

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

Judith Townend
Centre for Law, Justice and Journalism
City University London
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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 (1978) writes how 'deterred by the fear of punishment, some individuals refrain from saying or publishing something that which they lawfully could, and indeed, should'
- UK and European courts have also recognised there can be a 'chilling effect' on legitimate expression (see, for example: *Derbyshire County Council v Times Newspapers Ltd* [1993] A.C. 534, which established that it was 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 2009, launch report for Libel Reform campaign identified various case studies where authors deemed there was an illegitimate threat to freedom of expression through 'unnecessary and disproportionate' legal restrictions
- Subjectively defined: varying weight placed on competing rights, depending on circumstances and an individual's opinion

Recent usage

The Leveson Inquiry: 'The big picture is that there is a chilling atmosphere towards freedom of expression which emanates from the debate around Leveson', Michael Gove MP

Press regulation: 'If the state is given the power to oversee or limit our work it could bring about a new ice age where the most important work we do is gone forever', Brian Flynn, investigations editor, the Sun

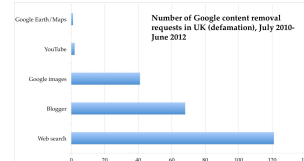
Can the 'chill' be measured?

To measure - or map - the chilling effect we need to identify illegitimate threats. The passage of the Defamation Bill in Parliament highlighted the methodological difficulties.

- Parliamentary committee reports: Indicated an absence of data
- Court records: Not available for bulk analysis
- Media organisations: Do not disclose (or keep?) full records
- Law firms / chambers: Report some outcomes on own sites or through media
- Claimants / Defendants: Some piecemeal reporting - on personal blogs, in media, through representatives

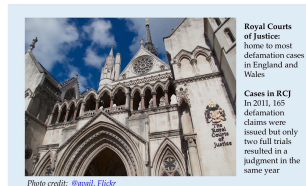
Transparency reports

Google and Twitter have begun to track online content removal, by country, across different legal categories, including defamation - but there is limited detail given about incidents and methodology.



Judith Townsend, PhD candidate
Centre for Law, Justice & Journalism
City University London

Contact details
• Email: judith.townsend.1@city.ac.uk
• Twitter: [@jtownsend](https://twitter.com/jtownsend)



Royal Courts of Justice: home to most defamation cases in England and Wales

Cases in RCJ
In 2011, 165 defamation claims were issued but only two full trials resulted in a judgment in the same year

Photo credit: @swail, Flickr

Missing data

In 2012, the Ministry of Justice identified that:

- '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'
- 'It 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'

This absence of data inhibits understanding of the chilling effect, and the impact of defamation law on journalism and publishing.

Recommendations

In order to improve our understanding of the chilling effect, we need better data collection

- Ofcom and the new press regulator could collect annual, anonymised data from media organisations to help improve arbitration processes and inform policy makers
- Ministry of Justice and Her Majesty's Courts and Tribunals Service (HMCTS) should make public court records more accessible to researchers and journalists, and begin to categorise and aggregate data at source

Illegitimate threats could be tracked with the help of a media legal support network

- Academics and lawyers could develop a support service similar to the Online Media Legal Network at Harvard University's Berkman Center for Internet and Society, which would monitor letters of claim and informal threats of action

Relevance to socio-legal study

The absence of solid data about the chilling effect and defamation law is indicative of scarce information about other areas of civil law - for example, breach of confidence and privacy. This inhibits academic analysis and the development of evidence-based legal policy. Socio-legal research is weakened by a dearth of information about unreported cases, out-of-court settlements and arbitral processes.

References

- Gove, M. (2012) Speech to the Press Gallery, 21 February.
- Glavinelli, J. & Rosewood, J. (2009) *Free Speech is Not for Sale*.
- Ministry of Justice (2012) *Impact Assessment* (A No. M29 143), 1 April.
- Prescribed, D. (2012) 'Non-investigations about Robbery Act has forced us to turn away whistleblowers', *Press Gazette*, 13 November.
- Schauer, F. (1978) 'Free Risk and the First Amendment: Unraveling the Chilling Effect', *Boston University Law Review*, 58(3), pp.685-732.

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

The tip of the iceberg

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](#)

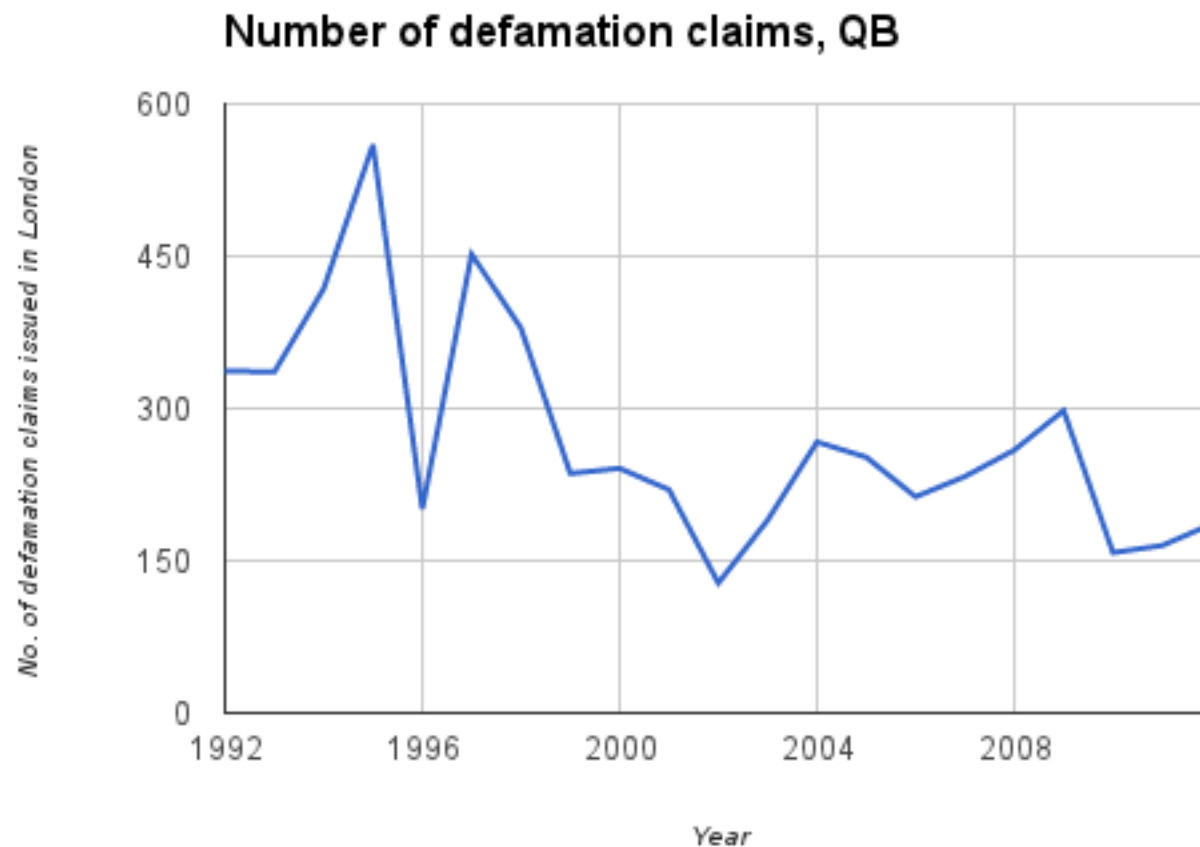


Defamation claims

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

Updated from table originally compiled by Jaron Lewis ([Inform 2011](#)), based on MoJ annual statistics

Defamation claims 1992-2012



Defamation cases

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- ‘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

	Claims issued	Judgment by default	Summary judgment	Trials concluded	Interlocutory applications for Masters
All claims in RCJ	4,864	1,190	269	182	8,113
Defamation claims	158	39	9	6	264

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.

Jackson report case data

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](#))

Case Number	Type of case	Result	Defendants' costs	Sums paid to Claimant		CFA?
				Costs	Damages	
1.	Libel	Settlement	£557,750	£2,033,145 [#]	£115,000	Y
2.	Libel	Settlement	£1,438,980	£1,700,000 ¹	£105,000	
3.	Libel	Trial – won by Claimant	£572,023	£1,076,381 ^{#2}	£30,000 ³	Y
4.	Libel	Trial – won by Claimant	£687,801	£670,000 ⁴	£85,000	Y
5.	Privacy	Trial – won by Claimant	£416,177	£420,000	£60,000	
6.	Libel and Privacy	Settlement	£77,435	£368,000	£100,000	Y
7.	Libel	Settlement	£101,114	£356,606 [#]	£125,000	Y
8.	Libel	Settlement	£115,420*	£326,207 [#]	£550,000*	Y
9.	Libel	Settlement	£38,460	£286,001 [#]	£12,500	Y
10.	Libel	Settlement	£70,549	£215,000	£50,000	Y
11.	Libel	Settlement	£33,604	£200,000	£105,000	
12.	Libel	Settlement	£79,530	£200,000	£30,000	
13.	Libel	Settlement	£49,411*	£188,000 [#]	£150,000*	Y
14.	Libel	Settlement	£78,900	£167,090	£40,000	Y
15.	Libel	Settlement	£0	£100,000	Included in costs paid	
16.	Libel	Settlement	£49,095	£91,000	£0	Y
17.	Libel and Privacy	Settlement	£10,024	£82,000 [#]	£50,000	Y
18.	Libel	Settlement	£57,856	£38,191	£25,000	
19.	Libel	Settlement	£2,139*	£36,318 [#]	£210,000*	Y
20.	Libel	Offer of Amends	£176	£32,000	£12,500	Y
21.	Libel	Settlement	£17,000*	£45,000 [#]	£110,000*	Y
22.	Libel	Settlement	£6,545	£44,354	£50,000	Y

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 use¹;
- 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 60² of the 1996 Act or Rule 63 of the Scottish Arbitration Rules³ and any applicable caps on recoverable costs or expenses); and
- g) overall, is inexpensive for all parties.

Deleted: ("the Act")

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.

¹ The principle that arbitration should be free does not preclude the charging of a small administration fee, provided that: (a) the fee is determined by the Regulator and approved by the Board of the Recognition Panel; and (b) the fee is used for the purpose of defraying the cost of the initial assessment of an application and not for meeting the costs of determining an application (including the costs of the arbitration).

² Section 60 (Agreement to pay costs in any event): *An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.*

³ The Rules are set out in Schedule 1 to the Arbitration (Scotland) Act 2010. Rule 63 (Ban on pre-dispute agreements about liability for arbitration expenses) M: *Any agreement allocating the parties' liability between themselves for any or all of the arbitration expenses has no effect if entered into before the dispute being arbitrated has arisen.*

And just who is a 'relevant publisher'?

Leveson and press self-regulation

Are you a relevant publisher?

Relevant publishers are the newspapers and newspaper-like publications that we are incentivising to join a self-regulator.

If you are not a relevant publisher then nothing changes: you carry on as you are.



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Start
↓



This is not legal advice

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

www.gov.uk/dcms

Key

● 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.

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

- judith.townend.1@city.ac.uk
- @jtownend – Twitter

- <http://bit.ly/openjustice>
- <http://lawjusticejournalism.org>
- <http://meejalaw.com>