



## Exploring the Law

### *Privacy Laws and The Media*

#### **Opening sequence:**

"The truth, the whole truth and nothing but...How does the defendant plead? Not guilty! Everyone, no matter how rich or poor has the right to sue if they've been defamed or...No one should be scared of making a reasonable criticism of a company in case they get sued for libel. Guilty!"

#### **Gary Slapper:**

Hello! I'm Gary Slapper, Professor of Law at the Open University, and with me is Frances Gibb, Legal Editor of The Times. In 2010 the tennis player, Robert Dee, sued a British newspaper after it said that he was the 'world's worst tennis pro'. A defamatory statement is a false statement which tends to lower a person in the estimation of right thinking people generally. Frances, do you think that it's too easy now for people to sue for defamation in Britain?

#### **Frances Gibb:**

I think it is. I think there's been a big change from where we were a few years ago. You could argue a few years ago that it was almost impossible for people to bring libel cases, that newspapers and the media held all the cards. For a number of reasons I think it's gone the other way.

#### **Gary Slapper:**

Some would say there is a big responsibility on large organisations whose broadcasts or publications can change the world and affect greatly the way that life works. So a responsibility on those organisations to be careful about what they say about other people and other organisations, so hence the law of defamation. But there needs to be a balance doesn't there? Between the right of free speech and the way that the organisations behave.

#### **Frances Gibb:**

There does. I mean the media hasn't always been entirely responsible and I think for that reason there's been a lot of public support for the growing law of privacy. That's been one of the big changes in recent years. Really encouraged by European court cases, and in particular the Human Rights Act now being in law in this country. And it's highlighted that people can bring claims successfully against newspapers for invasions of privacy. That's been one big development.

#### **Gary Slapper:**

The Court of Appeal in 2010 eventually sided with the case of the science writer, Simon Singh, who had been sued by the British Chiropractic Association after he criticised them in a newspaper article and the debate in that matter seemed to swing on how far it's legitimate for a member of the public to write critical things about a large organisation, without being open to personal action for defamation. What did you think about the balance of that case?

#### **Frances Gibb:**

That case was absolutely terrifying in many ways. Although Simon Singh actually did win in the end, it cost him I think £200,000. So that can't be right. The Court of Appeal got it right in the end and they said, we can't have people not able to express opinions, and that the answer to an opinion being expressed that people don't like is not to kind of chill it down but to have more debate. And I suppose it must have had quite an impact in your area Gary, in academia, as well as just in the general free speech debate - that case.

**Gary Slapper:**

Yes absolutely. There have been several cases now in which academic writers have sought to criticise medical techniques, medical devices, pharmaceutical products, and have been sued for defamation in the UK by American corporations. You would have thought that, as you say, and the Court of Appeal said in the Singh case, that the antidote to something false being said or allegedly false against a company, is for the company to use its often very considerable resources, to contradict the lie against it, in the public domain, with supporting proof and to enter into the spirit of free public debate. Not to try to extinguish debate by going personally after someone who has been the critic.

**Frances Gibb:**

No. The most outstanding example of that was quite a few years ago, wasn't it? When the whole libel arena was very, very different and it was that classic case of the so called McLibel Two. The two unwaged protestors who were sued by the might of the McDonald's corporation, over various leaflets that these two had distributed and of course you will remember, that turned into the longest trial in British history I think.

**Gary Slapper:**

Yes. And often I think these cases play it with the law of unintended consequences. That the detriment that the company, the suing company suffers as a result of being a claimant, is worse than it would have suffered if it had remained quiet or had tried to resolve the matter in a different way.

**Frances Gibb:**

That's right. It was a real cautionary tale wasn't it, in that one? Because although the protestors didn't win, well they won on a few points but I think overall McDonald's probably won more points. The publicity and the whole thing rebounded on them to a great extent.

**Gary Slapper:**

Absolutely. And as the Court of Appeal said in the Singh case, that the scientific controversy should be better settled by the methods of science, rather than the methods of litigation, that a crucible of a law court isn't the best place to resolve complicated scientific debates. And anyway, science is, well like many other human subjects, a dynamic phenomenon. It changes all the time and the debates become richer for being more open and multi parties and it's not a good idea to try to sort this out in a single ...

**Frances Gibb:**

In the law court. No. But what I think is really interesting, is why we've got this change, and why I think the media and newspapers and so on are now on the back foot, whereas before newspapers and the media were the ones who were regarded as holding all the cards. It's now, I think, gone the other way. And I think it's a number of things. Apart from the rise of privacy law it's now easier for people because of the no win, no fee arrangements that we get, and that didn't exist in the days of course when the McLibel Two were fighting, there is no legal aid for libel, and there were no other sources of funding for people. But now, a number of law firms have really made their name by bringing these actions with massive uplift on their fees if they win.

**Gary Slapper:**

What was then the outgoing government at the beginning of 2010, tried to have the law changed in line with the Jackson Review by saying that instead of solicitors being able to charge 100% uplift on their normal fee, it should be capped at 10%.

**Frances Gibb:**

That's right, yes. Interestingly the coalition government, about the one piece of legislation they have pledged themselves to, is reforming the laws of libel. And I think every party was signed up to that before the election, just to remedy the scales I think really. Maybe to cap these no win, no fee arrangements as you say, at 10%. But also I think, very important, which would also help adjust the scales, to have a statutory defence of public interest, which doesn't exist. There is case law, but there is no defence in law, whereby the newspapers or the

media can say, it was in the public interest and this is what we're going to argue and here it is in law.

**Gary Slapper:**

Because the public interest I think would arguably include the contribution to debate of people who are saying something which is interesting and highly critical that might over history turn out to be wrong but was an interesting thing to have had as part of a stimulant to the discussion. If you look back over the history of different scientific or philosophical debates, you always find that these things are better for having a variety, a diversity of viewpoints. If people have to absolutely prove the correctness of everything that they're saying, before they enter into discussion, it impoverishes debate. That's a different thing from recognising that someone who is personally injured by a falsehood which brings them into disrepute. A sort of standard that old fashioned definition of defamation should clearly have a right to sue and should be compensated. And that the person who is libel should be known to be libel in the public domain. I think those things are very different.

**Frances Gibb:**

Obviously there has to be responsibility. I think newspapers know that and at the moment there is the so called Reynolds Defence. This is the nearest we've got at the moment after a case involving the former Irish premier. But it is quite hard to fulfil the Reynolds criteria. So I think that's why it's important to put that into statute. But there are other things that are floating around that I think would help as well, like perhaps some sort of curb on the use of these super injunctions. These are injunctions against the press or preventing publicity about a case or a person. And you can't even talk about the existence of the injunction. And that seems to be on the increased, which is alarming.

**Gary Slapper:**

Yes, I think that came to light dramatically in one case where an oil company had sought to extinguish the debate in parliament, and to prevent reporting of a question that had been asked in the British parliament about an action, which was subsequently withdrawn. But which demonstrated the lengths to which some companies will go in order to have debate cut. Whereas the public interest is surely in most instances in debate remaining open, with the continuing right of any person who thinks that they've been aggrieved to have an opportunity to correct the error against them.

**Frances Gibb:**

Yes. I think there's been a worry about judges being perhaps prepared to grant these too readily. And along with that worry has been the worry that judges are too much in favour of privacy laws, and perhaps a little bit anti jury. Because there's a current case at the minute going through, involving the bodyguard of Michael Jackson, former bodyguard, which is a libel action he's bringing against Channel 4. And in that case, which is not a particularly complex case, it's been ruled that there can be no jury. Which is discretionary in libel cases, but you would have thought in that case there was a fairly good argument to have a jury. And I think people are alarmed thinking is this a move towards the end of juries in libel actions?

**Gary Slapper:**

It's difficult to justify the determination of an issue in the public interest, if you're excluding the public from discussing that very point.

**Frances Gibb:**

That's right.

**Gary Slapper:**

Thank you very much for an interesting discussion. Frances Gibb.

Closing Announcement:

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