

# THE PROPOSED RESTRICTION ON CORPORATE BODIES TO SUE FOR DEFAMATION

## Introduction

Clause 11 of the Defamation Bill entitled 'Action for defamation brought by body corporate' states that, "*A body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate.*"

The current law provides that a corporation can sue for defamation and recover damages without having to show that the publication caused, or is likely to cause, substantial financial loss. A corporate body has to show that the publication has a *tendency* to damage it in the way of its business<sup>1</sup> - An inclusive principle that can include loss of good will<sup>2</sup> (as it is commonly understood) and is broad enough to capture the variety of ways in which the reputation of a corporate body may be damaged.

A company cannot be injured in its feelings in the way that individuals can and as a consequence awards of damages in most corporate libel claims are substantially lower than in claims concerning individuals. The highest sum in recent times for a sole corporate claimant has been £50,000, whereas the highest damages award for an individual is capped at around £220,000. It would be a mistake to interpret the relatively low sums paid out as any reflection of the seriousness of the libels in many corporate claims and the harm that they cause. In fact, the high gearing between the likely damages and the cost of litigating to obtain those damages tends to deter corporate claimants 'only in it for the money' to the extent that any such parties exist in the first place. It is likely that the corporate claimant will recover 70-80% of its costs from its opponent and therefore, because damages are low, it will be left out of pocket. The vast majority of corporate claimants bring proceedings to correct or clarify a false claim or allegation and pay a heavy price for doing so.

---

<sup>1</sup> "the authorities clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business" *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 17 per Lord Bingham.

<sup>2</sup> "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured" *Lewis v Daily Telegraph* [1964] AC 234 at para 262 per Lord Reid.

Reports suggest that in recent years the number of libel claims brought by corporate claimants has grown. The increase in global trade and competition has led reputation to become the currency against which all other commercial assets are pegged. Consumers place increasing reliance and trust in 'the brand' or trading reputation of a business. As a consequence the protection of reputation has become a dominant concern for all commercial organisations whether it's Amazon or the sole trader dependent on his Ebay rating.

Increasingly, the value of reputation is being measured in the cost of repair. It is only when determining the cost of restoring goodwill or a credit rating, rebuilding the trust of lenders and customers or regaining and retaining staff that the true cost and therefore the true value of a reputation can be calculated.

Against this backdrop, growing access to the Internet, the rise of anti-corporate campaigns and long-term changes in publishing and the media have provided an environment in which corporate reputations are under greater attack and those reputations are more vulnerable to damage than ever before. In the current climate corporations need all the tools at their disposal, including legal safeguards in some circumstances, to protect their reputations. Every little helps.

## **Reasons for Reform**

### ***The Chilling Effect***

One justification for the proposed reform is referred to at paragraph 126 of the Bill's explanatory notes which relies upon and cites one of the conclusions to the House of Commons' Culture, Media and Sport Committee's Report on 'Press Standards, Privacy and Libel' (the 'CMSC Report') that, *'the mismatch in resources between large corporations and many defendants has already led to a stifling effect on freedom of expression'*.

The CMSC Report's conclusion is not an adequate basis on which to propose such a far reaching reform as Clause 11. The conclusion appears to have been drawn from only two cases over the last eleven years: The McLibel case of 1999 where McDonald's Restaurants

sued the environmental protestors Helen Steel and David Morris and the 2008 proceedings brought by Tesco against the Guardian. Tesco's claim against the Guardian was not an example that supports the concern over the mismatch of resources in any event as it was between a well resourced corporation and a well resourced Newspaper Group. To any extent that there was evidence of there being such a mismatch in resources this proposed reform is inherently unfair in that the small minority of cases in which that might be the case are being used to shut out the overwhelming majority of corporations for whom taking on the resources of Associated Newspapers Limited<sup>3</sup> or News Group Newspapers Limited, for example, is a formidable and daunting prospect in which they will almost certainly be out-resourced.

The supposed 'chilling' effect on freedom of speech that some large corporate bodies are apparently exercising, due to the fact that no financial loss needs to be proved as a precondition to being able to sue, is exaggerated. Furthermore, the resources of many NGOs and Newspaper Groups should not be underestimated. The web has reduced the costs of campaigning and provided efficient ways of raising revenue. As a result many NGOs are increasingly well resourced and willing to flex their financial muscle in campaigns to turn public and media sentiment against targeted companies. In terms of money and influence, the balance of power has shifted from the days (if they ever existed) of NGO Davids and corporate Goliaths.

Further, whilst throughout the CMSC Report there is the implication that the McLibel case is somehow indicative or representative of a state of affairs, no other evidence was provided. Yet the proposal that springs forth from such limited evidence will have damaging consequences for every corporate body in this jurisdiction regardless of their size or resources. References abound to 'large' or 'wealthy' corporations as being a cause of concern and yet the current proposal makes no allowance for those corporations that are neither 'large' nor 'wealthy'. Since 1999 it has become abundantly clear that the McLibel case was atypical and it is not appropriate to draw broader conclusions from it or to use it as the basis for restricting the rights of the full range of corporate bodies in the way proposed by

---

<sup>3</sup> Daily Mail and General Trust plc's Annual Report for 2009 lists Associated Newspaper's annual revenue as £876 million and its operating profit as £62 million: <http://www.dmgtreports.com/2009/#bottom>

the draft Bill. If the purpose of the proposed reform is to challenge the abuse of resources by large scale corporations why are smaller corporations being equally discriminated?

The CMSC Report's conclusion that there is a '*stifling effect on freedom of expression*' characterises the dispute between Tesco and the *Guardian* in prejudicial terms. For example, Tesco were reported to have provided the *Guardian* with '*limited*' written responses before publication. The Report's conclusions omit any reference to Tesco's written submission to the CMSC recording the fact of it, '*having explicitly told the Guardian five times prior to publication that these allegations were untrue*'. The Report's conclusions also fail to address the fact that, having been provided with a clear denial before publication (together with evidence), the *Guardian* still published the allegations. It is therefore difficult to see this case as indicative of a chilling effect. It is also worth noting that the *Guardian's* initial apology was an inadequate, single-paragraph '*correction*', in terms that were not agreed in advance with Tesco, as is normal practice in libel litigation, and in disregard to Tesco's solicitors' request that it should be agreed. The correction was buried on page 38, in the *Guardian's* '*corrections and clarifications*' column, in stark contrast to the prominence of the original articles published on the front page and in plain breach of the PCC's Code of Practice. To make matters worse, it expressly invited readers' attention to misleading and self-serving coverage about Tesco published elsewhere in that issue. It was only after a hard-fought battle that Tesco got the vindication it sought and deserved: a front page apology. Had corporations not been able to sue without proof of substantial financial loss, then despite the *Guardian* accepting that the allegations it published were false and defamatory, there would have been no mechanism for Tesco to force the paper to apologise, or to seek a Court Judgment in its favour.

### ***Limited Injury***

A second justification for the proposed reform appears to rest on the principle that a corporation can only be injured in its pocket and the assumption that financial loss will be immediately apparent and directly quantifiable.

Paragraph 124 of the Explanatory Notes provides that the proposed reform, *'would reflect the reality that "a company can only be injured in its pocket, and that its reputation can be injured by a defamation only when the injury sounds in money."* This view is overly restrictive and confuses damages for defamation with the damage caused to the corporation's reputation. It fails to acknowledge the variety of ways in which a corporation can be injured or the myriad consequences of such injury. There is a fundamental misconception in seeking to draw a direct line between a corporation being defamed and some form of quantifiable financial loss and, as a corollary, that the absence of proof of such loss implies the absence of injury. We do not make the same assumption about individuals who have been defamed and are willing to recognise that, in reality, the damage caused by a libel is insidious and unseen<sup>4</sup>. The same risk applies equally to corporate bodies as it does to individuals, as Lord Bingham noted in *Jameel*, *'First, the good name of a company, as that of an individual, is a thing of value<sup>5</sup>.'* (emphasis added). Lord Bingham went on to outline precisely why the restrictive view of damage to corporate bodies is inappropriate, *'A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value that the law should protect<sup>6</sup>.'*

This justification for reform ignores the place that corporations, large and small, hold in society. It underestimates the real value in corporate reputations. It devalues the fact that damage to a corporate reputation has an impact on the lives of individuals.

### ***Corporate Individuals can sue instead***

Paragraph 126 of the Explanatory Notes cites another of the conclusions of the CMSC Report as further justification for the proposed reform, namely that, *'individuals at companies who consider themselves defamed can also sue, funded by their employers'*. In other words, corporate reputations can still be protected by an individual director suing over the damage caused to his individual reputation and supported by the company.

---

<sup>4</sup> *'Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs'*. *Slipper v BBC* [1991] CA per Bingham LJ (as he then was).

<sup>5</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

<sup>6</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

There are significant problems with using individuals as a vehicle for confronting attacks against the corporate body: Most importantly, there will be cases where it is solely the reputation of the body corporate on the line and there will be no duality with the reputations of any of the directors or other individuals connected with the company or product. The fundamental misconception underling this justification is a conflation between the reputations of individuals and a corporate reputation. There will always be examples where the two are entwined such as Freddy Laker, Victor Kiam, Richard Branson, Stelios Haji-loannou and Lord Alan Sugar but they are the very limited exceptions to the rule<sup>7</sup>.

The suggestion that individuals within an organisation should set themselves up as proxies for their corporations also puts such claims at an immediate disadvantage in light of the principle that the limits of acceptable criticism are wider with regard to corporate figureheads<sup>8</sup>.

To suggest that the CEO of a pharmaceutical company should bring libel proceedings over the allegation that a moisturiser made by the company is carcinogenic, for example, may be to add an unnecessary layer of artificiality to a claim where the damage is clearly against the brand and the corporate reputation. If such claims are really envisaged by this Bill why does anyone think the proposed reform will restrain the large corporate bodies from funding such claims and maintaining the supposedly icy blast on freedom of speech? The dichotomy is exposed at paragraph 175 of the CMSC Report which draws specific attention to the risk of such supposed claims, *'Global Witness noted that it had experience of situations where repressive state authorities which were unable to sue made use of an individual as a 'front person' to act for them in defamation litigation. Clearly corporations wishing to exploit libel laws to stifle criticism could use the same technique'*

### **Extra-Legal Alternatives**

---

<sup>7</sup> "The leading figures in such corporations may be understood to be personally implicated, but not, in my opinion, necessarily so" *Jameel & Othrs v Wall Street Journal Europe* [2006] UKHL 44 at para 25 per Lord Bingham.

<sup>8</sup> "As to enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals... Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest" *Fayed v UK* [1994] 18 EHRR 393 at para 75

Paragraph 126 of the Explanatory Notes also cites the CMSC Report's conclusion that, '*companies have means not available to individuals to counter falsehoods and unfounded criticism through publicity campaigns*' as further justification for the proposed reform.

Whilst larger corporations may have extra-legal means available such as public relations, lobbying and advertising to respond to inaccurate claims none of these are able to provide the same set of objectives as Court proceedings. There will be circumstances where alternative, extra-legal solutions are no substitute for the processes involved in litigation – disclosure of evidence (or the lack thereof), verified witness statements, the provision of independent expert evidence, the opportunity for cross-examination and the scrutiny of a jury. Nor is it possible for extra-legal processes to achieve a judgment and definitive finding of fact from the independent authority of a Court. Neither are they likely to achieve publication of an apology by the defendant in which the defendant accepts that what has been published is false.

Behind this particular justification for reform appears to lie the 'marketplace of ideas'<sup>9</sup> metaphor associated with First Amendment rights in the US - That ultimately, what emerges from debate is the truth. However, extra-legal means of counteracting inaccuracies can sometimes run the risk of merely perpetuating the debate and obfuscating the facts. For instance, if an NGO or newspaper publishes a serious allegation about a company which, in turn, puts out a press release denying the allegation, it runs the risk that the public will adopt Mandy Rice-Davies' view that, '*well they would, wouldn't they*'. More seriously, the public doesn't know what is right and who to believe. In *Jameel* Lord Bingham anticipated such drawbacks to the use of extra-legal methods of dealing with defamatory allegations; '*Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury*<sup>10</sup>.

---

<sup>9</sup> '*The best test of truth is the power of the thought to get itself accepted in the competition of the market*' *Abrams v United States* [1919] per Justice Oliver Wendell Holmes cited in 'Speech Overview' by Rodney Smolla; Dean of University of Richmond School of Law; [http://www.firstamendmentcenter.org/speech/overview.aspx?topic=speech\\_overview&SearchString=smolla](http://www.firstamendmentcenter.org/speech/overview.aspx?topic=speech_overview&SearchString=smolla)

<sup>10</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

Again the proposed reform draws its justification from the supposed resources of larger corporates without consideration being given to the resources of small to medium sized corporations that may well not be able to call on such resources and yet their rights are to be equally restricted.

### **Other common law jurisdictions**

Paragraph 122 of the Bill's explanatory notes asserts that, '*under current law, trading companies with reputations in the jurisdiction may sue for defamation and recover general damages. This contrasts with the position in several other common law jurisdictions, such as the USA, Australia and New Zealand.*'

In fact, it is only those three common law jurisdictions that differ from the English model and the USA is not homogenous. Some States allow corporate entities to bring libel actions without requiring proof of special damages.

In Australia the restriction on the corporate ability to sue is not distinguished by loss but by size so that it is only not for profit or companies with less than 10 employees that can sue at all in defamation. There is no requirement to prove special damages for such companies.

Save for the Bill's inclusion of the requirement to prove 'substantial' financial loss, it is the New Zealand model that most closely resembles the proposed reform: A jurisdiction without perhaps the same socio-economic pressures on corporate reputation as England.

Other common law jurisdictions such as Canada, South Africa, India and Ireland share the approach of the English courts as do other 'civil' or 'code' jurisdictions such as France and Italy in that Corporates can sue in defamation without proof of financial loss.

Furthermore, it is revealing that a statute as recent as the Irish Defamation Act of 2009 specifically refers to the fact that a company can sue, "... *in respect of a statement concerning it that it claims is defamatory whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement*" (emphasis added).

## Problems of Definition

Aside from the unease regarding the need and justification for reform, there are three significant problems of definition in the proposed wording that raise concerns about its efficacy.

First, the term 'body corporate' requires delineation. Could it, and should it, include Partnerships (limited liability or otherwise) for example, or Trusts, Charities or NGOs? The term may well have been left deliberately ambiguous for the moment to let the current debate and further investigation set the boundary. If that is the case the question simply shifts to what terms should be used to define the body corporate. In light of the restriction being set in financial terms the only equitable basis to define a body corporate for these purposes would be by readily quantifiable and accessible financial terms rather than by the number of employees or some other arbitrary measure. If the way in which the business was structured was used it might enable companies to restructure as a way of avoiding the restriction and thus defeat the purpose of the Bill.

Second, the inclusion of the word 'likely' will make the exercise of the restriction extremely problematic. It is a quite different hurdle from the present requirement to show that the libel has a 'tendency'. Whether a defamatory allegation is "likely" to cause "substantial" financial loss will inevitably form the basis for significant and expensive interlocutory applications which will increase the costs of the litigation and delay the passage of the claim. If the corporate claimant was successful in such proceedings the additional costs would be sought from the defendant. All that will have been achieved is an increase in the litigation risk for both parties which, in fact, is the true source of the chilling effect of libel litigation.

The third problem of definition arises from the inclusion of the word, 'substantial'. Such brightly relative language simply attracts more legal moths and will lead to further applications from both sides to determine whether the loss is, or is not, substantial. Does it mean, for example, a significant loss in purely monetary terms or is it supposed to be proportional in some way to the overall value of the company and how would value be measured in such circumstances?

The requirement to prove that any financial loss has been 'substantial' also exposes a tension between the proposed reform and the culture of litigation fostered by the Civil Procedure Rules. Clause 1.4 of the Introduction to the Pre-Action Protocol for Defamation states, *'There are important features which distinguish defamation claims from other areas of civil litigation, and these must be borne in mind when both applying, and reviewing the application of, the Pre-Action Protocol. In particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only 1 year, and almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.'* However, the requirement of the proposed reform to, *'show that the publication has caused, or is likely to cause, substantial financial loss'* could lead potential claimants unsure about being able to prove their loss in financial terms to delay bringing proceedings whilst the quantifiable financial loss increases. Alternatively, the corporation that has been libelled will act as quickly as it can to mitigate the damage done by issuing proceedings in the absence of a satisfactory apology and, in so doing, reduce the likelihood of 'substantial' financial loss and so prejudice its chances of success. Again, such circumstances were anticipated by Lord Bingham in *Jameel* in which he stated, *'I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that a financial loss will actually accrue.'*<sup>11</sup>

## Conclusion

As a society we need to acknowledge the value of reputation and recognise its equal status to freedom of expression. As Lord Nicholls stated in *Reynolds v Times Newspapers*, *'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*

---

<sup>11</sup> *Jameel & Others v Wall Street Journal Europe* [2006] UKHL 44 at para 26 per Lord Bingham.

*public good*.<sup>12</sup> Whilst Lord Nicholls' comments concerned the reputation of individuals they are equally applicable to the reputation of corporations. If we are to allow a corporation to be sued for defamation it should have the same right to protect its reputation. If corporations are denied the possibility of suing to protect their reputations we are denying them the right to protect jobs and assets and a value that may have taken many years to accumulate. The consequences are far reaching as the Lord Chancellor told the CMSC, '*Bodies corporate do have reputations and on their reputations depend the livelihoods of, in large corporations, thousands of people and their share price, in which your pension fund or mine might be invested*'. Reducing the ability of corporate bodies to sue will devalue their reputation, their brand and, over time, their ability to do business.

Napoleon dismissed the English as a nation of shopkeepers. Today those shopkeepers, together with their companies and brands, play a significant and active role in society and many have reputations of substantial value. The risk of damage to those reputations is increasing as are the repercussions of such damage to the jobs and savings of a growing section of the population. As the number of stakeholders with a direct interest in upholding the right of corporate bodies to protect their reputations increases it would not be just or appropriate to restrict that right to the extent currently proposed without significant further investigation and consultation.

**Magnus Boyd**  
**Carter-Ruck**  
**1 November 2010**

---

<sup>12</sup> Reynolds v Times Newspapers Limited [1999] [2001] 2 AC 127