



Everyone acknowledges that freedom of speech is vitally important in a free society, but at the same time most people believe that they should have a right to protection against false allegations which damage their reputation. The libel laws should safeguard both of these freedoms, but in Britain today they do not protect either of them effectively. Our present libel laws do not guarantee justice to either defendants or plaintiffs; in fact, it is almost as if they have been deliberately designed to give us the worst of both worlds. On one hand, rich crooks can use the law to cover up their crimes, while on the other hand, ordinary people who find themselves the victims of smear campaigns are left with no means of redress. The libel laws have three main defects: the burden of proof, the size of damages, and the cost of legal proceedings.

### THE BURDEN OF PROOF

A lot of people do not realise that if you are charged with libel, the ordinary common-law burden of proof is reversed, and you are treated as guilty until proved innocent. This has serious implications for investigative journalists who want to expose fraud, corruption or any other kind of secret wrongdoing. A few years ago, Eric Barendt of University College, London, and three other leading academics carried out a major study of the effects of the libel laws on the media. They came to the conclusion that the existing law was an unfair restriction on freedom of speech, and they called for the burden of proof to be put on the plaintiff, as in other offences. In their own words:

One can doubt whether it is reasonable to expect the defendant to show the truth of matters, in the nature of things generally outside his personal knowledge, rather than require the plaintiff to show the allegations are false. After all, the plaintiff will always know the truth about his or her conduct.

(Barendt et al. 1997, p. 196)

Shortly after their book was published, the problems facing defendants were clearly illustrated by the case of Jonathan Aitken versus *Guardian* Newspapers. Aitken sued the *Guardian* over revelations about the amount of money that he was receiving from his Saudi Arabian business associates. In particular, he claimed that the bill for a stay at the Ritz Hotel in Paris in 1993 had been paid by his wife, Lolicia, rather than a businessman called Said Ayas. At the trial, it emerged that Lolicia Aitken had actually been in Geneva at the time, but the *Guardian* was only able to

prove this thanks to the remarkable coincidence that the hotel where she had stayed had just gone bankrupt, and the receiver was willing to let a journalist look at the records. As the editor, Alan Rusbridger, said in an article afterwards:

If Aitken had been telling the truth, it would have been an easy matter for him to prove that we were wrong. He would have had access to all the necessary credit-card data, booking forms, bank accounts and hotel receipts to show that he and his family were where they said they were. The *Guardian* would have been dead in the water. (Rusbridger 1997, p. 23)

Barendt and his team also mentioned some of the other obstacles which can make it hard for a defendant to prove that his story is true. For example, a witness may be willing to talk off the record but not appear in court, because his job is at risk, or because he himself is wanted for a crime, or because he is being intimidated by gangsters or terrorists. He may also be unavailable because he is out of jurisdiction, or he may not be credible in court because of a previous criminal record or a history of mental illness. If a defendant is relying on documentary evidence which was obtained by irregular means, the owner of the documents may demand the return of them.

In 1996, when a new Defamation Act was going through Parliament, Lord Lester of Herne Hill moved an amendment in the House of Lords to put the burden of proof on the plaintiff, but he was unsuccessful. It is about time someone tried again.

### MAKING THE PUNISHMENT FIT THE CRIME

If you are convicted of libel, you may have to pay thousands of pounds in damages. Until quite recently, you might have had to pay even more. In the 1980s, some juries started awarding ridiculously large sums of money in libel cases, so that the plaintiffs received more than they would have got if they had been maimed or crippled. This caused so much controversy that the government amended the law under the Courts and Legal Services Act 1990, giving the Court of Appeal the power to alter the damages awarded for libel if it found them to be excessive or inadequate. Another step in the right direction was taken in 1995, in the case of Elton John versus Mirror Group Newspapers, when the Court of Appeal ruled that a judge could prevent excessive awards for libel by referring the jury to awards for personal injury and Court of Appeal awards for libel. However, despite these reforms, the damages for libel can still be high enough to deter anyone who wants to expose a scandal.

The American libertarian Murray Rothbard argued that libel should be legalised on the grounds that it is impossible to define the right to a reputation in terms of property rights, because your reputation only exists in the minds of other people and is not a tangible thing (see Rothbard 1982, p. 126). This is not an entirely convincing argument. Human beings have not had a market value since slavery was abolished, so assault and murder cannot be defined as breaches of property rights in the same way as theft and fraud, but libertarians still accept that they should be illegal. However, Rothbard did have a point. Even if libel should be an offence, it does not necessarily follow logically that it should be punished in the same way as offences against property rights. Instead of making the culprit pay damages to the plaintiff in cash, it would be more appropriate if the only penalty was a retraction and an apology published at the culprit's expense. This would ensure that the damage to the victim's reputation was repaired, while avoiding the problem of deciding how to put a monetary value on something intangible. It would also remove another deterrent to investigative journalism by ensuring that the punishment was not out of proportion to the offence, so that journalists would be more willing to run the risk of making a mistake.

In the past, it has sometimes been suggested that there should be a statutory right to reply to factual inaccuracies in the media. Private members' bills have been introduced into Parliament for this purpose; the last one was introduced into the House of Commons by Tony Worthington of the Labour Party in 1989. The trouble with all these proposals was that they would have imposed the right-to-reply law on top of the existing libel laws, which would

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**FOR LIFE, LIBERTY AND PROPERTY**

have made the law even more repressive. Apart from that, some of the people behind them were a bit dodgy. For example, there is a pressure group called the Campaign for Press and Broadcasting Freedom which has been campaigning for a right-to-reply law since 1979, but it is run by a bunch of socialists who want to subject all the media to state control, and the only kind of freedom they believe in is free advertising for the Loony Left at everyone else's expense. On the other hand, however, if we had a right-to-reply law instead of the libel laws, it could be a big improvement.

### THE COST OF JUSTICE

The burden of proof and the size of damages make the law unfair to defendants, but it is also unfair to plaintiffs because of the cost of justice. It is very expensive to sue someone for libel, and legal aid is not available in libel cases, so millions of ordinary people cannot afford to do it. The situation has been improved by the Defamation Act 1996, because there is now a faster, simpler and cheaper procedure for dealing with cases, known as summary disposal of claims. Under the new system, a plaintiff can ask for a case to be dealt with by a judge alone, and the judge can declare that a statement was defamatory, order the defendant to stop publishing it, order the defendant to publish a correction and an apology, or award damages of not more than £10,000. This is a step in the right direction, but the law is still out of reach of a lot of people.

Since 1973, a special small claims procedure has been available in the county courts for dealing with claims for amounts not exceeding £5,000. Cases are heard by a judge in chambers, and the proceedings are simplified and informal. This system is now used to handle the great majority of civil cases. If cash damages for libel were abolished, there is no reason why a similar system could not be used to handle libel cases. If the county courts proved to be unsuitable, perhaps a special tribunal could be set up to administer the libel laws. Something like this was, in fact, proposed in some of the schemes for a right to reply.

### THE CONSEQUENCES OF REFORM

It is worth considering what the consequences for freedom of speech would be if the law was reformed. By far the worst abuse of the libel laws in recent times was the case of Robert Maxwell. He was notorious for the number of times he threatened to sue people for libel if they criticised his business practices, and he was rich enough to make his threats credible. The result was that it was not until his death that anyone realised he had embezzled £400 million from a pension fund. A fairer law would make it much harder for wealthy fraudsters to get away with it for so long.

It is not too hard to think of other examples of murky activities which could be exposed. During the Cold War, the socialist intellectual establishment always used to make sarcastic remarks about "reds under the bed" if anyone suggested that communist subversion was a threat to Britain. I, for one, would very much like to know how many reds really were under the bed — not just the actual spies, but the disinformationists and agents of influence in pressure groups and the media. Since the fall of communism, it has taken a very long time for the truth to trickle out. In 1994 Richard Gott had to resign very abruptly as literary editor of the *Guardian*, and in 1999 we learned the truth about Victor Allen of the Campaign for Nuclear Disarmament and Richard Clements and Raymond Fletcher of the Tribune Group, but they must surely have been just the tip of the iceberg. Who else was working for Moscow? In 1985, Chapman Pincher said in his book *The Secret Offensive*:

Of the many methods of planting Soviet propaganda and disinformation in regular use, the most continuously reliable is through journalists who are already committed ideologically to the Communist cause.

There are many such people in influential positions in the British and American media, and, no doubt, elsewhere in Europe. The laws of libel make it difficult for some of the most blatant to be named, but perceptive readers will have their own opinions. (Pincher 1985, p. 94)

If we want to make sure that future generations know the whole truth about the communist threat to freedom, legal reform is essential.

I will add just one more example from my personal experience. A few years ago, I wrote in one of my articles for the Libertarian Alliance that a certain politician supported the IRA, but Brian Micklethwait took legal advice and told me that I would have to alter it because it might be libellous. This was despite the fact that the person in question had called the IRA "freedom fighters" and had travelled overseas at least twice to speak in defence of terrorists who were being extradited to Britain.

Of course, the consequences for victims who cannot afford justice would be equally important. One of the worst examples of this in recent years has been the case of Robert Henderson. His story has already been told in full detail by Sean Gabb in Political Notes No. 154 (1999), so I will only give a brief summary of it here. It all started in 1995, when Henderson wrote an article for the *Wisden Cricket Monthly* saying that the England team should have more English players in it. This caused a storm of controversy in which he was accused of "racism" and his views were misrepresented by three national newspapers and the BBC. He complained to the Press Complaints Commission, the Broadcasting Standards Commission, and his MP, Frank Dobson, but he got nowhere, so he wrote to Tony Blair to ask for help. When the only reply he got was a four-line note from a House of Commons secretary, he wrote several more letters to Mr. Blair, and finally, out of exasperation, he wrote to Cherie Blair at the office of the law firm where she works. He wrote a total of thirteen letters to the Blairs in twelve months. On 25th March 1997, a few weeks after his final letter, the *Daily Mirror* published an article alleging that the police were investigating him on suspicion of stalking Cherie Blair. A similar article appeared in the *Glasgow Daily Record*, which is also published by Mirror Group Newspapers. Thanks to the Data Protection Act, Henderson was able to discover that this was untrue, because the Crown Prosecution Service had decided that he had committed no crime, but he could not afford to sue the newspapers and clear his name. Until the law is reformed and justice is made more accessible, there will be nothing to stop the socialist intellectual establishment smearing other ordinary people with impunity.

### THE OBSTACLES TO REFORM

If the case for reforming the libel laws is so overwhelming, why has it not been done already? The people who benefit most from the present system (apart from rich crooks like Robert Maxwell) are the lawyers who charge loads of money for handling libel cases. However, according to Eric Barendt and his colleagues, nearly all the libel cases in the London courts are handled by just three firms of barristers which specialise in them (see Barendt et al. 1997, p. 42). Compared to the huge newspaper and television companies which suffer the effects of the libel laws, these few barristers cannot be all that powerful. How have they been able to prevent the law being reformed? The Adam Smith Institute are supposed to be very good at working out ways of harnessing one vested interest and using it to defeat another one. This looks like the sort of problem which they could solve if they turned their attention to it. I sincerely hope that someone solves it soon, so that both the Robert Maxwells and the Robert Hendersons of the world get the justice they deserve.

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