

# Research impact: making a difference

## Reforming England's libel law

LSE research promoted balanced reform of libel law and emphasised the sheer cost of proceedings as the central problem

### What was the problem?

English libel law permits individuals and companies to go to court to defend their reputations against the harms caused by false and defamatory publications made by others.

A claimant must show that they have been identified in the publication, and that the publication was defamatory. They need not show that the publication was false, nor that it had caused or was likely to cause any particular loss. Both are presumed as a matter of law.

To avoid liability, a publisher can prove the truth of an allegation, show that it was made on a privileged occasion, show that it concerned a matter of public interest and was made responsibly, or that it was an honest comment.

The core problem with libel, however, has always been that legal proceedings are so expensive. Even preliminary legal arguments can cost tens of thousands of pounds. The cost of a full trial can run into hundreds of thousands, even millions of pounds. Understandably, this prompts many publishers to settle any complaints brought, sometimes irrespective of the merits of the case. Over time, many publishers have chosen simply to avoid publishing anything relating to certain individuals or particular themes for fear of legal repercussions.

This is the so-called 'chilling effect of libel law'. When legitimate speech is deterred it is clearly problematic. This is obviously the case where true facts about matters of public importance are left unpublished. It is devastatingly so when what goes unsaid concerns matters of life and death, as in cases where academic, medical and scientific researchers have been reticent to criticise conduct or products related to medical treatments, or have been 'punished' for having done so with the need to defend legal action. From 2009 onwards, the 'Libel Reform Campaign' keenly identified, illustrated and lobbied to address such concerns.

A much less highlighted dimension of the cost problem has been that it also precludes many prospective claimants who have been harmed by false and damaging publications from obtaining any redress. The problem of costs has cut both ways, to the detriment of the individuals concerned but also the wider public in their appreciation of matters of social and political importance. Libel has been the archetypal 'rich man's law'.

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The Defamation Act 2013 was passed by Parliament in the hope of addressing these problems. It is not yet clear whether the Act will achieve its aim. Moreover, the equivalent law in Northern Ireland has been left untouched as politicians there failed to extend the 2013 Act to apply in that jurisdiction.

## What did we do?

Research by LSE Associate Professor of Law Andrew Scott emphasised that libel laws comprise a balance between sometimes competing interests: the expression rights of publishers, the reputation rights of private citizens, and the wider social interests in freedom of expression and the accuracy of individual and corporate reputations. While concurring that freedom of expression is vital to a democratic polity, with Professor Alastair Mullis (Leeds) he warned against aggrandising that interest above others in *Something Rotten* (2009a), *The Swing of the Pendulum* (2012), and *Gatley on Libel and Slander* (2013).

He found that reform of libel law should focus less on amending the substantive law and more on the problem of cost and process. Scott proposed reforms that reflected insights drawn from social psychology, political philosophy and human rights law.

In particular, he identified the ‘single meaning rule’ – which requires the court to select one interpretation only from the range of possible meanings of a publication – as a driver of complexity and hence of cost, and recommended the introduction of ‘discursive remedies’ – corrections, retractions, rights of reply – as opposed to damages (*Ceci N’est Pas Une Pipe* (2014)).

Scott and Mullis also researched particular reform options (*Tilting at Windmills* (2014)). They warned that the proposed ‘single publication rule’ – which treats online publication as occurring only on the first day a piece is uploaded, leaving one year for any challenge to be brought – may fail adequately to protect reputation. Instead they recommended an alternative defence of ‘non-culpable republication’, which would apply from one year after the initial publication if the publisher highlighted that the accuracy of the publication had been challenged. They also assessed the proposal for a new defence of publication on a matter of public interest that became section 4 of the 2013 Act, finding that it would achieve a lawful balance between reputation and expression.

Scott was elected as an Academic Fellow of Inner Temple in recognition of his contribution to the work of the Bar of England and Wales.

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## What happened?

Scott's research was considered by the Government during the development of reform options, and was subsequently relied on during Parliamentary debates and investigations that culminated in the Defamation Act 2013. It has been cited by the courts, and provided the basis for a study conducted by the Northern Ireland Law Commission.

The Ministry of Justice Libel Working Group cited Scott's research in its Report (2010). He was invited to discuss the Draft Defamation Bill (2011) with Ministry of Justice officials.

Scott's research was also circulated among all Peers and Members of Parliament. It was extensively quoted in a House of Commons Library Briefing Paper (2010), and in a House of Lords Library Note (2010) that was prepared in advance of the Second Reading debate on the Defamation Bill. Lord Triesman's argument in the Second Reading debate expressly relied on the research.

Scott briefed the House of Commons Select Committee on Culture, Media and Sport in advance of its inquiry on Press Standards, Libel and Privacy (2010). He also gave written and oral evidence to the Joint Select Committee on Defamation (2011), and written evidence to the Joint Select Committee on Human Rights (2012).

The Ministry of Justice Libel Working Group recommended a 'single publication rule', but explicitly considered the option of introducing Scott's 'non-culpable republication' defence. The Joint Committee on Human Rights asked the Government to confirm that it has considered the problem Scott identified with the single publication rule.

The Joint Select Committee on Defamation requested additional evidence from key witnesses on the feasibility of alternative approaches to dispute resolution in libel claims recommended by Scott. The Committee concluded that the Government should explore further the development of a voluntary, media-orientated forum for dispute resolution. In line with Scott's research on costs, the Committee also recommended that the Government should consider further legal protection for those 'without substantial financial means'.

The Joint Select Committee on Human Rights cited Scott's research on the public interest defence, using it to support its own conclusion that the new defence should be preferred.

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The Northern Ireland Law Commission has relied heavily on Scott's research in its consultation on the reform of libel law in that jurisdiction. In particular, it is consulting on a proposal to jettison the single meaning rule and combine this change with the introduction of a bar on proceedings where the publisher has promptly and prominently corrected or retracted a contested interpretation of a publication.

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Dr Andrew Scott joined the LSE Law Department in 2006. His main research interests lie in the fields of media law and regulation, and constitutional law. His current research agenda includes projects on the law of defamation, the interplay between defamation and religious faith, corporations and the public sphere, and the regulation of journalistic newsgathering practices. He is the co-author - with Gavin Millar QC - of a forthcoming book on Newsgathering: Law, Regulation and the Public Interest (to be published by Oxford University Press)

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