

“ Taking down
my blog was a
tortuous decision ”

“ The
experience
was intimidating ”

So you've had a
threatening letter.

What can you do?

“ I felt that
I had little
choice but to
delete what I
had written ”

“ A lawyer's
letter is a scary
experience ”

Bloggers and libel law

This note is about English libel law for people who have been threatened with legal action for blogs, comments or articles they have posted online.

Bloggers and libel law

Libel law exists to protect people's reputation from being unfairly damaged by the publication of false allegations. English libel law is notoriously complicated, costly and skewed in favour of the person making the threat (the claimant). Reform has been promised, and if campaigners are successful, then changes may come into force in 2013 that will give online publishers and writers better defences against defamation actions.

In the meantime the current laws make a threat of libel action particularly frightening for online communities and writers. Online blogs and articles are available around the world, increasing risk of legal action from international figures. Online writers often don't have institutional support and easy access to legal advice. How you react in the first few weeks after you receive a threat is crucial in deflecting an unfounded claim or correcting something you got wrong. This leaflet is certainly not a substitute for legal advice, but it does provide information which other bloggers and writers who have been through the experience say they wished they had known at the outset.

What is defamation?

It is a public statement which lowers the standing of an individual or company in the eyes of others. Someone who thinks that their reputation has been damaged can bring a legal action against the statement's author to seek an award for damages. The libel laws of England and Wales are not fully codified. There are some judge-made laws and some parliamentary reforms, most recently the Defamation Act 1996. Libel is defamation in a permanent, recorded form and slander is defamation in an impermanent form, usually speech. Online writers and publishers will mostly be concerned with libel, although postings on a message board may be categorised as slander.

Under current court rules, libel actions are dealt with in the High Court. This sits in big cities, most frequently in London. Anyone can sue in England even if they or the person they are suing are based elsewhere or the material was written to be published elsewhere. The claimant simply has to show that they have a reputation in England (this could be a bank account, a business activity or some other connection) and that the material in question has been read in England.

You receive a libel threat...

Someone - an individual, a company or a legal representative on their behalf - writes, emails or phones you to say that something you wrote about them is libellous. They will probably want you to take down the material, and maybe to apologise, and they might threaten to pursue legal action if you don't.

Is it a real threat or a bluff?

If you receive a phone call threatening legal action, it is generally better to ask the person to set out their concern in writing. However, sometimes a phone call is enough for you to react as if you had a threat in writing. For example, if something on the internet is getting a large number of hits it is fair for the person involved to phone you to set out their claim and ask you to remove the material straight away.

The letter of claim

It could be a formal letter or an email. Your reaction to it could make a difference in any future case you might have to fight. A letter of claim will include:

- The name of the claimant
- The precise legal basis of the claim against you
- The actual words complained of
- Details of the website containing the words complained of, including the date of publication
- An explanation of why the words complained of are defamatory of the claimant
- Details of what the claimant wants you to do to resolve the issue

More usually, you would receive a letter or email. Not every letter, even one written by a solicitor, means that legal action is certain to follow. Legal action should only proceed against you after the claimant has complied with the pre-action protocol for defamation.* So a serious threat ought to start with the first step in the pre-action protocol - a letter of claim. If the threat you receive is not a letter of claim you may decide it is a bluff and choose to ignore it because legal action cannot yet proceed. This is a bit of a gamble and a lawyer would usually advise you to take any threat seriously, at least until you are sure you can defuse the situation. If it does go further, it will help your case to have reacted early. Of course, if you have got something wrong, you should correct it.

Do you take the material down or not?

A lawyer will tell you it is good practice to take the words complained of out of the public domain as soon as someone makes you aware that they consider them defamatory. This might be a temporary removal while you consider the claimant's objection and review your options.

Removal of the words is not currently required by law but if the case ever gets to court it will look better for you if you can tell the judge that you responded as soon as you were aware that there was a problem. Leaving it online may lead to a greater award of damages. Secondly, each download is seen as republication and so is a separate cause of action; by taking the material down you give yourself a period of a year, at the end of which the case is time-barred if a claim isn't brought.**

Make sure that you keep a copy of the material as it appeared on the website along with any other relevant evidence.

* Pre-action protocols. Almost all libel threats can be dealt with at an early stage and the Ministry of Justice has drawn up pre-action protocols to encourage quick decisions and resolutions before libel disputes get to court. Pre-action protocols clearly set out everything you and the claimant need to include in correspondence about the dispute and timelines to do this.

There is more information at http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_def.htm

** Limitation period is the time limit after you publish something that someone can bring an action for defamation against you. Currently this is one year. In the case of writing published on the Internet the limitation period of one year begins again every time someone clicks on the blog post or online article. This is known as the multiple publication rule.

How do you respond?

Many threats can be quickly defused by your response. Stay calm, review the material, and be friendly and open in your correspondence. Lawyers say the best way to avoid ending up in court is to write letters that would go down well if read out in court.

The letter of claim should include a time limit for your response. If you don't think you can respond to the threat within the time limit given or you want to look into things a bit further you should let the claimant know and specify the date by which you intend to respond. If there is no time limit given 14 days is usually assumed to be the default.

If the claimant has got it wrong:

The threat you receive might be based on a complete misunderstanding on the claimant's part. For example, you might have nothing to do with the website concerned and the claimant got the wrong person, or the publication could be outside the one year limitation period.** You might be able to reject the threat straight away in this case.

If you think the claimant has made a mistake, write and tell them.

If the letter isn't clear:

If the claimant is threatening to bring a libel action a letter of claim must specifically say so. It isn't enough for the claimant to make a general accusation that something is "against the law" or that the matter will be "passed to my lawyers". The claimant must specify:

- That the threat is for a libel action
- The words complained of
- The reason the claimant considers the words to be defamatory

If they do not, then you should reply pointing this out. Clearly set out what extra information you need and provide a fair deadline for a response. You might want to consult a lawyer at this stage (see Legal Advice box).

If you have made a mistake:

You might find when you review the material in response to a threat that you have made a mistake which needs to be fixed.

Correct the material and let the claimant know you have done this. This should be the end of the matter. If the letter of claim asks for something more than the correction of the material – damages or legal costs for example – you should get legal advice about this (See Legal Advice box).

If you are confident that you are right:

If you are confident that you have not made a mistake, the next step will be to write and tell the claimant, providing as much information as you can about why you reject their claim.

You might know that the words complained of are factually true. If this is the case, and you will be able to prove this in court, your defence will be 'justification'.

You might be certain the words complained of are an honestly held opinion based on facts. If you can prove this in court, your defence will be that the words are 'fair comment'.

Your words might have been fair and accurate reportage and protected by Qualified Privilege.

You should consult a lawyer for help in deciding whether you have a defence and in setting out the evidence in your response. It is important to note that having the evidence to support a defence does not mean that you would succeed in court.

Who else might be involved?

There may need to be other people involved in your discussions, for example your editor, publisher or internet service provider (ISP). The current libel laws make your ISP or publisher liable for publishing your words once they have been informed that someone thinks you wrote something libellous. You should share your plans with your ISP if:

- They contact you about the threat against you
- The claimant tells you that they have contacted them
- You are contractually required to tell your ISP about legal action against you

Make sure that they have the same evidence backing your decisions as you provide to the claimant. Without this evidence they may force you to take down your material to avoid becoming involved in an expensive libel suit themselves.

If you write for a site with some editorial control, for example for an online newspaper or magazine, the publication you write for will be liable in any legal action against you. Keep them informed of your plans. They may have a protocol for dealing with complaints and might help you to defuse the situation by offering the claimant a right to reply or help with your defence.

Legal Advice

You can find a lawyer through the Law Society, online at www.lawsociety.org.uk/choosingandusing/findasolicitor.law. Defamation is a complex area of law and specialists are rare, especially outside big cities. Make sure that any lawyer you consult has experience with the libel laws. A qualified libel specialist will charge upwards of £250 an hour. You might be able to get a lawyer to represent you on a Conditional Fee (no win, no fee) Agreement but this lies in the discretion of the individual lawyer.

The Media Legal Defence Initiative is in the process of bringing together a panel of lawyers to offer *pro bono* pre-action advice for online writers and publishers facing libel threats. They will be able to help assess the seriousness of a threat and draft your response to it and help you decide whether to defend your words. See www.mediadefense.org for more details.

Will you defend your words?

If you have responded to the claimant setting out the reasons why you are confident that you are correct but they pursue the threat, you have two options:

- To defend your words
- To settle the matter

You should consult a lawyer while making this decision.

Defending your words does not necessarily mean that you will end up in court. The pre-action protocol for defamation says that the defendant and claimant should both consider some form of alternative resolution without resorting to litigation. The courts, if the case reaches this stage, often require both sides to show that they have considered this. Options include:

- Discussion, negotiation and mediation
- Neutral evaluation by an independent third party, for example a lawyer experienced in defamation law or an expert in the subject matter of the claim

Your lawyer will be able to explain which option is most suitable.

When you decide to defend your words past this point you need to be prepared for the possibility that the battle will be long and costly. Libel actions often cost £200,000 and can easily cost closer to £1 million. This is because they can involve years of argument before the trial proper starts and because fees at specialist law firms in big cities are high. Costs will be pushed higher still where a case involves expert evidence or witnesses from around the world and evidence in foreign languages.

If you lose the case you will be liable for both sides' costs. Even a defendant who succeeds at trial will not recover all of the legal fees they have incurred and may be left substantially out of pocket. Conditional Fee Agreements are rare for libel defendants because relatively few win their cases and legal aid has not been made available for libel.

Settling the claim almost always means that your writing will have to be withdrawn from the public domain. Your lawyer's advice might be to settle the claim even if you are sure that what you have written is right. There is no shame in settling if you and your lawyer feel that the time, stress and financial risk of fighting on just aren't worth it. If so, be reassured that the real problem is with the legal system and not with you.

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Find out more at www.libelreform.org

