

Dear Sir

Consultation on Defamation and Malicious Publications (Scotland) Bill

I am writing because I have experience of the use of defamation laws by wealthy organisation to silence those with legitimate concerns, as I explain below.

I am a consultant cardiologist and medical researcher working in the NHS. In addition, for more than 30 years I have investigated and exposed misconduct, particularly research misconduct, by doctors and academic institutions in the United Kingdom and abroad, and by multinational pharmaceutical and medical device companies. I have reported more than 20 UK doctors to the General Medical Council (GMC) and many received sanctions and some have been suspended or erased from the Medical Register.

On the one hand, I have received praise and awards for exposing misconduct (e.g. the Annual Health Watch Award in 2003 and the first ever BMJ Editor's Award in 2012). A BMJ editorial in 2002 described me as "British medicine's champion whistleblower" and Private Eye called me "the Godfather of NHS whistleblowers".

On the other hand, during the last 30 years I have had to deal with many threats of libel actions from corporations, individual doctors and academic institutions. For example, I reported Dr A K Banerjee to the GMC. He was first suspended from the Medical Register for a year and later struck off because he had falsified research, because he had financially defrauded patients and medical insurers, and because of concerns that his poor clinical skills had harmed patients. I pointed out that senior officials at King's College London had been aware of his misconduct for a decade before I reported him to the GMC and King's College had failed to report him. In attempts to silence me, King's College threatened me with defamation claims three times in 15 years. I also received threats of legal action from Sterling-Winthrop when I showed that the corporation had falsified research findings and data submitted to licensing authorities for their drug amrinone, which I proved was ineffective in treatment of heart failure and had life threatening side effects. I got amrinone banned Worldwide. Dealing with these threats took time and money.

For 20 years, my articles have described the way that the defamation laws in many countries protect the reputations of wealthy organisations and individuals at the expense of those, particularly poor people, with legitimate concerns about public safety and prevents whistleblowing. This was illustrated by the four defamation claims brought against me between 2007 and 2011 by NMT Medical, a US medical device company. I met and explained the issues to Jack Straw MP, when he was Lord Chancellor. He is on record as saying that hearing the details of my case convinced him of the need for reform of the libel laws. My case was used as one of the drivers for the Libel Reform Campaign that led to the Defamation Reform Act in England and Wales. I will briefly describe what happened to me and explain why I feel that the balance in defamation laws needs to be shifted more to protect those who raise concerns in the public interest and for accurate reporting of scientific data and news.

I was the principal cardiologist in a multicentre clinical trial in the UK (patients involved were from England, Scotland and Wales) testing a cardiac device in patients. At a cardiology conference in USA I stated that information about the trial data was being misrepresented and information presented was incomplete. What I said was reported online on an American cardiology website. The trial's sponsor that made the device, NMT Medical, sued me for both libel and slander. NMT did not sue the website or its reporter or demand that the article be taken off the website. In fact NMT sued me three times over different versions of the article. NMT claimed "double actionability" because it was on a US website. Double actionability meant that even though I was being sued in England, the English Court would also need to consider whether there was defamation in the other jurisdiction where published (i.e. USA), but because there is no Federal Law on defamation in USA, I would have to argue the case separately for every US state, as well as in English law.

I was interviewed on the Radio 4 Today Programme about being sued for libel, without mentioning NMT. NMT sued me again. The interview had been pre-recorded and checked by

BBC lawyers who said that there were no grounds for them suing, but NMT sued anyway. NMT did not sue the BBC or even ask for the interview to be removed from the BBC website (listen again service). It was clear that NMT planned to use its financial muscle to silence me because I had raised legitimate concerns about their device and their conduct.

A scientific paper reporting the trial was produced. Though I was the trial's principal cardiologist, I refused to put my name as an author of the scientific publication in the journal *Circulation* because the data was false. One other member of the trial steering committee also refused to be a co-author and NMT instructed their lawyers to sue him. They did not serve the claim on him.

The legal actions went on for nearly 4 years until NMT went into liquidation. The reason they went into liquidation was that the device did not work. I sent *Circulation* the real data and it publish a 700 words correction (Dr Fiona Godlee, the editor of the *BMJ*, said that it is the longest correction of a paper that she had seen), a new version of the paper and a data supplement. So my concerns were vindicated. In addition, I reported the first author of the paper (the trial's principal headache specialist) to the GMC. He was suspended from the Medical Register for misconduct including dishonesty in the clinical trial. He appealed to the High Court and the Court upheld the tribunal's decision to suspend his medical registration for dishonesty.

So time has vindicated me and confirmed what I said about the device. Yet I was subject to 4 years of legal actions with loss of considerable amounts of time. My legal costs exceeded £300,000. There was worry for my family and me, etc. If NMT had not gone into liquidation, my lawyers anticipated a six months trial, which would have meant I would have to give up my work as a cardiologist and become bankrupt. It was clear that NMT's plan was to wear down my family and me by costing me enormous sums of money. (It is notable that NMT used the same QC and junior counsel that McDonald Corporation used in the *McLibel* case – the longest running civil case in English legal history.) In addition, during the time that NMT were suing me other doctors with concerns about NMT's devices were afraid to speak. As a result patients were harmed.

I am not a lawyer and I do not have views on wording of the law change, but it is clear to me that we need to alter the balance of the law to give more protection to those who raise concerns and to scientists discussing research.

The fact that you have decided not to allow claims on behalf of deceased people because such provisions might have prevented post mortem allegations of abuse by Jimmy Savile (and other cases) illustrates the problem with defamation laws. Just laws would allow victims to raise allegations about people like Jimmy Savile during their lifetimes in order to protect other vulnerable people and punish the guilty. If such things should be exposed after a guilty person is dead, it is even more appropriate that the law should not prevent them being exposed when the culprit is still alive. The fact that lawmakers are content to have laws that protect such individuals during their lifetimes, so that they can continue to abuse children and other vulnerable people and allow the guilty to escape punishment is evidence that the law is unbalanced in favour of claimants, even when their conduct is monstrous. The defamation laws must be rebalanced.

Yours sincerely

Dr Peter Wilmshurst FRCP, FFSEM, FISM