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Closed Data: Defamation and Privacy Disputes in England and Wales

Judith Townend*

INTRODUCTION

Transparency and open data are ‘a powerful tool to help reform public services, foster innovation and empower citizens’, said the Prime Minister in an open letter to Cabinet Ministers in July 2011.¹ In the same year, the Coalition Government held a consultation, ‘Making Open Data Real’,² to explore how it might ‘best embed a culture of openness and transparency in our public services’. ‘Open data’ extends to the public courts: one of the Government’s new commitments was to publish information about criminal justice: anonymised sentencing data, information about the performance of probation services and prisons, and national crime mapping. More recently, the Ministry of Justice set out an open data strategy for 2012–15, covering both civil and criminal courts.³ To some extent, this ‘culture of openness’ mirrors the judicial consideration given to open justice, which allows justice to ‘be seen to be done’⁴ and accountability of court proceedings.

Civil courts have been given scant attention in the Cabinet Office consultation and the Government’s wider open data project, despite the media and political attention given to civil issues, such as litigation costs and family law. In this paper, I will consider the ongoing public debate around defamation and privacy civil litigation and argue that legal researchers and other interested members of the public are in fact confronted with

* Centre for Law, Justice and Journalism (CLJJ), City University London, UK. The author wishes to thank the contributors—on and offline—to the CLJJ’s ‘Open Justice in the Digital Era’ project, and in particular, Lucy Series, University of Exeter, with whom she worked on a joint submission to the Cabinet Office’s Open Data consultation, which has directly informed this article. Draft extracts of this piece have previously appeared online. All omissions and errors remain the author’s own. All websites accessed June 2013.

1 Prime Minister, ‘Letter to Cabinet Ministers on Transparency and Open Data’ (7 July 2011), www.number10.gov.uk/news/letter-to-cabinet-ministers-on-transparency-and-open-data.

2 ‘Making Open Data Real: A Public Consultation’ (4 August 2011), www.cabinetoffice.gov.uk/resource-library/making-open-data-real-public-consultation.

3 Ministry of Justice, ‘Open Data Strategy 2012–15’ (28 June 2012), www.gov.uk/government/publications/open-data-strategy-2012-15.

4 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

inaccessible and ‘closed’ data about public court cases when attempting to analyse the issues at play. Furthermore, as will be shown through an examination of various case law sources, the reasons for this opacity are not necessarily logical: the open justice principle makes the source data theoretically available, but it is not publicly accessible in a useful form. The data has not been deliberately closed from public view, but there appears to be no way for the public to access it. It is as if it is stored in a public filing cabinet with no drawer handles or labels.

This is detrimental to policy-making and the legal reform process, which often relies on academic research and journalism during consultation stages, as is well documented elsewhere. For example, the independent ‘fact-checking’ organisation FullFact was partly born out of its director’s belief that ‘policy can be distorted by inaccurate claims’, following his experiences as a researcher in the House of Lords.⁵ The organisation argued as part of its evidence submitted to the Leveson Inquiry⁶ that ‘open justice in this century must mean more than merely being able to walk into the courtroom’, and highlighted concerns about public access to sentencing remarks. The organisation was not able to check an ‘eye-catching claim’ made in the press about a judge’s decision in a criminal case.⁷ In its view,

The more direct access to official sources is made easy, the greater the social pressure for good journalism. Moreover, having official and primary sources available online provides a foundation from which assessable and trustworthy journalism can be built up.

Similarly, this short paper argues that more direct access to official sources of data about libel and privacy data will improve the public debate, and the journalism and academic research which informs it.

Since 2008 the national news media have taken an extensive, if fluctuating, interest in libel reform and privacy-related interim injunctions, and these issues have been addressed by numerous committees that have taken evidence and produced reports relating to defamation and privacy law, including the House of Commons Culture, Media and Sport Select Committee, the Libel Working Group, the Joint Committee on the Draft Defamation Bill and the Joint Committee on Privacy and Injunctions. The Judiciary has examined the issues too: a committee chaired by Lord Neuberger reported on ‘super-injunctions’, anonymised injunctions and open justice in May 2011, and Lord Justice Jackson reported on civil litigation costs in January 2010. All of these consultations lacked the necessary data for their analytical purpose, an observation made directly

⁵ Will Moy, who worked for the independent member, Lord Low of Dalston. Details at <http://fullfact.org/about/team>.

⁶ Available at www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Fourth-Submission-by-Full-Fact.pdf.

⁷ A Sippitt, ‘Did a Group of Muslim Women Escape Jail for Attack Because They Were “Not Used to Alcohol”?’ (8 December 2011), http://fullfact.org/factcheck/Muslim_women_spared_jail_for_attack_because_not_used_to_drinking-3179.

in some reports. While there are several in-depth academic texts that cover this area of law,⁸ there are serious limitations to the case law data in the public digital domain. Some data is available through services run by private legal information companies and some is published online free of charge by law firms, but there is no centralisation of substantial data by Her Majesty's Courts and Tribunals Service (HMCTS) and the Ministry of Justice—to the extent that the authors of the Government's Impact Assessment on the Defamation Bill 2012 felt unable to state the 'true number' of defamation trials in 2010, instead estimating a number based on data about the outcomes of proceedings in the Queen's Bench overall.⁹

Additionally, it should be borne in mind that the courts data—cases in court and claims—represent only the 'tip of a very large iceberg', as Eric Barendt *et al* identified in the mid-1990s in relation to publishers' libel experiences.¹⁰ For media organisations and small online publishers, including social media users, the reach of libel and privacy is far wider than the cases that make it to court: there are unofficial warnings, letters before action, and of course the anticipated threat of a claim, even if it does not materialise.

The first section of this paper considers the availability of public data around defamation and its role in informing the libel reform process and media coverage. The second section then examines privacy law and the body of data around interim privacy injunctions. The third section reflects on information about the costs of defamation and privacy litigation. In conclusion, it will be suggested that a lack of public case data about defamation and privacy litigation, indicated by the Impact Assessment on the Defamation Bill 2012 and the report by the Master of the Rolls' Committee on Super-Injunctions, hampers the policy-making process, public debate and academic research around these issues of public interest. The patchy data in this area is of particular concern because a new system of arbitration could be introduced as a result of the recommendations made by Lord Justice Leveson at the end of 2012, as an alternative to civil court proceedings.¹¹ Additionally, in the long term, it would be useful to monitor changes to litigation activity brought about by the new Defamation Act 2013, as suggested in the Impact Assessment on the Bill.

⁸ See, for example, D Price QC, K Duodu and N Cain, *Defamation Law: Procedure & Practice* (Sweet & Maxwell, 4th edn 2010), which sets out a schedule of defamation trials since 1990, with the name of the case, the date of the trial, the outcome and brief details.

⁹ *Impact Assessment* (IA No: MOJ 145, Ministry of Justice, 1 April 2012) para 2.230, 51, www.parliament.uk/documents/impact-assessments/IA12-009.pdf.

¹⁰ E Barendt, L Lustgarten, K Norrie and H Stephenson, *Libel and the Media: The Chilling Effect* (Oxford University Press, 1997) 41.

¹¹ See 'An Inquiry into the Culture, Practices and Ethics of the Press Report' (Leveson Inquiry) (November 2012), vol 4, pt K, ch 7, 1768.

I. DEFAMATION CASES

a. Ministry of Justice Annual Statistics

Each year the Ministry of Justice publishes annual statistics on civil litigation, which include the outcomes of all cases in the Queen's Bench Division of the High Court (number of all Summary Judgments, Judgment by Default, Trials, Interlocutory Applications for Master). These outcomes may not necessarily relate to the number of new claims issued: they could include hearings of claims from one or more years previously. With regard to defamation cases specifically, we are told that the total number of claims issued in each claim value bracket (£15,000–£50,000 or over £50,000 or Unspecified), but not given a breakdown of outcomes, beyond the overall figures.¹² As a result, an official number of defamation trials is not recorded. Jaron Lewis, who until recently led Reynolds Porter Chamberlain's media group, has compiled a table of these statistics for 1990–2011.¹³

These figures suggest that of the claims that make it to court, only a fraction have a reported outcome. For example, the Ministry of Justice reported 165 defamation claims during the calendar year 2011, but a manual search of cases suggests that there were only around 23 defamation cases that reached summary judgment or full trial in the same time period, not including appeals that completed cases.¹⁴

b. Impact Assessment on the Defamation Bill

The Impact Assessment on the Defamation Bill, given an 'amber' rating by the Regulatory Policy Committee, assessed the societal and economic costs and benefits of the proposed reforms.¹⁵ On the whole, the Ministry of Justice was unable to 'sensibly' monetise the impacts, as it might have done for a different type of bill, 'in part due to a lack of robust baseline data'. It did not have 'the necessary data and evidence to make quantitative predictions of how relevant variables would change compared to the baseline in future'.¹⁶ This was partly because it could not acquire the information from the parties involved in defamation cases, but it was also not able to access the necessary courts data. For example, its figures on defamation litigation rely on the Ministry of Justice's annual

¹² For 2011, this was: £15,000–£50,000, 28; Over £50,000, 61; Unspecified, 76; Total, 165. Ministry of Justice, 'Judicial and Court Statistics (Annual)', www.gov.uk/government/publications/judicial-and-court-statistics-annual.

¹³ Contained in 'Judicial Statistics 2011: Number of Defamation Claims Remains Low', Inform's Blog (7 July 2012), <http://inform.wordpress.com/2012/07/15/judicial-statistics-2011-number-of-defamation-claims-remains-low>.

¹⁴ 'Defamation Trials, Summary Determinations and Assessments in 2011', Inform's Blog (11 January 2012), <http://inform.wordpress.com/2012/01/11/defamation-trials-summary-determinations-and-assessments-in-2011>.

¹⁵ *Impact Assessment* (MOJ 145, 2012).

¹⁶ *Ibid*, para 2.2, p 24.

statistics, which, as outlined above, contain only very basic facts about defamation: the number of claims issued, categorised in three value brackets.

The Impact Assessment noted that '[t]here 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', and that '[d]ata are not collated centrally on the outcomes of defamation claims issued in court'. In addition, it had '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'.¹⁷

In order to estimate the outcomes of defamation cases in 2010, the Ministry of Justice appears to have calculated 3.25 per cent of the outcomes of total cases in the Queen's Bench Division, to arrive at figures specifically relating to defamation (known to account for 3.25 per cent of all Queen's Bench cases in 2010). Its table suggests that there would have been nine summary judgments and six trials concluded if the 158 defamation claims were similar to all 4,864 claims in the Queen's Bench Division.

Volume in 2010					
	Claims issued	Judgment by default	Summary judgment	Trials concluded	Interlocutory applications for Masters
All claims in RCJ	4,864	1,190	269	182	8,113
Defamation claims	158	39	9	6	264

If similar to all claims

*Claims issued in the Queen's Bench Division of the High Court at the Royal Courts of Justice. Source: Judicial and Court Statistics (2010), Ministry of Justice.*¹⁸

But these are not the actual outcomes; an important disclaimer is given: the figures only apply 'if similar to all claims'. The document does state, however, that the evidence collected from its analysis of a sample of 145 case files 'would seem to support these assumptions, particularly on the number of trials concluded'.¹⁹ This sample data also comes with a disclaimer: 'As not all case files are completed consistently, these data should

¹⁷ *Ibid*, paras 2.17–2.23, p 27.

¹⁸ *Ibid*, para 2.56, p 32.

¹⁹ *Ibid*.

be treated as approximate only.²⁰ It gives details of 331 defamation cases identified as having been issued at the Royal Courts of Justice over the period 1 October 2009—7 November 2011 (not including any cases issued at District Registries). In conclusion, the document states: '[W]e would expect fewer than 10 defamation trials a year in total ... Though the true number may be higher than 10, with only 158 defamation claims issued in total in 2010 it is considered unlikely to be much higher.'²¹ In other words, the Ministry of Justice estimated the number of trials because no central records are kept. A manual search suggests that there were, in fact, three completed full defamation trials that resulted in judgments in 2010.²²

Furthermore, the Defamation Bill Impact Assessment tentatively noted: 'It appears there are very few jury trials at all, and no systematic data is collected.' Unofficially, it is widely known among media law researchers and practitioners that the first libel jury trial in nearly three years took place in June 2011.²³ Lord Lester, for example, told the Joint Committee on the Draft Defamation Bill in April 2011 that he 'believe[d] that there has been no jury trial in a libel case in the last 18 months',²⁴ although this information is not officially recorded by the Ministry of Justice.

The Impact Assessment also contains a useful nine-point methodology for establishing baseline data with which to 'monetise the impacts of each of the proposals.'²⁵ This baseline data could have been compared with post-reform data (once the provisions of the Defamation Act 2013 come into force), in order to assess the impact of the legislative changes. This cannot be done because 'comprehensive (or reliably representative) data [is] available for very few of these factors.'²⁶ In the absence of more extensive data, it would be impossible to conduct this comparative exercise.

c. The Culture, Media and Sport Select Committee

The Culture, Media and Sport Select Committee identified a data problem in its report on libel, privacy and press standards, published in February 2010. With regard to 'libel tourism' it said: 'During the course of our inquiry we asked for information on the number of cases challenged on the grounds of jurisdiction and the success rate of such challenges. We have been provided with no such information and it was not clear who would be responsible for collecting it.'²⁷ As a result, it recommended as follows:

²⁰ *Ibid*, para 2.58, p 32.

²¹ *Ibid*, para 2.230, p 51.

²² Inform's Blog (n 14).

²³ *Cooper v Evening Standard and Associated Newspapers* (2012) (not yet reported).

²⁴ Lord Lester, Oral Evidence to Joint Committee on the Draft Defamation Bill, *Oral and Associated Written Evidence, Volume II* (HL Paper 203 & HC 930-II, 27 April 2011), Qs 1–40, 41.

²⁵ *Impact Assessment* (MOJ 145, 2012) para 2.14, p 26.

²⁶ *Ibid*, para 2.15, p 26.

²⁷ House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel, Second Report of Session 2009–10* (24 February 2010), para 207.

[T]he Ministry of Justice and the Courts Service should as a priority agree a basis for the collection of statistics relating to jurisdictional matters, including claims admitted and denied, successful and unsuccessful appeals made to High Court judges and cases handled by an individual judge. We further recommend that such information be collated for the period since the House of Lords judgment in the Berezovsky case in May 2000 and is published to inform debate and policy options in this area of growing concern.²⁸

d. The Libel Working Group

The Libel Working Group's report, published in 2010, includes an Annex compiled by the Ministry of Justice summarising 219 unspecified defamation cases issued in the High Court in 2009.²⁹ Of those, 34 were identified as having a 'foreign connection'. This figure differs from the Ministry of Justice's reported number of claims issued in 2009, which was 298, and it sets out six reasons why the data 'needs to be treated with caution', emphasising that the data provides 'a snapshot of cases from one year only' and that it does not 'attempt to give a conclusive picture of the place of domicile of the parties'. Annex C³⁰ gives a list of 'libel tourism' cases raised by members of the Working Group, with a footnoted disclaimer that the committee 'recognise[s] that "libel tourism" is a controversial concept'.

In the absence of a centralised source of information, many of the reports cite each other's statistics. For example, figures given by Lord Justice Jackson regarding the number of jury trials³¹ were used in the report by the Ministry of Justice's Libel Working Group and subsequently repeated in the Impact Assessment;³² this is the claim that 'fewer libel cases are now being heard with a jury rather than by a judge alone', with four of each in 2008 and four jury trials and nine by judge alone up until November 2009.³³

e. Sweet & Maxwell reports

Each year the legal publisher Sweet & Maxwell releases statistics on the number of defamation cases in court—not claims issued—for the year ending 31 May, and gives additional details about the types of claimants and defendants in a press release. There are limitations to the publishers' data and accompanying analysis.³⁴ The latest press release opened 'Phone hacking scandal leads to lower media appetite for libel risk', prompt-

²⁸ *Ibid*, para 208.

²⁹ Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), Annex B, 45.

³⁰ *Ibid*, Annex C, 52.

³¹ Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, December 2009) para 6.2, p 328.

³² *Impact Assessment* (MOJ 145, 2012), para 2.231, p 51.

³³ *Report of the Libel Working Group* (n 29) 85.

³⁴ See criticisms raised on Inforrm's blog, for example: 'Misreporting Defamation Research: No "Drop in Cases" and No Leveson Effect' (4 September 2012), <http://inforrm.wordpress.com/2012/09/04/misreporting-defamation-research-no-drop-in-cases-and-no-leveson-effect>.

ing various media reports that attributed a post-Leveson effect. However, as explained above, the cases in the courts over a 12-month period may not match the claims issued in the same 12-month period; they may well have been issued well before the crescendo of the phone hacking scandal, or the beginning of the Leveson Inquiry.

It would be useful if the publisher supplied more details about the provenance of the data, such as the case names and methodology of categorisation. This would help readers and researchers analyse factors affecting litigation, and any significant changes, for themselves. Of course, as a private company, Sweet & Maxwell is under no public service obligation to provide these reports, so it would be even better if the courts provided this information at source.

The Sweet & Maxwell data is significant—and therefore included here—because it has influenced public and media debate, perhaps more than any other public source of defamation data. As an illustration, on 12 June and 12 September 2012 David Morris MP argued in the House of Commons³⁵ that “‘libel tourism’ has been a burden on our civil legal system”, citing the textbook *Media and Entertainment Law*.³⁶

In September 2010 the *Daily Telegraph* reported that libel challenges by actors and celebrities in the London courts had trebled over the past year.

This would appear to refer to a report headlined ‘Libel challenges by actors and sport stars treble in year’, which was based on ‘figures from the legal information provider Sweet & Maxwell’.³⁷ In the absence of fuller data, it is difficult to ascertain the foundation of the statement, or the level and type of ‘libel tourism’ in the courts—an exercise that is not attempted for the purposes of this article. More data at source would allow us to check public statements such as these, which may have a bearing on future policy and statute. Researchers would then be able to make more informed analyses of the features of libel law, such as the number of corporations making claims, or the nature of claims involving claimants and defendants based outside England and Wales. It would have allowed the Libel Working Group to look at more than a ‘snapshot’ of case data.

f. Criminal Libel

This final section completes the inventory of defamation data sources. The criminal offences of defamatory, seditious and obscene libel were abolished as part of section 73 of the Coroners and Justice Act 2009, which came into effect from January 2010. Blasphemous libel was abolished the year before, under the Criminal Justice and Immigration Act 2008. Curiously, a number of ‘libel’ offences have been recorded in Home

³⁵ HC Deb, 12 June 2012, col 202; HC Deb, 12 September 2012, col 371.

³⁶ U Smartt, *Media and Entertainment Law* (Routledge, 2011).

³⁷ ‘Libel Challenges by Actors and Sport Stars Treble in Year’ (3 September 2010), www.telegraph.co.uk/news/uknews/law-and-order/7978156/Libel-challenges-by-actors-and-sport-stars-treble-in-year.html.

Office statistics since January 2010: four in 2010/11 and one in 2011/12.³⁸ A spokesperson from the Home Office confirmed:

Suffolk [Police] have reviewed the four libel offences recorded in 2010/11 and have now ‘reclassified’ these to non-notifiable offences of Malicious Communication. South Wales have confirmed that they did record an offence in 2011/12 as it still appeared in the Home Office *Counting Rules*³⁹ but have not indicated whether this was in error.⁴⁰

II. PRIVACY CASES

a. Master of the Rolls’ Committee on Super-Injunctions

In 2010, the Master of the Rolls recommended that the Ministry of Justice, with the assistance of HMCTS, ‘should collect data about super-injunctions and anonymised injunctions, in relation to all privacy orders which derogate from the principles of freedom of expression’. This was following ‘growing public concerns about the use and effect of what were termed super-injunctions and the impact they were having on open justice.’⁴¹ There had been a frenzy of media reporting around super-injunctions, both prior to the committee’s formation and during its meeting period.⁴² The final report drew attention to incorrect use of the term ‘super-injunction’,⁴³ but also acknowledged an absence of official data.⁴⁴ The absence of recorded data was such that Lord Neuberger was unable to tell journalists precisely how many so-called super injunctions and anonymised privacy injunctions—by the report’s own definitions—had been granted since 2000.⁴⁵ According to the report, specific records were not ‘kept in respect of such mat-

³⁸ Home Office, *Crimes Detected in England and Wales 2010/11*, www.gov.uk/government/publications/crimes-detected-in-england-and-wales-2010-to-2011; *2011/12*, www.gov.uk/government/publications/crimes-detected-in-england-and-wales-2011-to-2012.

³⁹ Home Office, *Counting Rules* (30 March 2012), section 99, www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/counting-rules/count-other?view=Binary (no longer available).

⁴⁰ Email communication with author.

⁴¹ Master of the Rolls, ‘Committee Reports Findings on “Super-Injunctions”’, press release (20 May 2011), www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011.

⁴² See J Townend, ‘Lord Neuberger’s Report Cuts through the Superinjunction Hysteria’ (20 May 2011), www.guardian.co.uk/law/2011/may/20/lord-neuberger-report-superinjunction-hysteria.

⁴³ According to the report, ‘[t]he term super-injunction is frequently used incorrectly to refer to an anonymised injunction’. Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (20 May 2011), para 2.15, p 20.

⁴⁴ *Ibid*, para 4.4, p 54.

⁴⁵ Press conference held by the Lord Chief Justice of England and Wales and the Master of the Rolls (20 May 2011), transcript available at www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf.

ters.⁴⁶ The committee's recommendations sought to prevent that type of data blackout occurring again and suggested that the Ministry of Justice's Chief Statistician should, with HMCTS, 'examine the feasibility of introducing a data collection system for all interim non-disclosure orders, including super-injunctions and anonymised injunctions'.⁴⁷

In relation to issues around courts' communication with parliament, it said that the Ministry of Justice, HMCTS and the House authorities 'should consider the feasibility of a streamlined system for answering *sub judice* queries from the Speakers' offices'. This would involve 'the creation of a secure database containing details of super-injunctions and anonymised injunctions held by HMCTS, which could be easily searchable following any query from the House authorities'.⁴⁸

The Ministry of Justice has released three privacy injunction data bulletins since then, reporting that there were three proceedings where the High Court in London considered an application for a new interim injunction prohibiting the publication of private or confidential information between July and December 2012.⁴⁹ These figures are not matched to any specific cases. It would be useful to researchers if the cases with a public judgment were identified. These data provisions were made permanent by inclusion in the Civil Procedure Rules with effect from 1 October 2012.

b. Joint Committee on Privacy and Injunctions

The Joint Committee 'strongly welcome[d] the arrangements made by the Master of the Rolls to monitor and publish figures on the number of anonymised and super-injunctions granted and the circumstances in which they are granted',⁵⁰ and recommended that super-injunctions and anonymised injunctions that were granted before the Master of the Rolls' committee's report and are still in force 'are reviewed by the courts to ensure they are still necessary and are compatible with that committee's conclusions on open justice'. Once reviewed, figures on them should be published.⁵¹

⁴⁶ *Report of the Committee on Super-Injunctions* (20 May 2011), para 4.2, p 53.

⁴⁷ *Ibid.*, vi.

⁴⁸ *Ibid.*, vi–vii. According to the Joint Committee on Privacy and Injunctions, '[d]iscussions are under way about creating such a system': *Session 2010–12 Report* (HL Paper 273 HC 1443, TSO, 12 March 2012), para 228, 50.

⁴⁹ Latest bulletin (Ministry of Justice, 14 March 2013) at www.gov.uk/government/publications/statistics-on-privacy-injunctions--2.

⁵⁰ House of Commons/House of Lords Joint Committee on Privacy and Injunctions, *Session 2010–12 Report* (HL Paper 273 HC 1443, TSO, 12 March 2012), para 64, p 22.

⁵¹ *Ibid.*, para 65, p 23.

c. Public Judgments

The Master of the Rolls' report also suggested that—in line with the recommendation in *JIH v News Group Newspapers*—‘judgments and orders containing derogations from the principle of open justice are made publicly available’.⁵² It suggested that ‘an anonymised injunction is a less extensive derogation from open justice, as the proceedings and judgments, subject to necessary redactions, remain in public view’.⁵³

Gideon Benaim has since raised a concern that ‘allowing the publication of the fact that an injunction has been granted, together with basic facts about the specific case ... creates publicity and hysteria about who the person seeking the injunction is, and also encourages online speculation fuelled by those in the know’.⁵⁴ In his view, transparency issues ‘can be dealt with easily by a periodic release of statistical information on the number of injunctions, the type of injunction, the sex of the claimant and the type of subject matter (whether medical, sex, child etc)’. These releases could also include information ‘such as whether there was a media defendant, whether the public interest was argued, and whether the claimant was a politician, businessperson or some other well-known person’. He argues:

It isn't necessary to publish information about specific cases contemporaneously, nor to publish to the world at large at any time the ‘not so basic’ details of a specific case, in the way that the courts have started to do. The Practice Direction can be amended to oblige practitioners to provide the required basic information to a central office in the High Court. Transparency is possible through statistics without needing to draw attention to individuals at the time they obtain the injunction.⁵⁵

While Benaim's proposal sounds sensible, there are associated problems to tease out. For example, he contends: ‘In reality the media never made an application to discharge a “super-injunction”—despite the fact that they were fully aware of their terms (having been served with each one)’. But how does he—and researchers—definitively know that in the absence of data before mid-2011? Since the judiciary does not even know how many ‘super-injunctions’ (as defined in Lord Neuberger's report) there were, or the basic details of them, it is difficult to verify that fact at source. Instead, researchers rely on lawyers or members of the media sharing details that are difficult or impossible to check at the courts. It seems likely that information does come out this way, but it is a fallible and inadequate means of accountability.

⁵² *Report of the Committee on Super Injunctions* (2011), para 4.8, p 55.

⁵³ *Ibid*, para 2.26, p 24.

⁵⁴ G Benaim, ‘Privacy Protection: Have the Courts been Led Astray?’ (6 September 2012), www.guardian.co.uk/media/2012/sep/06/privacy-protection.

⁵⁵ *Ibid*.

III. COSTS

a. Jackson Report

General data on defamation costs was included in Appendix 17 of the Jackson Preliminary Report,⁵⁶ which has been used to inform subsequent reports and debate. It sets out the anonymised details of 154 libel and privacy claims resolved in 2008 involving nine national newspaper groups, broadcasters and news agencies as well as local newspaper publishers, as compiled by the Media Lawyers Association, which is formed of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. This included 137 claims for libel, 15 claims for breach of privacy and two combined claims for both libel and breach of privacy. Details include the Result; Defendants' costs; Sums paid to Claimant; and whether a Conditional Fee Agreement (CFA) was used. The Final Report analyses and summarises this data in new tables.⁵⁷

When asked about the number of CFA cases that had been won by claimants, Jackson LJ told the CMS Committee in May 2009 that there was a limit to the evidence he was able to collect:

It appears, from the evidence which I have received, that claimants are successful in a very high percentage of defamation cases. The evidence which has been supplied to me does not enable me to give you a precise percentage; it is something I would have been delighted to receive, but none of the parties on either side of this particular divide has furnished me with evidence which enables me to confirm or contradict the 98%. I would be surprised if it is that high, but it is certainly a high percentage.⁵⁸

When asked about data from previous years, he said:

I am afraid I do not have data from previous years. Obviously, it would be helpful if I did have. This [preliminary] report has been prepared in the space of four months and defamation litigation is actually a very small part of the total subject and there are a huge number of appendices dealing with costs in all sorts of areas. I took the view that the contemporaneous evidence is the most helpful, and my appendices give a snapshot of costs being incurred at about the present time.⁵⁹

Like the writers of the Impact Assessment, Jackson LJ was unable to acquire the necessary data from the parties, and compromised with an anonymised 'snapshot of costs' in the

⁵⁶ Lord Justice Jackson, *Preliminary Report: Civil Litigation Costs Review* (1 May 2009), appendix 17, www.judiciary.gov.uk/JCO%2fDocuments%2fGuidance%2fapp17.pdf.

⁵⁷ Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, December 2009) ch 2 [7] (p 23); appendix 1, 515.

⁵⁸ Culture, Media and Sport Committee, *Minutes of Evidence, Press Standards, Privacy and Libel*, Qs 918–74 (19 May 2009), para 213.

⁵⁹ *Ibid*, para 216.

MLA Appendix, which has since been criticised by David Howarth for its ‘skewed’ data.⁶⁰ Howarth takes issue with the widely accepted belief that libel costs are too high, dissecting both the Jackson appendix and a study published by the Centre for Socio-Legal Studies in Oxford in December 2008, arguing that ‘[t]here is no evidence that libel costs “regularly reach hundreds of thousands of pounds” or that they are “out of control”’.⁶¹ In turn, Howarth’s own statistical analysis has been questioned by Helen Anthony, who suggests that he paints an ‘artificial picture’.⁶² While it is outside the scope of this article to assess the various claims made about costs, its findings support Howarth’s observation that ‘the reality is that we know little about the costs of libel cases’.⁶³ His final conclusion urges ‘a fervent search for reliable evidence’;⁶⁴ a commendable suggestion, but one that is easier said than done when legal researchers are faced with the same barriers as the Ministry of Justice in its Impact Assessment on the Defamation Bill: an absence of official collated statistics and detailed evidence from the parties involved in defamation and privacy litigation.

CONCLUDING REMARKS

This article has identified large gaps in information concerning the number and type of privacy and defamation cases, and has attempted to set out some of the contributory reasons for this ‘closed data’. Similarly, David Howarth identified an absence of data on defamation costs—a point which can also be extended to data on privacy costs. As indicated by a number of recent reports—some partly instigated by a short supply of data—there is widespread concern about the lack of evidence in this field, which has an effect on related procedural and statutory legal reform. ‘Closed data’ on defamation and privacy litigation, indicated by the Impact Assessment on the Defamation Bill 2012 and the report by the Master of the Rolls’ Committee on Super-Injunctions, damages the policy-making process, public debate and academic research around these issues of public interest. This is particularly significant as policy-makers attempt to devise mechanisms around Lord Justice Leveson’s recommendations for a new arbitration service to resolve civil complaints.⁶⁵ Furthermore, without changes to the way data is collected and

⁶⁰ D Howarth, ‘The Cost of Libel Actions: A Sceptical Note’ (2011) 70 *Cambridge Law Journal* 397. See also R Moorhead, ‘Are Libel Costs 150 Times Greater in England and Wales?’, Lawyer Watch blog (29 May 2012), <http://lawyerwatch.wordpress.com/2012/05/29/are-libel-costs-150-times-greater-in-england-and-wales>.

⁶¹ *Ibid.*, 419.

⁶² H Anthony, ‘Alternative Libel Project Report: Costs, ADR and Leveson’, Inform’s Blog (3 April 2012), <http://inform.wordpress.com/2012/04/03/alternative-libel-project-report-costs-adr-and-leveson-helen-anthony>.

⁶³ Howarth (n 60) 397.

⁶⁴ *Ibid.*, 419.

⁶⁵ At the time of writing, both the Government’s Draft Royal Charter and a charter drafted by a group of newspaper publishers contained varying provisions for a new arbitration service.

collated, it will be impossible to monitor the effect that the new Defamation Act 2013 has on litigation activity, once its provisions are in force.

The various concerns of and recommendations made by the committees discussed above need to be taken seriously by Government as part of its open data initiative, which should not only focus on criminal law. Data on civil litigation, costs, type and detail of cases also needs to be carefully monitored and made available to the legal profession, journalists and researchers, as well as the wider public, in a cost-efficient and practical way. This heightened accountability should not impede the courts' administration of justice⁶⁶ but will ensure, for example, that members of the public are able to easily access an official figure concerning the number of libel trials that have taken place, rather than an estimate or supposed number. As it stands, we know very little information about the very tip of the defamation and privacy iceberg.

⁶⁶ Cf the Lord Chief Justice's comments about cameras in court at his annual press conference, 27 September 2012, transcript available at www.judiciary.gov.uk/media/media-releases/2012/lcj-press-conference-2012. He said: '[A]ny further changes to the system will have to be examined with only one single criterion in mind, and that is whether by letting the cameras into that part of the process, the administration of justice is likely to suffer.'