

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.

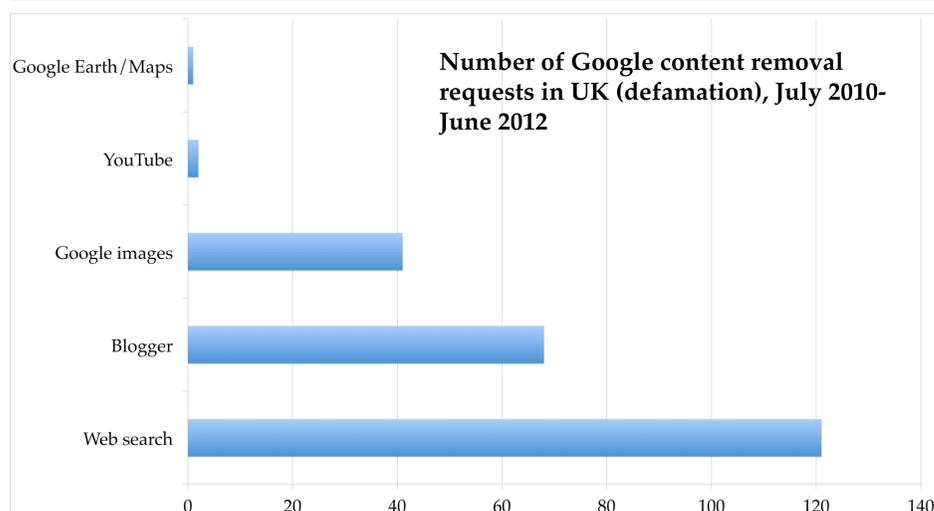


Photo credit: @avail, Flickr

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

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

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