Libel cases should be settled on their merits, and not according to the size of litigants' bank accounts

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Libel laws are not perfect but they do give people rights. **Helen Anthony** *argues that the current High Court process for libel cases has an alarming effect on free speech. Alternative methods of dispute recommendations and the introduction of a cost-cap could offer greater access to justice in defamation cases.*

Two organisations committed to freedom of expression, English PEN and Index on Censorship have spent the last year considering whether defamation claims can be resolved in a better way than by using the current High Court process. The results of the Alternative Libel Project were published this month, in which Index and PEN make their recommendations for change.

It can cost tens or even hundreds of thousands of pounds to get the court to consider a libel case on only a preliminary level, such as Apsion v Butler [2011] EWHC 844 (QB) where the claimant was awarded summary judgement and claimed £80,000 in costs. If a case proceeds to trial the costs can be over £1million.

These high costs have a chilling effect on free speech. This has been borne out by research (including by The Publishers Association and Sense About Science) which shows that editors and publishers are avoiding publishing articles and books about certain individuals or topics because of the threat of being sued for libel.

This needs to change. The libel laws are not perfect but they do give people rights and the state should offer an accessible process through which those rights can be enforced.

There are several reasons for the high cost of libel cases. High hourly rates charged by lawyers, funding arrangements which allow more than 100 per cent costs recovery, and protracted complicated proceedings all contribute. For this reason the Alternative Libel Project makes several recommendations for reform.

The first is that parties ought to use alternative methods of dispute recommendation (ADR) much more often than they do at present. We have identified three methods of ADR which we believe work effectively. Mediation, where a trained mediator helps the parties to find a mutually acceptable (and not necessarily legal) solution. In our research we found that over 90 per cent of defamation cases that were mediated settled as a result of that mediation. Next is arbitration, where the parties engage a highly experienced lawyer to make a binding decision on part or all of their case. Where parties can isolate the key barriers to settlement, arbitration on those issues leads to the resolution of the whole case.

Last is Early Neutral Evaluation, where a judge considers all the issues in the case at an early stage and offers a non-binding opinion on the outcome. If the case doesn't settle and goes on to trial, it goes before a different judge. Early Neutral Evaluation acts as a judicial reality check and is incredibly effective in other areas of law, such as in Technology and Construction Court cases. We believe it could work equally well in defamation.

Instead of compelling ADR (which is less likely to work if it is forced on the parties), the government and courts must encourage it. To do this, the Pre-Action Protocol for Defamation should be changed, and courts should impose costs penalties on those who unreasonable refuse ADR.

Alongside this, the court should be far more robust in managing cases that come before it. This is absolutely key to controlling the amount of money that can be recovered in a libel case. A precedent for good case management has been set in the Patents County Court, which introduced new procedures in 2010 with a specific mandate of keeping costs down. The judge in that court applies a cost benefit analysis to every application he receives, and users of the court seem to welcome this approach.

In addition, one very specific measure the government could take is to allow a party to apply to the court to determine the meaning of an alleged defamatory statement, independent of full proceedings. Resolving meaning is a hurdle in many libel cases, and we believe this could be examined as a stand-alone issue, giving parties a judicial decision on one key element of the case. Much like arbitration, resolving this key issue could help parties settle the entire case.

Finally, as well as significantly reducing the cost of proceedings, new funding measures need to be put in place. Litigants' biggest fear is not their own costs, but having to pay the other side's costs under the loser pays rule. We think there is a case for removing this fear by allowing parties to make an early application to the court to be protected against having to pay the other side's costs.

In addition, a costs cap ought to be introduced, so that there is certainty over the potential cost of proceedings and parties are incentivised to control their own costs to keep them within recoverable limits. The level of the cap should be set periodically by the Ministry of Justice and might bet set, for example, at the level of the average UK house price. There is no good reason why a libel trial should ever cost more than a home. This is still beyond the means of most people in this country – but it would mark a significant drop on today costs. If our recommendations on ADR are adopted, most cases will not run up costs which are anywhere near as high as the cap, but never the less a cap would be an important backstop.

As our year long project draws to a close, we hope our work has made a contribution to the debate on improving access to justice in defamation cases. We are encouraged by the response we have received from the Ministry of Justice so far. We hope that our recommendations may result in future libel cases being settled on their merits and not according to the size of litigants' bank accounts.

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Note: This article gives the views of the author, and not the position of the British Politics and Policy blog, nor of the London School of Economics.

About the author

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