Shifting the Burden in English Defamation Law

The proposed reform is the repositioning of the burden of proof from defendant to claimant in the English law of defamation. With the help of an example, this essay will show how the current law (section 15 of the Defamation Act 1996) lends itself to misuse by unscrupulous claimants. The example will demonstrate how the law in its current state does not perform its primary role of protecting reputation as well as it might. It will also serve as an opportunity to introduce a reform that would discourage such misuse and improve the effectiveness of the law on defamation. Finally, some objections and possible alternatives to the proposed reform will be considered.

To establish the background for the proposed reform, let us examine *British Chiropractic Association v Simon Singh*, which is a case currently in progress in the High Court. The British Chiropractic Association ('BCA') is bringing a claim for libel against journalist Simon Singh over an article he wrote in the *Guardian* last year[1]. The part of the article complained of was this:

"*The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organization is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments*"[2].

[1] Simon Singh, 'Beware the spinal trap', *Guardian* (London 19 April 2008) Original withdrawn; available at http://svetlana14s.narod.ru/Simon_Singhs_silenced_paper.html accessed 5 October 2009
[2] ibid

When Singh was made aware of the BCA's unhappiness with his article, the *Guardian* immediately offered them the chance to straighten the record in a written reply, also to be published in that newspaper. The BCA refused. They also refused the *Guardian's* offer to make amends, although this sum remains undisclosed. It was 'Chiropractic Awareness Week' and the BCA felt they could only vindicate their reputation through a claim for libel.

At the preliminary hearing on meaning in May this year[3], the words under particular focus were 'bogus' and 'happily'. Eady J found at the preliminary ruling that these words meant neither, as Singh contended[4], that the BCA promoted these treatments while naively believing in their efficacy; nor that there was insufficient evidence for the efficacy of chiropractic treatments. The judge ruled that the words 'bogus' and 'happily' meant that the BCA promoted treatments the efficacy of which they were fully aware was nil. On this interpretation, this was "the plainest allegation of dishonesty"[5]: a clear defamatory statement.

Now onto the BCA's conduct during the course of this claim, and a step towards identifying the problem with the defamation law. The BCA have been criticized by the media for bringing this claim at all. The proper course of action, it has been suggested, would have been to accept the *Guardian's* offer of a right to reply. In such a reply, the BCA could have highlighted evidence to show chiropractic is an effective

[3] *British Chiropractic Association v Simon Singh* (case no. HQ 08X0265) High Court preliminary ruling 7 May 2009 available at < http://jackofkent.blogspot.com/2009/05/bca-v-singh-official-ruling.html> accessed 5 October 2009
[4] Simon Singh, 'BCA v Singh - The Story So Far' 3 June 2009 http://www.senseaboutscience.org.uk/index.php/site/project/340 accessed 5 October 2009
[5] *British Chiropractic Association v Simon Singh* (case no. HQ 08X0265) High Court preliminary ruling [13], 7 May 2009

health treatment for the conditions above, thereby supporting their promotional claims[6] and achieving added exposure for their work. Critics have suggested[7] this would have been the most appropriate course of conduct, especially as science is seen as a rigorously evidence-based discipline.

However, the BCA only released their evidence fifteen months after the original claim had been made, and only after Singh had entered a plea of fair comment, which effectively necessitated a reply of this sort anyway. Had the burden of proof lain with the claimant, the BCA would have been called to proof at the outset. Not only would the public have been informed about the efficacy of a health treatment at an earlier stage, but much time, money and effort would have been saved. In pursuing their libel claim, and showing reluctance to disclose evidence for the efficacy of chiropractic, it is arguable the BCA denied the public the information it deserved for the sake of their own reputation. That said, it must be acknowledged that after Eady J's preliminary ruling, the BCA are technically correct in claiming they have been defamed. However, their evidence has now been widely discredited.[8] A complaint regarding the efficacy of chiropractic treatments for colic has been upheld[9]. Furthermore, in their reply[10] to Singh's defence[11], the BCA state that whilst their website

"does not purport to cite, and does not cite, all available evidence in respect of chiropractic...it is for the defendant to establish, on the basis of a comprehensive

[6] 'Happy Families' promotional leaflet, withdrawn from BCA website; available at <http://www.westonchiropractic.co.uk/pdfs/happyfamiliesp3.pdf> accessed 5 October 2009
[7] David Allen Green, 'The BCA'S Reply' (conclusion) (2009) <http://jackofkent.blogspot.com/2009/06/bcas-reply.html> accessed 5 October 2009
[8] Professor Edzard Ernst, 'Chiropractic for paediatric conditions: substantial evidence?' (2009) BMJ 339:b2766
[9] ASA Council Adjudication against Dr Carl Irwin & Associates, 20 May 2009 <http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46281.htm> accessed 5 October 2009
[10] BCA Reply 9(20), Statements of Case, *BCA v Simon Singh* (case no. HQ 08X0265)
[11] Singh Defence, Statements of Case, *BCA v Simon Singh* (case no. HQ 08X0265)

review of all available evidence (whether published or unpublished) that there was not a jot of evidence that chiropractic can help with the specified matters".

That is to say, since Eady J's ruling that his article constituted fact and not comment, Singh must prove not only that there was no evidence to support chiropractic as an effective treatment, but also that the BCA knew this to be the case (cf. the principle in *Lingens v Austria* (1986) 8 EHRR 407, para 46). Because of the positioning of the burden, the BCA may put Singh to proof with a self-assurance they certainly did not show with regard to their own evidence. All of this gives import to the suggestion that the BCA have been using the defamation law as a kind of shield behind which to hide their poor quality evidence, whilst trying to maintain a reputation to which they knew, on the evidence, they did not have a right.

Most importantly, any reputation the BCA did hold, which the defamation law was supposed to protect, would surely be in a better state now if they had accepted the *Guardian's* offer of a clarifying reply in that newspaper, rather than suffer the reputation-destroying campaign against them[12], not to mention the embarrassment of effectively having put 'chiropractic on trial' with only scientifically weak evidence to support it. The temptation and ease of putting a defendant to proof when a claimant has something to hide allows the use of the libel law in an active way - for the management of negative publicity - as well as in a defensive way, to protect reputation. Despite Eady J having established that the BCA was the victim of a defamatory statement, it now seems almost impossible for the BCA to vindicate

[12] 'Sense about Science' campaign <http://www.senseaboutscience.org.uk/index.php/site/project/334/> accessed 5 October 2009

themselves. The libel law is thus exposed as having failed to function in the role for which it was designed, and this is because its current structure lends itself to abuse.

The aim of relating these events has been to highlight the kind of situation that may arise while the burden of proof remains with the defendant in defamation cases.
If the burden had lain with the claimant, the evidence for chiropractic would have been forced out at an early stage (if indeed the claim would have been brought at all). This would certainly have been in the public interest, and ultimately in the interests of both the parties, since the issue of evidence has really been at the core of this case ever since the BCA decided not to accept a settlement. The earlier the evidence is presented, the cheaper, quicker and more efficient the process is for all parties involved. Misconceived litigation like *BCA v Singh* would arise much less if the burden of proof were shifted to the claimant.

Having identified the problem with the law as it stands, it is now appropriate to discuss some practical implications, objections and possible alternatives to the proposed reform.

First, shifting the burden could arguably cause an increase in the publication of spurious material by journalists who know their story is untrue, but publish nevertheless for commercial reasons. With the burden on the claimant, the journalist may then sit back as the claimant may be forced to reveal actual details of his private life simply to prove the allegations false. This would perhaps represent an overcompensation for the current balance in favour of the right to reputation, and may

simply shift the possible area of abuse from prospective claimant to prospective defendant. In the situation where journalists began producing articles of this nature, thereby taking advantage of the repositioned burden, it is to be assumed the judge would award such compensatory and exemplary damages as to strongly discourage this kind of material being published in the future. However, misuse would still be possible wherever the burden lies. That is to say, where either claimants *or* defendants started to abuse the position of the burden, the judiciary would make an example of them by imposing heavy damages; but this would not avoid the potential for misuse.

Conversely, the threat of a libel claim by itself is arguably enough to discourage irresponsible journalism, even where the burden lies with the claimant. After *BCA v Singh*, the journalistic community will undoubtedly take greater care over its words in order to avoid the hassle and cost of a similar claim. This point is to be given extra weight when we consider that the BCA is bringing its claim against Simon Singh personally, not the *Guardian.* The effect of a threat of a claim of this kind on the psyche of a journalist threat is significant. Furthermore, for writers publishing longer works such as features or biographies, it is enough for them to have to consider every possible interpretation of their words they use in order to avoid potential libel. The 'chilling effect' of potential claims works sufficiently with the burden on the claimant, especially with the threat of being sued personally. The only added effect of the burden where it stands is to stifle free and open writing, and thus to reduce the quality of journalism in this country.

Second, in conducting research for this essay, it was difficult to find any journalism supporting the idea of the burden resting with the defendant. Evidently, the media

have an interest in suppressing any measure which may compromise the law on freedom of expression, which may help explain the dearth of journalism in favour of the current law on defamation. However, one of the more significant arguments in support of the current law concerns the nature of reputation. Once a defamatory article has been published, it is very difficult – despite compensatory remedies - for the defendant to shed the stigma entirely. Even if the claim succeeds, the defendant is vindicated and damages are successfully awarded, the claimant's reputation is unlikely to be restored to the state it was in before the material was published (not to mention the ensuing publicity of a libel claim). Because of this, it may be argued, the law of defamation works best erring on the side of caution, and this is best achieved by requiring defendants to prove the truth of any defamatory claims they may publish. The resulting 'chilling effect', it may be said, is the unfortunate but necessary price to pay for the effective protection of reputation.

However, in response it is enough to cite the recent liberal trend in defamation common law, developed in cases stemming from *Reynolds v Times Newspapers Ltd*[13] such as *Bonnick v Morris*[14], *Jameel v Wall Street Journal Europe*[15], and *Seaga v Harper*[16]. These cases recognize what Lord Bingham labelled the "liberalising intention of the *Reynolds* decision"[17]. They give greater weight to the development of responsibly conducted journalism, which represents an extensive broadening of the defence of qualified privilege. This is a movement towards greater compliance with Article 10 of the European Convention on Human Rights. Article 10 is especially important to the kind of free and open society which the European Union exists to

[13] [1999] 3 All ER 961
[14] [2003] 1 AC 300
[15] [2005] EWCA 74
[16] [2009] UKPC 26
[17] *Jameel* [2005] EWCA 74(35)

promote. The free flow of information, as the cornerstone of a democratic society, must be encouraged as much as possible whilst maintaining a balance with the protection of reputation. In keeping with the 'liberalising intention' of the *Reynolds* case law, the shifting of the burden of proof to the claimant would represent more clearly the notion that the right to freedom of expression is the 'starting point', which may then be qualified for the protection of reputation; not the other way round.

Third, the question might be asked of the proposed reform, "Would special use of damages not do the job just as well?" To return to the example of BCA v Singh: if the case goes to trial and, as would then appear likely, the BCA emerges victorious, would awarding them nominal damages suffice to discourage future claims of this kind? In *Grobbelaar v News Group Newspapers Ltd*,[18] the claimant won his libel action but had destroyed his own reputation through his conduct before and during the trial. Nominal damages of £1 were awarded and he was ordered to pay the defendant's costs despite the success of his claim. Even if the BCA win their case, the value of their reputation - like that of the defendant in *Grobbelaar* – will be negligible and nominal damages would therefore seem appropriate. Using damages in this way, the courts would send out the message that even if a claimant is formally correct to bring his claim, the defamation law must not be used as a tool for managing publicity.

This would be an attractive way of reaching a satisfactory result should *BCA v Singh* go to trial. However to use damages in this way would not be attacking the problem at its root. Subsequent common law decisions, without the aid of new legislation, could perhaps be relied upon to develop the principle of discouraging the misuse of libel

[18] [2002] 1 WLR 3024

law. This provides little guarantee of effectiveness: as noted by Eady J in a speech used as part of a government consultation process on libel,[19] the common law on Articles 8 and 10 of the Convention, when left to develop without the aid of new legislation, has not developed as some have desired, and perhaps a "legislative 'nudge' may after all be required"[20]. A simple legislative nudge such as the reversal of the burden in libel cases would resolve the current problem of misuse with greater certainty than an anticipated development of the common law based on one possible outcome of *BCA v Singh* or similar cases. It would also save future defendants the trouble of being dragged through trials while the common law undergoes an inevitable teething stage of development. With the burden on the claimant, prospective claimants would think more carefully before committing to a libel claim. The use of libel law as a publicity management tool would thus decrease. Where libel law is currently too easy to use actively – as in *Singh* – to manage negative publicity, it would be used only defensively for its original purpose as a tool for the protection of reputation.

Finally, the English law on libel is currently the subject of much international criticism[21][22][23]. 'Libel tourism' has become popular in this country because of the ease of bringing a claim in our courts and the high chances of success relative to other common law jurisdictions. The reverse burden of proof makes it easier for claimants to abuse our libel law, and this generates poor publicity for our courts at the

[19] Sir David Eady, speech given in House of Lords as part of Department for Culture Media and Sport Select Committee consultation process on Press Standards, Privacy and Libel [7] 18 February 2009 <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcumeds/memo/press/uc7502.htm>
[20] ibid
[21] Richard Alleyne, 'British libel laws stifle free speech, claims UN', *Daily Telegraph* (London) 14 August 2008 < http://www.telegraph.co.uk/news/2556244/British-libel-laws-stifle-free-speech-claims-UN.html> accessed 5 October 2009
[22] Alan Rusbridger, "A Chill on 'The Guardian'", *New York Review of Books* (New York) January 15 2009 http://www.nybooks.com/articles/22245 accessed 5 October 2009
[23] Emily MacManus, 'Will British libel law kill net free speech?', openDemocracy 27 March 2009 <http://www.opendemocracy.net/article/email/will-net-free-speech-survive-british-libel-litigation>

international level. A replacement of the old legislation with a new law act would help improve both the domestic and international reputation of English defamation law.

That concludes this proposal for a reform of the English defamation law. While there are strong arguments on both sides, placing the burden on the claimant would ultimately make for a more efficient law which would also suffer less misuse of the kind outlined above. Reforms on costs in libel trials and the 'multiple publication rule' are already under consideration by the Ministry of Justice[24][25]. It would therefore be convenient to incorporate the proposed reform on burden, along with any other necessary reforms, in a new act superseding the Defamation Act 1996.

Word Count 2,613

[24] 'Controlling Costs in Defamation Proceedings', Ministry of Justice 24 September 2009 <http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm>
[25] 'Defamation and the Internet: the Multiple Publication Rule', Ministry of Justice 16 December 2009 <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>