

Antony Whitaker

# It could be you: a sure-fire way to lose a million

Most lotteries are unlawful. Libel litigation is a lottery. So libel litigation should not be allowed. A triangular fallacy no prosperous libel lawyer would countenance for a moment, though his ruined client might take a different view. "The pitfalls of libel" — chapter 11 of this colourful and amusing survey of the law — should be required reading for anyone contemplating a libel action unless he can afford to lose, at today's rates, about £1 million of his own money (legal aid has never been available). Actions that look promising at the start can all too easily go unforeseeably and disastrously wrong; and when they do, the only route to extrication is for the plaintiff to withdraw and pay his own and the other side's costs.

The sad and sorry tale of how Frank Skuse, the forensic scientist accused of negligently misrepresenting the effect of his nitroglycerine test, who eventually dropped his case facing a bill of nearly £290,000, is a chilling example. David Hooper observes that people are usually not obliged to sue for libel and

soundly advises that both the expense involved and the fact that many libels are soon forgotten are extremely good reasons for not suing.

This book has a place in the lawyer's office as well as on the home bookshelf, if only because the tables at the back of figures awarded, and when, provide an additional and possibly speedier route to case identification where the names of the parties have been forgotten but the size of the award is remembered.

It comes at a particularly appropriate moment, when the remaining parts of the 1996 Defamation Act, streamlining and reshaping some of the remedies available, have just been brought into effect, and the benefits of the qualified privilege defence recently endorsed by the House of Lords in the Reynolds case are being explored. Combined with the recent Woolf reforms of civil procedure generally, they should make the law more user friendly for litigants.

The final chapter, "Libel in the

new millennium", looks to the future, and covers problems arising out of libel on the internet, libel insurance, expansion of the Reynolds defence, and the implications of the Human Rights Act, due to come into force in the autumn.

The book is more one to be dipped into than read from cover to cover (much as my school housemaster advised that Machiavelli's *The Prince* should be consumed "like vintage port, in small doses"). Tightly written, with heavily compressed arguments and explanations, it requires a focused reader, and one wonders just how much of the wry humour will be understood by non-lawyers.

Robert Maxwell, the "libel terrorist", inevitably has a chapter to himself, where his notoriety as a blustering and blood-thirsty bully is almost lovingly portrayed. My own experience in the *Scottish Daily News* litigation he launched against *The Sunday Times* left me with an image of Captain Hook and the crocodile rolled into one, with the

alarm clock ticking away inside until, years later, he walked his own plank into the ocean.

A megalomaniac self-publicist, Maxwell cast his shadow across every item of potentially critical copy that crossed one's desk in those faraway days when the Reynolds qualified privilege defence, which would certainly have seen off many of his noisier protests, had not even been dreamed of. But despite the sound and fury, he never pressed any of his claims against *The Sunday Times* to court, any more than those he launched against *The Bookseller* and Tom Bower.

A number of libel records were broken in the David and Goliath action brought by McDonald's against two courageous but penniless environmental campaigners. They had issued a leaflet criticising the company's business practices and the food industry in general, focusing on people's health, employees' rights, animal welfare and marketing methods. The action started in September 1990, and judgment was finally given in June 1997. Although McDonald's won a points victo-

ry, it was, as Hooper rightly points out, a public-relations disaster for them. The evidence spanned two years; the judge — there was no jury, inevitably — had to spend six months on his 762-page judgment; by March 1995 it had become the longest libel action; the longest English civil case by December 1995; and the longest English trial by November 1996. Hooper estimates that McDonald's overall trial costs would have exceeded £10 million. Most barristers rejoice at the prospect of a long trial on a well-paid brief and daily refresher fee, but was Richard Rampton QC, McDonald's counsel, pleased or depressed that his three or four-week estimate for the case turned out to be but a drop in the ocean? After the case had been going about a year, I met him one lunchtime outside the law courts. My suggestion that he might care to join me for a hamburger was politely, but jovially, refused.

No one understood better than the judge just how perplexing and illogical for the layman this branch of the law can be. Towards the end of the case he commented: "The law of defama-

tion has grown up in its own special way over the last 150 years, and whereas in ordinary negligence claims, if you don't know what the law is you can say what you think is sensible and there is a 90 per cent chance of you being right, I'm not sure the percentage isn't the reverse of that in the law of defamation."

It seems unlikely that the volume of libel litigation will reduce to any significant degree, because the media will continue to investigate those whose cupboard skeletons reveal them as hypocrites. Watching the spin of the wheel redistribute other people's wealth is a fascinating and absorbing pastime, whatever *schadenfreude* it generates. For that reason one hopes that future editions of this book will continue to chronicle colourful courtroom dramas as they unfold.

To conclude, a small point for the next edition: in *Holley v. Smith* in 1997 it was the plaintiff and not the defendant, as stated who had to prove the fraud allegations to be plainly untrue if he were to obtain an injunction.

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