Against the Grain

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As I See It! -- Libel Law in the UK: Free Speech Under Threat?

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As I See It! — Libel Law in the UK: Free Speech Under Threat?

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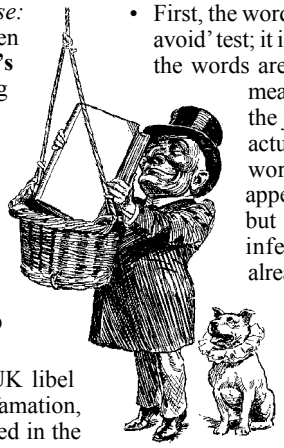
The UK law of libel has been under the spotlight in recent months in relation to books published in the USA but not in the UK, where copies of the US edition may find their way into the UK via Internet booksellers like **Amazon**, or via **eBay**. Commentators in the USA have disparaged UK law as a threat to free speech, plaintiff-friendly, an invitation to 'libel tourism', 'forum shopping' etc.

The most notorious case is that of *Funding Evil*, a book by the US academic, **Rachel Ehrenfeld**, which was published in the USA, but not in the UK. Nevertheless, 23 copies found their way into the UK. As a result, **Sheikh Khalid bin Mahfouz**, whom the book suspected of providing funds to al-Qaeda, successfully sued the author in 2005 for libel. In other words, the case was won by a plaintiff who is neither resident in nor a citizen of the UK, against a defendant who is also neither a UK citizen nor a resident, in respect of a book published outside the UK.

Another US publication has also been affected by libel law in the UK — and in Australia and New Zealand, where the law is very similar. **Andrew Morton's** *Tom Cruise: An Unauthorised Biography*, has been published in the USA by **St. Martin's Press** early in 2008. But it is not being published in the UK. Indeed, the *Amazon.com* site lists **Morton's** book, but indicates that it is only for sale in the USA and Canada. And a search on *Amazon.co.uk*, the UK site, brought up a lot of books about **Cruise**, but not **Morton's**. The publisher has clearly decided that the threat of litigation in the UK is sufficient to stop publication there.



So what is so draconian about UK libel law? Libel is part of the law of defamation, the other being slander. It is grounded in the common law; it is not a recent invention of statute. The law of defamation exists to afford redress for unjustified damage to reputation. Its history goes back to the fourteenth century. So it comes to us in the 21st century with a long-established pedigree.

Defamation is the publication of a statement about a person that tends to lower that person in the regard of reasonable people, or tends to leave that person 'shunned and avoided'. While slander is a verbal statement, libel is a statement in permanent form: writing, pictures, theatre and film, statues, radio and TV, and statements on the Internet, including Websites, emails, blogs, and even chat rooms. The difference between libel and slander is only that slander requires proof of actual damage, while libel is actionable in itself without adducing additional evidence — injury to the plaintiff's reputation is sufficient. Thus where a plaintiff proves publication of a false statement that damages his reputation without lawful justification, he or she need not plead or prove special damage in order to succeed.

The major difference between UK and US libel law is that US law requires proof of malice and falsehood on the part of the defendant; the law is also subject to the constitutional right to free speech enshrined in the First Amendment. The UK position is different. The intention of the person making the statement is irrelevant. Proof of injury to the plaintiff's reputation is enough. Furthermore, the UK law has to be seen in the context of other laws. Unlike the USA, the UK has no written constitution. UK constitutional law is a patchwork of conventional legislation and convention. There is no entrenched constitutional right to freedom of speech. Neither is there, except for the provisions of European human rights law, any right of privacy under UK law. So defamation fills part of that space that would otherwise be subject to other rules in other jurisdictions.

What is required to establish a case of libel in the UK? Well, the dead cannot be libelled. Insults or mere abuse do not count as libel.

- First, the words must meet the 'shun and avoid' test; it is a question of law whether the words are capable of a defamatory meaning. It is then a matter for the jury to decide if the words actually are defamatory. The words may on the face of it appear to be quite innocuous, but may be capable of being inferred as defamatory. As already mentioned, defamation protects reputation.
- Secondly, they must have been 'published'. The definition of 'publication' is much broader than what librarians and publishers mean by the process of publishing books and journals; it simply means distributed to at least one other person. If a statement is repeated or re-distributed, that constitutes a fresh publication. In the case of newspapers, books, journal and magazines, that means that the author, the editor, the publisher, the printer and the bookseller may all be liable. Under common law, a bookseller or library has a defence if it can demonstrate on reasonable grounds that it had no knowledge of the libel in a book. This has been extended in the *Defamation Act 1996* to printers, broadcasters and Internet Service Providers.
- The onus is on the defendant to refute the plaintiff's claim that his or her reputation has been damaged, or to demonstrate that the statement is covered by one of a number of defences.

In defending a claim of libel, the defendant has a number of absolute defences:

- Justification: the statement is true, or substantially true in spite of minor inaccuracies. This is the nuclear defence that will blow the claim out of the water!
- Fair comment on a matter of public interest: an honest opinion based on true facts. 'Public interest' covers the activities of government and public institutions, art and theatrical productions etc... However, the statement will not be fair if the defendant is motivated by malice or dishonesty.
- Absolute privilege: statements made in Parliament or in court proceedings, communications between lawyer and client or between ministers and senior officials, and reports of any UK, European or UN criminal tribunals, are not actionable at all.

The defence of qualified privilege is also available to a defendant in circumstances where he or she made the statement to protect his or her private interests, or made a complaint to the proper authorities about some issue to redress. In other words, the defendant must have a proprietary interest or some legal or moral duty to make the statement. Lawyers expert in distinguishing one case from another will quickly realise that there are few satisfactory criteria that can be applied to each and every case. It depends on the nature of the statement, the role or status of the defendant, and the circumstances in which it was made. The interest/duty test is very general, and its application is a matter for the judge. Nevertheless, the claim for qualified privilege will be rejected if the defendant is motivated by malice, or if the statement has been published more widely than is necessary to protect whatever interest is at stake.

One aspect of qualified privilege that goes to the heart of the idea of freedom of speech is the liability of writers and publishers — especially newspaper journalists and publishers — for stories published on matters of public interest. Here, the English courts have clarified and extended the concept of qualified privilege.

- In 2001 the case of *Reynolds v Times Newspapers* (2001 2 AC 127) established the so-called **Reynolds** privilege as a defence in respect of responsible journalism.
- In a very recent case, *Jameel v Wall Street Journal Europe* (2006 UKHL 44), the **Reynolds** defence was defined as merely one aspect of qualified privilege, and that the interest/duty test applied. Nevertheless, there is a valid defence

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if the subject matter is of significant public importance, and that the journalist and the publisher had taken reasonable steps to verify the story. The courts set a standard that is no higher than that of 'responsible journalism.'

In the **Ehrenfeld** case, **Dr. Ehrenfeld** did not defend the action in the UK, and judgment was awarded to the plaintiff by default. If the case had been defended, it may well be that qualified privilege would have worked, and the action set aside. The UK has manoeuvred the law into a position protecting free expression very similar to that of the US First Amendment.

Even if none of these defences work for the defendant, there remains the defence of an 'offer to make amends'. This must be in writing, and consist of a correction of the statement made, an apology to the plaintiff, and agreed compensation and legal costs. Such an offer will not be allowed if the defendant has already raised one of the defences of absolute or qualified privilege.

There remains the problem of the 'libel tourist'. Currently, provided the statement is published (i.e. disseminated) in the UK, it is actionable, even though it was never intended to be made in the UK, and the plaintiff is not a UK citizen or resident. The **Ehrenfeld** case clearly raises some disturbing issues about applying UK law to issues that originate outside the UK and only encounter UK jurisdiction by chance. But bad cases do not of themselves drive the cause of good law, or render existing law unworkable or unacceptable. Given the US record of trying to apply domestic US law to events and disputes that take place outside the USA, we British are entitled to be sceptical of US complaints of extraterritoriality, especially in such limited circumstances.

So what do we British make of this? Do we feel constrained from speaking our minds or writing columns like this? The short answer is no. But what the law does is ensure that even humble writers like your columnist check our facts. Moreover, publishers will be aware that libel actions are always complex, and very expensive to bring or to defend. In the UK there is a social and political tradition of free expression, and of mocking our leaders, in business, government or even in our local communities. There is no 'public figure' defence in UK law, as there is in the USA. Nevertheless, political satire of the most direct and savage kind has been meat and drink to British cartoonists, journalists and commentators for centuries. That an American thinks that UK libel law threatens free speech is made in the context of an American legal and social context where such rights are assumed to need rigorous statutory protection. The British wear these issues more lightly!

Little Red Herrings — Stop the Presses!

by **Mark Y. Herring** (Dean of Library Services, Dacus Library, Winthrop University) <herringm@winthrop.edu>

Last month a new study commissioned by the **British Library** and the **Joint Information Systems Committee (JISC)** issued one of those "Duh!" reports. The new study (available here *http://www.bl.uk/news/pdf/googlegen.pdf*) found that the "**Google** Generation," or those brought up by computer wolves, is not very Web-literate. Stop the presses! News flash! For those in this profession once called librarianship (but fast becoming Cyberianship) this is hardly news. The study further found details that will likely amuse public services librarians in particular and any librarian working with the public but especially with children of "Hover Parents." The "**Google** Generation" it seems, can be an impatient lot, though the jury is still out. They want both the search itself, and the navigation to pages to arrive in nanoseconds — and they want it now. They become petulant when the first five hits (I'm being generous) are unusable. In short, they have "zero tolerance" for anything that smacks of study. Okay, I'm editorializing now, but surely you get the drift.

The study is quick to point that these traits are now emerging across all age groups. I don't doubt it. We elect presidents on a whim, decide important questions on **YouTube**, and solve our medical needs at the end of a point and a click. It's hardly surprising that when surrounded by such harried behavior, even those old enough to know better now tend on that downward "snatch and grab" spiral. The implications of the study, especially with respect to the older age groups, aren't the best of news as one might think. If the older generation is becoming more like the younger one, libraries will become the palimpsest on a computer screen, but more on that later.

On the face of it this study seems good news for information literacy proponents, the new catchphrase many of us are using to convince our administrations that we cannot, should not, in our growing girths, be replaced by the micro-thin **Apple notebook**. But the report goes quickly from sanguine to lugubrious. While libraries are charged with coming to terms that "the future is now," libraries are also charged to make interfaces more user-friendly, more "standard and easier to use." In other words, more like **Google**, which you'll recall has created generation of Web-illiterate users. Okay, now I get it.

Now I don't mean for readers to infer that I'm opposed to the idea of making our catalogs more user-friendly, or that I do not seek to make interfaces easier to use, or that I think making our exorbitant information in databases that rival the cost of bungalows on Cape Cod is inherently a bad thing. On the contrary I greatly favor the idea, though I believe some of the new products are much ado about nothing. (For example, what I may "digg" this year may not necessarily be something I'll "digg" three years from now). In other words, some of the new technology seems purposefully dated for built-in obsolescence in about that same time frame that the new version will appear, but I digress). It is unquestionably true that we must make very expensive information more widely known and easier to search.

But what troubles me about this report is the underlying assumption that making users more intelligent searchers is next to impossible so we must make things more **Google**-like. That's good news for **Google**, of course, not so good news for the rest of us. Embedded in the report, too, is the fundamental assumption that one can't change users so we must change libraries. If libraries are to be useful in the future they must shuffle off all their intellectual pretensions and ape the "snatch and grab" mentality of the Web in order to be successful. In other words, live with the idea that their million-dollar enterprises may well be "pass on" weigh stations. It's a high price to pay for pointing others in the right direction. This logic is similar to the shoe salesman who had only a size 9 for his size 11 customer so he just chopped off his customer's toes. The shoe fit, you see, even if the customer did walk funny ever thereafter.

Other parts of the report will also raise eyebrows. For example, over the next ten years it predicts a unified Web culture. While it doesn't make entirely clear what this will be — will it be **Google**, will it be tiered (so that those looking for serious information can bypass all the spam and vibrator ads) or will it be something else — immediately it is clear that libraries in most of their forms will diminish as they fade. The report also calls for a rise in eBook sales. We've been hearing this for the last twenty-five years with no significant change in those sales. This could well be the eBook decade but I reserve the right to doubt one more year. Occasionally the report resorts to bizarre language. Consider the following:

"Users are promiscuous, diverse and volatile and it is clear that these behaviours [sic] represent serious challenges for traditional information providers, nurtured in a hardcopy paradigm and, in many respects, still tied to it. Libraries must move away from bean counting dubious download statistics, and get

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