Goodbye libel, hello privacy

The growth in privacy claims could spell a new boom in damages, says **David Hooper**

Fewer libel actions are being brought as litigants and their advisers grasp the risks of suing over reputation. Vast tax-free bonanzas are a thing of the past; 1991 was the high-water mark. Few claimants now get more than £100,000; most settle for £20,000 or less. Libel courts are still busy, as long-running cases such as *Irving v Penguin Books* show.

Juries will, given half a chance, award thumping damages against media defendants of whom they disapprove. Witness the recent £105,000 awarded to Victor Kiam against *The Mirror*'s discredited City Slicker journalists, and the £375,000 awarded to ITN and two of its journalists against *LM* magazine. After being told by the judge not to award more than £150,000 to each journalist, the jury returned to ask if it was possible to award more if they threw in some aggravated damages.

Changes in the law and related procedural rules have made it easier to bring claims, particularly if damages are capped at £10,000. Claimants can enter into "no-win, no-fee" agreements with their lawyers. From Saturday, under the Access to Justice Act 1999, successful lawyers operating under conditional fee agreements can recover from defendants not only their normal fees, but an additional success fee of up to 25 per cent to compensate for the risk of underwriting the case, plus the claimant's insurance premium against having to pay the defence costs if he lost.

As claimants' lawyers tend to offer conditional fee arrangements only for near-certain winners, this is likely to be a bonanza for plaintiff lawyers and to increase yet further the costs of libel litigation — scarcely what this liberalising measure intended. Also next month the fast-track and summary trial procedures established by the Defamation Act 1996 come into force. If you limit your damages to £10,000, you can have a speedy, less costly trial by judge alone. Increasingly, judges will control the conduct of libel actions and, where possible, deal with actions summarily and without a jury. Reduction of legal costs will open the doors of the libel courts to the less well-off. Parties will be encouraged to disclose more about their case with libel law's belated adoption of pre-action protocols. But there will be increasing pressure on media defendants to produce their defence quickly. Defendants will have to decide whether to contest cases or pay the modest damages requested.

Defending libel actions has been made easier by the decisions of the House of Lords in the Derbyshire County Council and Reynolds cases — both notable successes for Times Newspapers. The Derbyshire case established the importance of Article 10 of the European Convention on Human Rights and freedom of speech and put an end to the nonsense of an authority suing for damage to its governing reputation. Reynolds greatly widened qualified privilege and the ten criteria laid down by Lord Nicholls of Birkenhead make it very difficult for a claimant to assess how a particular court will rule on qualified privilege.

A growth area is likely to be in the realm of e-mail rather than the Internet. In the absence of US legislation such as the Communications Decency Act 1995 protecting Internet service providers (ISPs) when they publish hoax messages about a person selling T-shirts glorifying the Oklahoma bombers, British ISPs will have to remove libellous messages once they are put on notice. E-mail, with its pernicious ease of circulation, is more problematical. Last year British Gas paid £226,000 in damages and costs when it circulated an e-mail falsely accusing a competitor of misusing confidential information

The lessons of the past decade seem to be these. The media are fighting back. Newspapers have a good prospect of winning. In 1988 Michael Meacher's loss of his action against *The Observer* was the press's first victory since the *Daily Mail* overcame the Moonies in 1981. Nowadays politicians fare particularly badly against the media. Neil Hamilton and Jonathan Aitken were the victims of their hubris, David Ashby of his inability to see how others would view him. Being the member of an unpopular party was enough for Paul Judge, the Director-General of the Conservative Party, to lose his case against *The Guardian* and for the jury to disagree in the action of the Tory MP Bill Cash against the *Sunday Mirror*.

Any shibboleth of libel law such as the burden of proof or absence of any requirements to prove damage can be challenged by reference to Convention case law, and the libel landscape may look very different in a few years. Claimants will do well to remember that skeletons fall unexpectedly out of cupboards in high-profile libel cases and to examine their past in uncomfortable detail. The actress Gillian Taylforth was undone by the production of an over-exuberant video of her behaviour at a party, and the journalist Jani Allan by the disclosure of an all-too-frank diary. With their powers under Section 7 of the Defamation Act 1996, courts take a more interventionist approach on what words mean and do not hesitate to throw out cases where the alleged libellous meaning appears convoluted, albeit untrue. So Jessye Norman's complaint about "Honey, I ain't got no sideways" and the *Neighbours* stars Ann Charleston and Ian Smith's complaint about their heads being superimposed on a pornographic photo fell at this hurdle.

The libel boom may be over but watch for a rise in conditional fees litigation, fast-track libel claims and a growth of privacy claims, where damages may exceed those in libel actions.

● *The author is a solicitor with Biddles and author of* Reputations under Fire: Winners and Losers in the Libel Business, *Little, Brown, £25.*

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Jessye Norman: "Honey, I ain't got no sideways"