I should also stress that *BCA v Singh* is only the tip of the iceberg. For example, few people realise that I was threatened with libel in 2010 after criticizing a climate pseudoscientist. And, last month, I was threatened, this time by a magazine distributor after raising concerns about a ‘health’ magazine that the company was supplying. Again, I was writing to the company on a matter of public interest. The magazine in question currently has ASA complaints on 20 of its adverts, which may be a record. The editorial content is equally appalling and offers potentially harmful advice.

Libel law needs to offer a level playing field, so that journalists can write about serious matters of public interest, which in turn will mean that the general public can read the full story.”

Dr Simon Singh, science writer
“Which? is the largest consumer organisation in Europe with over 1.3 million subscribers. It is independent and not-for-profit and does not take advertising or receive money from government. Which?’s mission is to make things better for consumers by empowering them to make informed choices about the products they buy and the services they use.

Which? often receives regular pre- and post- publication libel threats on issues of considerable public interest. For example, when we published our lab testing based child car safety seat report containing a number of ‘Don’t Buy’ recommendations for car seats we thought were unsafe, the manufacturers trade body threatened to sue us for libel and malicious falsehood unless we retracted the claims, published a full apology and paid them damages. We refused and were engaged in costly and time consuming correspondence for more than a year before the claimants changed their position and backed down.

On the pre-publication side, a request to some national double glazing firms for comment on our undercover research exposing potential breaches of consumer law in sales techniques was met with several long letters from a leading national law firm threatening us with a libel claim if the story ever saw the light of day. Again, we refused to back down but only after protracted and time consuming correspondence with lawyers for companies which could have simply given us a comment or denied the allegations.

There are other examples where the legal issues from publication threats are too finely balanced to risk proceeding with publication as we had planned. Which? recognises and agrees that a balance needs to be struck between freedom of expression and the emerging right to reputation. However, an unfettered ability for corporates to use libel threats as part of a suite of reputation management tools is very damaging for important public discourse because decisions about whether to publish start to become about the cost benefit analysis of publication. There is a very grave risk that the self-censorship caused by this phenomenon will continue to hamper the development of ideas and restrict the debate of issues of significant public importance. Which? agrees there needs to be a balance but strongly believe this balance will be struck in the wrong place if clause 4 is not amended. Now is the time to change this problem.”

David Marshall, in house lawyer, Which?
“Myself and the *Guardian* were sued by vitamin pill magnate Dr Matthias Rath after an article I wrote. Dr Rath was buying full page adverts denouncing Aids drugs while promoting his vitamin pills in South Africa, a country where hundreds of thousands were dying every year from Aids under an HIV denialist president. The population is vulnerable to the promotion of miracle cures. I said his actions were highly worrying, in no uncertain terms. I believe I was right to do so.

The libel case brought by Dr Rath was drawn out over 17 months. It cost £500,000 and a phenomenal amount of time. Dr Rath eventually dropped his case.

For the duration of the case I was silenced on the serious issues that Dr Rath’s activities raise, the chapter on his work was pulled from my book, and I was unable to comment on his further movements around the world.

The proposed reforms do not go far enough to prevent a “chilling effect” on freedom of speech. A stronger public interest defence would allow science writers like myself to raise concerns in the future, and know that defending my words won’t take several years, and hundreds and thousands of pounds.

The public must decide if they want people like me to be allowed to raise concerns about the activities of people like Dr Rath. If he were to sue me again, on a matter that was clearly in the public interest, the current Defamation Bill wouldn’t change a thing.”

*Dr Ben Goldacre, medical journalist and author*
THE IMPACT ON NOVELISTS

“It isn’t just science, but also culture, that is affected by the libel laws. Simply put, if writers are to police the overlapping area between imagination and memory [...] a kind of paralysis sets in. That paralysis has a name – self-censorship.

But the chilling effect of the libel laws go beyond self-censorship – publishers must spend huge amounts of money fighting legal cases; the money spent on lawyers means less money available for the actual books. This doesn’t mean less money for the big authors who publishers are desperate to hang on to – it’s the newer voices, the quieter voices, the experimental and already marginalised voices, who find themselves shut out. In the case of smaller publishing houses there is no money for legal cases; they can be wiped out by a single accusation, or else choose to take the most conservative possible approach to publishing, minimising all risk, to keep the shadow of libel from their door. The risk-minimising attitude of the publishing industry is a danger to freedom of expression.

Kafka once spoke of fiction as an axe for the frozen sea inside us – without a proper public interest defence, and measures to dispense with trivial claims, the libel laws are in danger of freezing the axe itself.”

*Kamila Shamsie, novelist (speech delivered at Parliamentary event, 27th June 2012)*
In 2006 the *British Medical Journal (BMJ)* was sued for libel by Dr Rath after exposing Dr Rath’s unscientific and dangerous promotion of nutritional supplements to people with HIV in South Africa. The *BMJ* was forced to settle, apologise and pay £100,000 in damages. *BMJ* editor-in-chief Dr Fiona Godlee has said: “People whose scientific claims are questioned are turning to the law to attempt to silence their critics rather than engaging in open scientific debate. The *BMJ* has been forced to take the decision to avoid writing about, and therefore will not be scrutinising and investigating Dr Rath again.”

“I and other scientific journal editors are not looking for less emphasis on the need to get things right and to correct things when we get them wrong, we are looking for an environment for science and medicine where the threat of legal action, backed up often by potentially enormous financial resources prevents publication that would be in the interests of patients and the public.”