Digital journalism in a chilly climate? A view from England & Wales

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A chilly climate?

Defamation’s ‘chilling effect’
Mapping the social articulation of a legal concept

Legal origin
The concept of the ‘chilling effect’ was developed in First Amendment cases in the US, but has spread to other jurisdictions to describe an illegitimate threat to freedom of expression in defamation cases.
- Schauer (1980) notes how, “limited by the fear of punishment, some individuals refrain from saying or publishing something that which they would do and, indeed, should
- UK and European courts have also recognised such a ‘chilling effect’ on legitimate expression. (See, for example, Defamation, Court of Appeal, 23 May 2006)
- Some have argued that the chilling effect is contrary to the public interest for a local authority to sue for libel
- Documented by legal scholars through case law and limited empirical evidence

Social articulation
Used in a variety of contexts, but mainly in relation to defamation law.
- In 2018, the Defamation Public Affairs suggests that many cases where authors have decided not to pursue or proceed with a case due to the threat of defamation litigation due to emotional and inappropriate judicial restrictions
- Substantively defined: varying weight placed on competing rights, depending on circumstances and an individual’s opinion

Recent usage
The Liberal Inquiry’s ‘Defamation’ paper notes that there is a chilling atmosphere following the decision of a number of cases where journalists have been awarded substantial sums of money

Can the ‘chill’ be measured?
To illustrate this point, the chilling effect is used to evaluate the Defamation Bill. The passage of the Defamation Bill in Parliament highlighted the problematic chilling effect.
- Parliamentary committee reports indicated an absence of data
- Court records not available for full analysis
- Media organisations (albeit disproportionately) lack records
- Law firms’ chambers: Report on outcomes in cases decided through media
- Claimants’/Defendants: Some plagiarism reporting, on personal blogs, in media, through representatives

Transparency reports
Google and Facebook have begun to track online content removals, by publishing transparency reports [2016], showing that there is limited detail given about incidents and methodologies.

@jimmywook
#6:46 PM - 14 Nov 2015

Relevance to socio-legal study
The absence of data about the chilling effect and information law to indicate of any sensible information about other areas of civil law— for example, breach of confidence and privacy— This inhibits academic and policy analysis. This is the importance of defamation research, supplemented by a dearth of information about comparable cases, out of court settlements and judicial processes.

Recommends
- In order to improve our understanding of the chilling effect, we need more data collection.
- The impact and nature of a proposed annual, anonymised data from media organisations to help improve arbitration procedures, and inform policy makers
- Ministry of Justice and its Major Court Studies Service (H4727) should make public court records more accessible to researchers and journalists, and begin to aggregate and aggregate data of court

Recommendations
- Academic and researchers could develop a researching tool similar to the Online Media Legal Network at Harvard University’s Berkman Center for Internet and Society, which would publish data on data and judicial threat of action

[Image of graphs and tables]

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Emerging themes...

1. Methodological challenges for measuring the chill
2. The application of the chilling effect to privacy law, as well as libel
3. The implications of the Defamation Act 2013 (and costs reform / post-Leveson regulation)

No. 1 makes the study of number 2 & 3 very difficult
The chilling effect defined

‘deterred by the fear of punishment, some individuals refrain from saying or publishing something that which they lawfully could, and indeed, should’ (Schauer 1978)

‘an illegitimate threat to freedom of expression through “unnecessary and disproportionate” legal restrictions’ (Libel Reform campaign 2009)
How to map the chill?

The chill is subjectively defined, with varying weight placed on competing rights, depending on the nature of publication and an individual’s opinion.

To measure - or map - the chilling effect we should attempt to identify criteria that define illegitimate threats, looking at:

- Actual litigation experiences
- Threats of action and the outcomes of these threats
- Anticipated threats of legal action
Courts data – cases in courts and claims – represent only a fraction of legal disputes: the ‘tip of a very large iceberg’ (Barendt et al, 1997)

Pic (Photomontage): [Wikimedia commons](https://commons.wikimedia.org)
## Defamation claims

<table>
<thead>
<tr>
<th>Year</th>
<th>Claims issued in London (QB)</th>
<th>Defamation claims issued in London</th>
<th>% of all London (QB) claims issued</th>
<th>£15-50k</th>
<th>£&gt;50k</th>
<th>No value stated</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Not yet available</td>
<td>Not yet available</td>
<td>Not yet available</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>5,549</td>
<td>186</td>
<td>3.35</td>
<td>65</td>
<td>60</td>
<td>61</td>
</tr>
<tr>
<td>2011</td>
<td>4,726</td>
<td>165</td>
<td>3.49</td>
<td>28</td>
<td>61</td>
<td>76</td>
</tr>
<tr>
<td>2010</td>
<td>4,864</td>
<td>158</td>
<td>3.24</td>
<td>27</td>
<td>47</td>
<td>84</td>
</tr>
<tr>
<td>2009</td>
<td>5,694</td>
<td>298</td>
<td>5.23</td>
<td>52</td>
<td>62</td>
<td>184</td>
</tr>
<tr>
<td>2008</td>
<td>5,173</td>
<td>259</td>
<td>5</td>
<td>43</td>
<td>77</td>
<td>139</td>
</tr>
</tbody>
</table>

Updated from table originally compiled by Jaron Lewis ([Inforrm 2011](#)), based on MoJ annual statistics.
Defamation claims 1992-2012
Defamation cases

• ‘There is no official collection of figures relating to the number of defamation cases that reach full trial or on the number of pre-trial hearings in defamation cases’
• ‘Data are not collated centrally on the outcomes of defamation claims issued in court’
• ‘...no reliable data on the number or outcome of cases that do not reach court, including damages and costs paid’
• MoJ was not able to obtain information ‘on the amount spent by media organisations and others on legal advice to help them make decisions about whether to publish, challenge or defend a challenge’

*Impact Assessment on Defamation Bill (2012)*
### (Official) Data guesstimates

#### Volume in 2010

<table>
<thead>
<tr>
<th>Claims issued</th>
<th>Judgment by default</th>
<th>Summary judgment</th>
<th>Trials concluded</th>
<th>Interlocutory applications for Masters</th>
</tr>
</thead>
<tbody>
<tr>
<td>All claims in RCJ</td>
<td>4,864</td>
<td>1,190</td>
<td>269</td>
<td>182</td>
</tr>
<tr>
<td>Defamation claims</td>
<td>158</td>
<td>39</td>
<td>9</td>
<td>6</td>
</tr>
</tbody>
</table>

**If similar to all claims**

Claims issued in the Queen’s Bench Division of the High Court at the Royal Courts of Justice.

Source: Judicial and Court Statistics (2010), Ministry of Justice.

*ibid* para 2.56, 32.
First 22 cases of 154 libel and privacy claims against the media resolved by settlement or judgment in 2008, detailed in Appendix 17 of Lord Justice Jackson’s review of civil litigation costs (Preliminary Report 2009)

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Type of case</th>
<th>Result</th>
<th>Defendants’ costs</th>
<th>Sums paid to Claimant</th>
<th>CFA?</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Damages</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£557,750</td>
<td>£2,033,145*</td>
<td>Y</td>
</tr>
<tr>
<td>2.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£1,438,980</td>
<td>£1,700,000</td>
<td>Y</td>
</tr>
<tr>
<td>3.</td>
<td>Libel</td>
<td>Trial – won by Claimant</td>
<td>£572,023</td>
<td>£1,076,381*</td>
<td>Y</td>
</tr>
<tr>
<td>4.</td>
<td>Libel</td>
<td>Trial – won by Claimant</td>
<td>£687,801</td>
<td>£670,000</td>
<td>Y</td>
</tr>
<tr>
<td>5.</td>
<td>Privacy</td>
<td>Trial – won by Claimant</td>
<td>£416,177</td>
<td>£60,000</td>
<td></td>
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<tr>
<td>6.</td>
<td>Libel and Privacy</td>
<td>Settlement</td>
<td>£77,435</td>
<td>£368,000</td>
<td>Y</td>
</tr>
<tr>
<td>7.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£101,114</td>
<td>£356,606*</td>
<td>Y</td>
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<tr>
<td>8.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£115,420</td>
<td>£326,207*</td>
<td>Y</td>
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<tr>
<td>9.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£38,460</td>
<td>£286,001*</td>
<td>Y</td>
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<tr>
<td>10.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£70,549</td>
<td>£215,000</td>
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<td>11.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£33,604</td>
<td>£200,000</td>
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<tr>
<td>12.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£79,530</td>
<td>£200,000</td>
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<td>13.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£49,411*</td>
<td>£188,000*</td>
<td>Y</td>
</tr>
<tr>
<td>14.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£78,900</td>
<td>£167,090</td>
<td>Y</td>
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<tr>
<td>15.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£0</td>
<td>£100,000</td>
<td></td>
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<tr>
<td>16.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£49,095</td>
<td>£91,000</td>
<td></td>
</tr>
<tr>
<td>17.</td>
<td>Libel and Privacy</td>
<td>Settlement</td>
<td>£10,024</td>
<td>£82,000</td>
<td></td>
</tr>
<tr>
<td>18.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£57,856</td>
<td>£38,191</td>
<td>Y</td>
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<tr>
<td>19.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£2,139*</td>
<td>£36,318*</td>
<td>Y</td>
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<tr>
<td>20.</td>
<td>Libel</td>
<td>Offer of Amends</td>
<td>£176</td>
<td>£32,000</td>
<td>Y</td>
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<tr>
<td>21.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£17,000*</td>
<td>£45,000</td>
<td>Y</td>
</tr>
<tr>
<td>22.</td>
<td>Libel</td>
<td>Settlement</td>
<td>£6,545</td>
<td>£44,354</td>
<td>Y</td>
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</table>
Research surveys 2013

In 2013 I carried out a number of online surveys among digital journalists and online writers based in England and Wales, asking about their experiences and perceptions around defamation and privacy-related civil litigation.

Quantitative findings are tricky to verify, but help indicate general patterns of behaviour and perception. The qualitative findings from open-ended questions (participants’ comments and observations) help provide greater insight into the complex notion of the ‘chilling effect’.

Findings to be published in early 2014.
Post-Leveson arbitration plans

22. The Board should provide an arbitral process for civil legal claims against subscribers which:

a) complies with the Arbitration Act 1996 or the Arbitration (Scotland) Act 2010 (as appropriate);
b) provides suitable powers for the arbitrator to ensure the process operates fairly and quickly, and on an inquisitorial basis (so far as possible);
c) contains transparent arrangements for claims to be struck out, for legitimate reasons (including on frivolous or vexatious grounds);
d) directs appropriate pre-publication matters to the courts;
e) operates under the principle that arbitration should be free for complainants to use;
f) ensures that the parties should each bear their own costs or expenses, subject to a successful complainant’s costs or expenses being recoverable (having regard to section 60 of the 1996 Act or Rule 63 of the Scottish Arbitration Rules); and

g) overall, is inexpensive for all parties.

23. The membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different types of publisher.

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Deleted: (‘the Act’)
And just who is a ‘relevant publisher’?

Leveson and press self-regulation

Are you a relevant publisher?

Start

Does your publication contain ‘news-related material’? This means news, opinions about news or gossip about celebrities or other public figures.

Yes ➔ No

Does your publication have more than one author?

Yes ➔ No

Is it published “in the course of a business”? Are you carrying out commercial activity?

Yes ➔ No

Is your publication under editorial control? This means that someone decides what the articles are about, what they say and how they look.

Yes ➔ No

Is your publication a blog?

No ➔ Yes

Is publishing news the main focus of your business? For example, your business is mainly about news rather than a bit of news on a website that largely covers something else.

No ➔ Yes

Do you have 10 or more employees and an annual turnover over £2m?

Yes ➔ No

Key

This is not legal advice

This is a guide to help you understand the relevant publisher definition

www.gov.uk/dcms

You’re probably not a relevant publisher, based on your answers.

You may be a relevant publisher, based on your answers. However, there are other exemptions such as charities publishing news connected to what they do, special interest titles, scientific journals, and companies publishing news about their activities.

Department for Culture
Medias & Sport

Leveson and press self-regulation

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Department for Culture
Medias & Sport
Research questions for 2014+

• Will a new arbitration system reduce or heighten a perception of the ‘chill’?

• What effect will a new arbitration system have on the number and type of defamation and privacy cases?

• What effect will the reforms of the Defamation Act 2013 have on the number and type of claims brought against journalists and digital publishers?

• What effect will cost reforms have on journalists’ and digital publishers’ perceptions of the chill?
Research development

• Scope for a more sophisticated interdisciplinary approach to provide clarity around the ‘chilling effect’ and develop robust mechanisms to protect freedom of expression (beyond large media orgs)

• What methodologies can we use to track the impact of defamation and privacy processes across jurisdictions?
Contact

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- http://meejalaw.com