

The Singh case, 2010

1. Recently, the Simon Singh defamation case became a cause celebre in the UK for a push for big changes in defamation law, which might have relevance to our law. However, some aspects of the campaign for change have been misinformed and misdirected.
2. In a number of recent cases in the United Kingdom, professional bodies or companies have sued individuals who have criticised the support given by such bodies for the practices of their members or application of scientific methods. Simon Singh, a science writer, was sued by the British Chiropractic Association for questioning the evidence for its medical claims, and Peter Wilmshurst, a cardiologist, is being sued over his criticisms of an American company's heart implant trial. A movement has grown up around these cases where concern has arisen about the chilling effects of the law on scientific criticism.

THE SINGH CASE

3. Dr Singh, a best selling author, wrote an article which appeared on a page marked "Comment and Debate" in *The Guardian* in April 2008. In it, he criticised chiropractic and the British Chiropractic Association's claims that its members could help treat children with colic, sleeping and feeding problems, ear infections, asthma and prolonged crying "even though there is not a jot of evidence". He had added: "This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments."
4. Mr Justice Eady, dealing with issues of meaning and whether the words were fact or comment, held that they were defamatory - the "plainest allegation

of dishonesty" - and amounted to a verifiable statement of fact. This meant Dr Singh would have to prove that the BCA did promote the activities of chiropractors in a dishonest way, which he said he could not do. He stated that he thought he was expressing an opinion that the BCA was promoting bogus remedies because it utterly believed they were effective, even though there was no evidence to support this. Singh was prepared to fight the case on the basis of fair comment (we call this defence honest opinion), but not truth.

5. By the time the case reached the Court of Appeal it had lasted almost two years, and cost Singh more than £100,000 in legal fees. He stated he was only able to fight on because of his status as a bestselling author. He believed the BCA sued him personally, rather than accepted the *Guardian's* offer of an opportunity to reply in its pages, to chill or silence him and people like him.

THE CAMPAIGN FOR REFORM OF LIBEL LAWS

6. His case and others helped spark a major campaign for libel reform, whose backers range from the Astronomer Royal to the Poet Laureate, from the editor of the *British Medical Journal* to the editor of *Private Eye*, and from Helena Kennedy QC to Stephen Fry. They argued that the libel law of England and Wales is fundamentally flawed. Some of the points they made were:
 - a. UK libel case are so horrendously expensive that most writers, scientists and journalists cannot afford to defend their writing, even if they are convinced it is accurate and important. These costs can easily run to over £1 million and are wholly disproportionate to the damages involved, which might be less than

£10,000. (An Oxford University report has shown that English libel cases cost over one hundred times more than those on mainland Europe).

- b. English libel laws are seen as extremely hostile to writers because defendants are seen as guilty until proved innocent, a reversal of normal practice. On the other hand, claimants do not even need to prove that they have been damaged in any way.
- c. It was also argued there is no robust public-interest defence.
- d. It is too easy to sue in London, no matter where you work or live - libel tourism is rife and London was seen as a haven for Eastern European oligarchs, Saudi billionaires and giant corporations who want to silence criticism.

THE CLEVER TACTIC BY SINGH SUPPORTERS

7. Meantime, some of Singh's supporters had looked at the BCA web site for all its 1029 members online, written a quick computer program to download the member details, recorded them in a database and then downloaded the individual web sites. They then searched the data for the word "colic" and manually checked each site to verify that the chiropractors were either claiming to treat colic, or implying that chiropractic was an efficacious treatment for it. 160 practices in total were found, with around 500 individual chiropractors. Using their postcodes, the supporters found their local Trading Standards office using the Trading Standards web site. By various means, the group eventually sent out around 240 complaints about individuals to the Trading Standards offices. The complaints referred to the relevant standards and code requirements and suggested they had been breached but emphasised the individual chiropractors were not being

described as dishonest but might simply be mistaken about the quality of evidence. This campaign resulted in many chiropractors being told to take down such references on their websites by their professional bodies and others.

THE SINGH CASE BITES THE DUST

8. Simon Singh's appeal was decided in February this year and was upheld. The Court of Appeal took the subject matter and context of the particular article and the dispute to which it related into account, and held that Singh was not making a statement of verifiable fact, but one of opinion. The Court said rather dramatically:

'The opinion may be mistaken, but to allow the party which has been denounced on the basis of it to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth.'

9. However, the judgment is somewhat short on legal reasoning about why the words are opinion rather than fact. The Court described the word 'evidence' as value-laden in the context of the case. However, an ordinary, reasonably reader might well not agree. This case illustrates just how difficult the distinction between fact and opinion can be.
10. It seems clear the compelling influence on the court was its awareness of the popular campaign supporting Dr Singh against the BCA, which by this time was backed by Nick Clegg, the Lib Dem leader (and now kingmaker in the UK Parliament), and more than 40,000 people. The court also mentioned the existence of an unhappy impression that the BCA was attempting to silence one of its critics, because the Association chose not to sue the

Guardian, nor to take up its offer of an opportunity to refute. There were also a number of comments indicating that scientific criticism is special in some way and should not be chilled. "Accordingly this litigation has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic."

THE BCA CUTS ITS LOSSES

11. Not long after, the BCA said in a statement that it decided to discontinue after careful consideration of its position in the light of the Court of Appeal judgment. It said Mr Justice Eady, which it described as "the UK's most experienced defamation judge" had agreed with its approach, but that the Court of Appeal, in its recent judgment, had taken "a very different view of the article". While it still considered that the article was defamatory, the decision provided Dr Singh with a defence such that the BCA now took the view that it should withdraw to avoid further legal costs being incurred by either side. ...and more in the same vein.

DISAGREEMENT ABOUT WHERE TO NOW

12. So, success in the battle for Singh, but the war is somewhat more undecided. For one thing, two respected academics, Professor Alastair Mullis and Dr Andrew Scott, refuted a number of the claims made about defamation in a report in January this year. They pointed out:

- a. Harm to reputation can be debilitating and the chilling effect of libel is undesirable only to the extent that it causes true and important information to be withheld from the public sphere.

- b. Almost all development of UK defamation law in the last 15 years has made it more difficult, less profitable, and hence less advisable for claimants to sue.
- c. There is in fact a clear public interest defence known as the Reynolds, or Jameel defence in the UK.
- d. It is not surprising that private costs of bringing defamation claims in the UK are significantly more than in Europe - in many European countries, the cost of prosecuting libel claims falls on the state in the form of criminal libel.

13. It does seem the evidence about some of these matters has been overstated. There is a fascinating discussion of these issues under the heading: 'Libel, privacy and press freedom under fire in the UK', on the blog for Inforrm - The International Forum for Responsible Media Blog. See: <http://inforrm.wordpress.com/>

14. Meanwhile, all sorts of official bodies have been worrying at and reporting on the issues. For example, the UK House of Commons Culture, Media and Sport Committee's recent report *Press standards, privacy and libel* recommended that the Government consider reversing the general burden of proof in relation to corporations: 24 February 2010, 48.

15. A Special Libel Working Group set up by the Ministry of Justice reported in March this year. It was made up of media, government officials, and lawyers. It was undecided about libel tourism, but did think more work should be done on perhaps putting the public interest defence in statute.

16. So, some changes may be made, but undoubtedly, the debate will continue, so long as media and lawyers can draw breath.

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