

## Reframing Libel

### Science and libel

A number of well-publicised defamation cases within the past twelve months (Simon Singh, Peter Wilmschurst, Henrik Thomsen) have led to expressions of concern that current English laws have the effect of stifling academic debate in the field of science. The advancement of science depends on the exchange of theories and the sharing of research; theories which may not be capable of objective proof, research which is never complete.

The problem for the courts, of course, is not new. The case of *Upjohn v BBC* concerned allegations broadcast in 1992 that the company which marketed the sleeping pill Halcion (triazolam) (which in 1991 had sales of \$237million) had concealed knowledge of serious adverse side effects. In giving judgment for the claimant, after a trial involving an estimated 36,000 sheets of paper and lasting 62 court days (a record for defamation cases at the time) Sir Anthony May, who heard the case without a jury, said in June 1994:

*“It is important to state at the very outset of this judgment that the question whether triazolam is or is not a safe and effective hypnotic does not arise for decision in this case. This judgment does not address that question. Any representation that any part of this judgment may be taken as a decision or expression of view which favours one side or other of the medical and scientific debate would be false and, if I may use the expression, misleading.”*

*“Happily the question which of these opposing views about triazolam or what balance between them is to be preferred is not an issue in this case. It would be most unfortunate if it were. There are numerous authorities and bodies throughout the world whose function it is to consider these matters and who are medically and scientifically competent to do so. I can conceive circumstances in which it may be necessary for a court to adjudicate such matters. But at least in the wide ranging context of the debate which lies behind the issues which do arise in this case, the proposition that a single lawyer (let alone with a lay jury), untrained in medicine or science, should be expected to decide matters which have been the professional concern of medical and scientific Professors, Doctors, Pharmacologists, Statisticians and Other Experts worldwide during their entire professional careers – matters which have been the subject of years of research and generated literally hundreds of reports, papers and articles in learned journals – is little short of absurd.”*

Nor can it be said that the court either can or should always leave such issues to be decided by other competent authorities and bodies. New theories, new information may come to light which may lead critics legitimately to challenge the consensus of established practice or to question findings and decisions of the relevant authorities; the opinions of experts may differ. This was one of the issues which arose in the Henrik Thomsen case, in that European agencies had taken a different stance from the US Food and Drug Administration in relation to the classification of risk associated with a particular product.

## General principles

The English law of defamation, consistent with the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1976) aims to strike a balance between freedom of expression and the right of reputation. Only in the First Amendment to the US Constitution (1791) is the right of freedom of expression couched in absolute terms “Congress shall make no law...abridging the freedom of speech, or of the press”.

Lord Nicholls in *Reynolds v Times Newspapers* [1999] 3 W.L.R.1010 said

*“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.”*

The pharmaceutical business is a multi-billion dollar industry. Vast sums of money are invested in the research, development and marketing of drugs and medical devices. Likewise (although it may not involve the same cost of production) there is a huge demand for alternative medicine and for homeopathic remedies. Success for the manufacturers of products and suppliers of services depends on consumer confidence, which, particularly where issues of health are concerned, may be undermined by rumours and allegations. And it is not just the profitability of companies and the financial interests of their shareholders which may be injured. The public may suffer if, as a result of false rumours and unsubstantiated allegations, people decline treatments and remedies from which they may otherwise have benefitted. The controversy which surrounded the MMR vaccination provides a dramatic example where a health scare may risk leading to a real public health issue.

The question arises whether in practice English law causes an undue inhibition of expression in the field of science and academia generally and, if so, how it should be addressed. Regrettably, despite the involvement of scientists in the debate for libel reform, there appears to be very little research data available to aid an understanding of the extent of the perceived problem. For his helpful article “*A Chilling Effect?*” published in *Science Magazine* (vol 328, 11 June 2010) the author, Tim Wogan, asked a number of leading scientific and medical journals whether Britain's libel laws were having a “chilling” effect. Acknowledging that the responses “varied widely”, the article states:

*“So far, there’s little evidence that scientific publishers have been seriously affected: None of 22 journals or journal publishers contacted by Science has rejected a research paper solely because of libel concerns, for example”:*

and it reports that one publisher had noted :

*“We know that on occasion academics may make assertions they can’t then support; the legal advice we obtain often helps to clarify their thinking and so we end up with a better paper, as well as one that should stand up in court”.*

### Current law

So far as the law of defamation is concerned, a cause of action only arises where the material published is defamatory of the claimant. I would doubt whether in practice this would be a frequent problem with scientific or academic papers; but of course, it may occur where, for example, the safety of a company’s product, the effectiveness of a particular treatment, or where the integrity of a scientist or academic is called into question.

Traditionally under English common law proof of the truth of a defamatory assertion of fact affords a complete defence to a claim. The defence of “Fair Comment” applies to the expression of opinions or “value judgments” which are based on established facts; this is a complete defence to a claim, unless the publisher is proven to have been “actuated by malice”, which in effect requires a claimant to prove dishonesty on the part of the publisher. In each case the test is on “the balance of probabilities.”

If defamatory material is published, in the event of a claim the onus is on the defendant to prove that what they have published as fact is more probably true than untrue and, if what they have published is opinion, it is for the claimant to prove that it is more probably dishonest than honest. If the “chilling” effect of English defamation law is to discourage the publication of defamatory allegations where the publishers are not confident that they have evidence to prove them to be true, it is by no means clear why this should be regarded a bad thing. Lord Hobhouse made the point in the *Reynolds* case:

*“The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.”*

The English common law has long recognised that there are occasions where people in certain relationships should be able to communicate information about others, without having to prove that defamatory statements are in fact true. Examples of this are where

an employer is asked to provide a reference, or where an individual honestly believes he has cause to make a complaint to the police or the appropriate authorities. The decided cases fall into two main categories:

- (a) where there is a legal, social or moral duty on the part of the publisher to communicate the information to a person who has a corresponding legitimate interest in receiving the information (“duty/interest”)
- (b) where the publisher and recipient have a common legitimate interest in communicating the information between each other (“common interest”).

In these situations (amongst others) the defence of qualified privilege applies, and a defendant will only be held liable if he is proven to have been actuated by malice, which in effect requires proof that he had no honest belief that what he published was true. The Court of Appeal in *Blackshaw v Lord* in 1984 indicated that this line of defence would only be available to the mass media in extreme cases, such as (per Stephenson LJ) where “*the urgency of communicating a warning is so great, or the source of the information is so reliable, that publication of suspicion or speculation is justified; for example where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs.*” This is because it would have to be shown that there was a **duty** on the media to publish the information to the public at large, “*and a section of the public is not enough*”.

In 1999, the House of Lords in the case of *Reynolds v Times Newspapers* laid down much widened circumstances in which the publication of a defamatory allegation to the public at large would be defensible, even though the allegation might be false. Lord Nicholls set out a non-exhaustive list of factors which the court would take into account, as follows:

1. *The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.*
2. *The nature of the information, and the extent to which the subject-matter is a matter of public concern.*
3. *The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.*
4. *The steps taken to verify the information.*
5. *The status of the information. The allegation may have already been the subject of an investigation which commands respect.*
6. *The urgency of the matter. News is often a perishable commodity.*
7. *Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.*
8. *Whether the article contained the gist of the plaintiff's side of the story.*
9. *The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.*
10. *The circumstances of the publication, including the timing.*

## Lord Lester's Bill

Although Lord Lester's Defamation Bill has been welcomed by campaigners for reform it is not immediately apparent how it would benefit scientists and academics. At a Policy Exchange debate in Westminster on 25 July 2010, Lord Lester indicated that he envisaged that clause 1 of the Bill would operate as a form of "public interest" defence, which he thought would assist.

Clause 1, which is headed "*Responsible publication on matters of public interest*" would establish a new statutory defence, largely based on *Reynolds* principles. It would apply to matters published "*for the purposes of, or otherwise in connection with, the discussion of a matter of public interest.*" The Bill, however, leaves out from the ten factors identified in *Reynolds* (a) the source of information, (b) the status of information, (c) whether the claimant's side of the story is included and (d) the tone. It is not, however, clear whether these proposed omissions make or are intended to make any difference to the law as it stands, bearing in mind the Bill proposes that the court "*must have regard to all the circumstances of the case*". As with *Reynolds* privilege, the defence would apply to the publication of matters to the public generally, rather than to a specialist readership. (It is, I suppose, possible that the nature of the readership might become a new factor which the court could take into account in "*all the circumstances of the case*" but there is no indication that this is the intent of the clause).

Both with *Reynolds* privilege and the proposed new statutory defence, one of the factors to be taken into account is whether comment was sought in advance from the claimant. With *Reynolds*, a factor, to which importance has been attached in a number of decided cases, is whether the published article gave the claimant's side of the story; this, as noted above, is omitted from clause 1 of Lord Lester's Bill (although it seems illogical that significance should be attached to whether advance comment was sought from the claimant, unless significance is also to be attached to whether the article fairly reflects the claimant's comments).

With most news stories, it will generally be regarded as a basic principle of responsible journalism to allow the claimant a reasonable opportunity to respond to allegations which are to be published, and to ensure that, if the allegations are then published, the article fairly reflects what the claimant has to say. This principle, however, does not necessarily sit comfortably with the publication of scientific and academic papers. Where a scientist, having carried out research, concludes that an adverse side effect may be associated with a particular product, should there be a requirement that, before publication, the paper should be sent to the manufacturer for comment? To allow the manufacturer a reasonable opportunity to respond may involve considerable delay and lengthy debate where the validity of the conclusions or the methodology of the research is questioned by the manufacturer's own (and other) scientists from its own (and other) research papers. For example, as arose in the Henrik Thomsen case, to what extent with a particular product do results obtained from research carried out on rats inform of possible effects on humans? Would other research carried out on dogs or monkeys reveal more relevant information? The possibilities for argument are endless.

There is in my view a clear distinction which the law does and should make between publication of papers within the scientific and academic community and publication to

the public at large. The public will want and has a right to know whether there is in fact a risk with a particular product and, if so, the extent of that risk; this requires a careful analysis of all the available information, which should include the manufacturer's own comments based on its research and data. Scientists and academics, on the other hand, by experience, training and with specialist knowledge will be better equipped to understand and to put into context the significance or otherwise of published research papers. The 1998 publication in the *Lancet* of the (subsequently withdrawn) paper "*Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*" by Andrew Wakefield and twelve others, although reported in some national newspapers, did not at the time lead to any major controversy; it was later, in 2001 and 2002, that the media coverage took on a new momentum, with the consequent public concerns regarding the safety of the MMR vaccination programme.

### An alternative

In the case of *Vassiliev v Frank Cass & Co [2003] EWHC 1428 (QB)* decided by Eady J, it was held that material described as "arcane, scholarly and complex" was covered by qualified privilege at common law because of the legitimate common interest between the publishers and the likely readers. The article in question related to the late US official Alger Hiss (who may or may not have been a Soviet spy, a matter of long standing debate). It had been published in *Intelligence and National Security*, a specialist journal with 146 subscribers in the UK whose readers were said to have a specialist interest in historical and contemporary intelligence issues. The article was also freely available online from two university websites, but, from the nature of the material, Eady J concluded that it was unlikely in reality to have been read by any casual surfer who did not fall within the "*same small circle of professional and academic specialist interest as the readers of the magazine.*"

On the face of it, *Vassiliev*, if followed in subsequent cases (it is a first instance decision, which was not the subject of appeal) may in itself provide the answer in affording additional and adequate protection to scientific and academic papers, published in scientific and academic journals, read by those within the scientific and academic community. Had the Henrik Thomsen case gone to trial, it is likely that this authority would have featured heavily.

There is, however, a potential drawback as the law stands. In *Kearns v General Council of the Bar [2003] EWCA Civ 331* (a case which related to a communication sent out by the Bar Council to its over 10,000 members) the Court of Appeal considered the interplay between *Reynolds* privilege and the previously established lines of authority of privilege based on the existence of duty/interest and/or common interest. In the course of his judgment Keene LJ observed that "*Reynolds was dealing with publication made to all the world, with the result that no pre-existing relationship was required...*" and that "*there is no half way house between publication to those in a pre-existing relationship, whatever their number, and publication to all the world.*"

It has been held in a number of cases that the defence of qualified privilege based on a pre-existing relationship of duty/interest and/or common interest applies only to publication to those who fall within the category. Two cases (*Trumm v Norman [2008] EWHC 116 (QB)* decided by Tugendhat J. and *Brady v Norman [2008] EWHC 116 (QB)*

decided by Richard Parkes QC) concerned the publication of material in the *Loco Journal*; the evidence was that 18,000 copies were distributed to members of ASLEF, 1,332 to retired members and 202 copies to others; of these 202 it was decided that somewhere in excess of 100 readers did not have any particular interest in the subject matter (above or beyond any member of the public) and therefore the defence of qualified privilege did not apply in respect of the publication to these few readers. Likewise in *Underhill v Corser* [2010] EWHC 1195 decided by Tugendhat J, it was held that although the defence of qualified privilege was available in respect of a serious allegation contained in a magazine, the "*King's Messenger*", circulated to 422 members of a society, it was not available in respect of its publication to an estimated 13 readers who were on the society's mailing list, but who were not themselves members of the society.

In the Republic of Ireland, the Defamation Act 2009 (which codified that country's law of defamation) at section 19 (2) provides that "*The defence of qualified privilege shall not fail by reason only of the publication of the statement concerned to a person other than an interested person if it is proved that the statement was published to the person because the publisher **mistook** him or her for an interested person*" [my emphasis]. I am doubtful whether the publishers of either the *Loco Journal* or the *King's Messenger* would have been able to establish that they "mistook" non-members for "interested persons" (and the evidence appeared to be that both had lists of members to whom publication could have been limited) but the statutory provision in Ireland nevertheless appears intended to address this situation.

Where the vast majority of readers of a specialist publication, for example a scientific or academic journal, will have a particular interest in the subject matter, I would consider it unfortunate if the defence of qualified privilege is unavailable in respect of a comparatively few copies which may incidentally be published to others. Eady J's reasoning in *Vassiliev*, however, would suggest that the common law is flexible enough to recognize that where the subject matter is itself of a specialist nature, the defence of qualified privilege will be available.

## Conclusion

The law of defamation draws a distinction between information published within a particular community and information published to the public at large. It is in my view right that it does so. Scientists and academics are able to exchange with colleagues theories and research for debate and further investigation without fear of liability, provided only that they are not proven to be dishonest. The law needs to strike a different balance where material is published to the public, where not only may unjustified harm be caused to the reputation and commercial interests of claimants, but also the public itself suffers if it is misinformed.

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**8 November 2010**