

Index on Censorship / English PEN

Parliamentary briefing: free speech, libel law and super-injunctions

21 October 09

English PEN and Index on Censorship, two of the UK's leading free expression organisations, are conducting a public inquiry into libel law. The decision to launch this inquiry reflects increasing concern in this country and abroad about the extent to which our courts are being used, and abused, to stifle investigative journalism and chill free expression of all kinds.

The cost of libel law puts free speech up for sale: defending a libel action in English law is on average 140 times more expensive than elsewhere in Europe, while the bizarre definition of "publication" in English law has turned London into an international libel tribunal. This is, in fact, the only area of English law where the defendant is guilty until proven innocent.

Index on Censorship and English PEN are proposing a number of recommendations in order to address these important concerns. Among other things, we recommend that corporate bodies should be prevented from launching a libel action unless they can prove malicious falsehood.

The recommendations will be published in full on 10 November 2009 with a launch event at the Free Word Centre, London, EC1R 3GA between 12 – 2pm.

This briefing for today's adjournment debate covers the role of 'super-injunctions' and the debate over the Carter Ruck injunction on the Guardian's reporting of the Minton report.

Super-injunctions

'Super-injunctions' prevent:

- the disclosure of the identities of those involved,
- the disclosure that an injunction exists at all.

So far this year, The Guardian alone has been served with at least 12 'super-injunctions', compared to just 6 in the entirety of 2006, and 5 in 2005.¹

One senior lawyer at a national newspaper told English PEN / Index on Censorship:

"There is a real issue of concern about the use of 'super-injunctions' by corporate claimants. I'm also not sure about the apparent tendency to say that Article 8 of the European Convention on Human Rights (right to privacy) protects corporations. My

¹ <http://www.guardian.co.uk/commentisfree/libertycentral/2009/sep/23/gagging-orders-media-injunctions>

impression is that there has been a general increase in this sort of order which severely or totally restricts reporting of court proceedings - while some appear to be cases where there is a genuine privacy issue at the heart of the case, others seem to be routinely being made in less deserving cases, where there appears to be a lack of judicial scrutiny or rigour before the order is made.”

They went on to add that although a claimant should only be able to claim anonymity in strict circumstances - the test is “necessity” - it isn’t clear how strictly this test is applied in practice.

And also of serious concern:

“is the routine disapplication of Paragraph 9 of the Practice Direction to CPR 29, so that a third party who is not present at the hearing, but who gets served with one of these orders is prevented from asking for a copy of the evidence on which it was based. This means the media are being bound by these wide ranging orders, without being told why. That seems to me to be fundamentally wrong.”

Mark Stephens, of Finers Stephens Innocent LLP has stated that there are 200 – 300 ‘super-injunctions’ in force at any one time in the UK.² He has also stated that the vast majority of ‘super-injunctions’ are about serious issues that are of public interest.³

One national newspaper lawyer told us that they knew articles newspapers wished to print on individuals funding terrorism had to be pulled because of ‘super-injunctions’.

It is also clear that judges are keen on granting pre-emptive injunctions prior to publication rather than forcing plaintiffs to sue post-publication. Pdraig Reidy of Index on Censorship told *The Economist* recently:

“the concept of ‘publish and be damned’ doesn’t hold much sway in the Royal Courts of Justice at the moment.”⁴

Parliamentary privilege and Super-injunctions

The absolute privilege of Parliament and the qualified privilege to report on Parliamentary debate (so long as such reports are not malicious) are cornerstones of our constitution, yet some lawyers have attempted this week to overturn these fundamental democratic principles. Carter-Ruck has argued that *The Guardian* would have been placed in contempt of court for reporting a Parliamentary question by Paul Farrelly MP about an injunction obtained by Carter-Ruck and the oil firm Trafigura on 11 September 2009 on the publication of a report on the alleged dumping of toxic waste in the Ivory Coast. The existence of the injunction and its

² ‘Barbara Streisand strikes again’, *The Economist* (17 October 2009)

³ Personal communication

⁴ *Ibid*

contents are both subjects of considerable public interest, yet Carter-Ruck continue to insist that the press should not have been free to report on a Parliamentary question regarding these issues. This goes directly against the letter and the spirit of the 1840 Parliamentary Papers Act, which states that the coverage of parliamentary proceedings is lawful so long as it is 'published bonâ fide and without malice'.

Carter Ruck, Trafigura and the Guardian

In instances, Trafigura has threatened to sue for libel those who claim that the dumping of toxic waste in Abidjan, Ivory Coast, has directly led to the illnesses that affected 102,000 people. On behalf of Trafigura, Carter Ruck solicitors have used a 'super-injunction' to prevent the publication of a Trafigura report (the Minton report) into this and to prevent both the reporting of the injunction and the reporting of a parliamentary question.

Trafigura meanwhile has paid out \$200 million to the government of the Ivory Coast, and in London settled for £30 million a joint action made by the 31,000 Ivorians who claimed Trafigura was responsible for their illnesses.

Libel law and the use of 'super-injunctions' are of deep concern to English PEN and Index on Censorship for their chilling impact on free speech.

Timeline

August 2006, Trafigura dumps toxic waste in and around Abidjan, Ivory Coast. According to a UN report, over 100,000 Ivorians seek medical help for breathing problems, vomiting and skin eruptions, 15 die. Trafigura maintain that the material discharged was harmless.

7 September, Trafigura commissions its scientists to investigate the possible effects of the dumping, this is known as the Minton report.

14 September, the Minton Report is sent to Trafigura.⁵ According to The Times the report said that Trafigura's oil waste was potentially highly toxic and "capable of causing severe human health effects", including death.⁶

13 February 2007, Trafigura pay the government of Ivory Coast an out-of-court settlement of \$200 million, but accept no liability.⁷

March 2008, the Ivorian Court of Appeal say there is insufficient evidence to pursue criminal charges against the company.⁸

⁵ The Guardian have now placed the Minton Report on their website: <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/16/mintonreport.pdf>

⁶ <http://www.timesonline.co.uk/tol/news/uk/article6878956.ece>; *The Times* (17 October 2009)

⁷ <http://news.bbc.co.uk/1/hi/world/africa/6360659.stm>

3 September 2009, UN special rapporteur for toxic waste Prof. Okechukwu Ibeanu finishes his report on the dumping of toxic waste in Ivory Coast.⁹

11 September 2009, Carter Ruck solicitors obtain a 'super-injunction' in the High Court on behalf of their client Trafigura to prevent The Guardian from publishing the Minton report.

16 September, The Guardian and BBC publish internal emails between Trafigura employees,¹⁰ "This is as cheap as anyone can imagine and should make serious dollars ... Each cargo should make 7m!"¹¹

Mid-September, Trafigura issue libel threats against The Guardian and BBC via Carter Ruck.

23 September, Trafigura agree to compensate 31,000 claimants around £1,000 each. The payout offer amounts to a total of around £30m. The original claim was for £100m, which would have given the claimants around £3,000 each.

Trafigura refuse to accept liability as part of the settlement. The waste, the company said:

"could at worst have caused a range of short-term, low-level flu-like symptoms and anxiety".¹²

1pm, 12 October, The Guardian contact Carter Ruck solicitors with a copy of Paul Farrelly MP's parliamentary question, telling them they intended to publish the question.

Mr Paul Farrelly (Newcastle-under-Lyme): To ask the Secretary of State for Justice, what assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in Ivory Coast, commissioned by Trafigura.

Carter Ruck responded the same day. Alan Rusbridger's recollection of events as follows is thus:

⁸ <http://news.bbc.co.uk/1/hi/world/africa/7687612.stm>

⁹ <http://www.scribd.com/doc/19839945/AHRC1226Add2>

¹⁰ <http://www.guardian.co.uk/world/2009/sep/16/trafigura-oil-pollution-fortune-tragedy>

¹¹ <http://www.guardian.co.uk/world/2009/sep/16/trafigura-email-files-read>

¹² <http://www.thelawyer.com/what-defines-a-legal-victory?/1002051.article>

“their letter unequivocally asserted that the Guardian would be in contempt of Court and sought an immediate undertaking that we would not publish.

The letter also stated that Carter-Ruck did not even accept that the publication by Parliament of Mr Farrelly’s question placed the existence of the injunction in the public domain!

We took leading counsel’s advice on this letter. She advised us not to publish, but to return to court to seek a variation in the order.”¹³

13 October, The Guardian bring a formal challenge to the ‘super-injunction’ before Mr Justice Sir Michael Tugendhat; Index on Censorship also write to the Judge, but because it is a ‘super-injunction’ do not know the content of the injunction, the party who served it, or its function.

7.30pm, 16 October, Carter Ruck write to The Guardian advising that it is “released forthwith” from any reporting restrictions relating to the ‘super-injunction’ placed on the Minton report. The Guardian publishes the Minton report.

18 October, the Speaker of the House of Commons confirms the adjournment debate will proceed.

19 October, a meeting between Carter Ruck and parliamentarians.

Our inquiry

English PEN and Index on Censorship, two of the UK’s leading free expression organisations, are conducting a public inquiry into libel law. The decision to launch this inquiry reflects increasing concern in this country and abroad about the extent to which our courts are being used, and abused, to stifle investigative journalism and chill free expression of all kinds.

The inquiry invited submissions from publishers, writers, editors, journalists, lawyers and other interested parties. It has held round-table discussions, leading to the launch of a libel report on **10 November 2009, 12 – 2pm, at the Free Word Centre, EC1R 3GA.**

The inquiry coincides with increasing concern in the House of Commons. The United Nations Human Rights Committee has already signalled its concern that English libel law discourages: ‘critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as libel tourism.’

For further information please contact Jonathan Heawood, Director, English PEN, on 0788 907 1711/020 7324 2541, or Jo Glanville, Editor, Index on Censorship, on 0771 302 0971.

¹³ <http://www.indexoncensorship.org/wp-content/uploads/2009/10/Letter-to-the-Speaker.pdf>