

Truth, Terror and David Trimble

Is the Nobel Peace Prize winner complicit in murder? What the Brits can teach Americans about libel law.

By [Michael McMenamin](#)

You are a very important person. But before your ego can deflate and you can start spending the prize money, some journalist writes a book accusing you of complicity in the government-sanctioned murder of innocent people. What to do?

If you're Henry Kissinger, you shrug your shoulders, denounce the accusations as absurd, and go about your business of preserving Soviet-American hegemony until Ronald Reagan can become president.

If you're David Trimble, the first minister of the yet-to-be-formed coalition government in Northern Ireland, the head of its largest Protestant party, and the co-recipient of the 1998 Nobel Peace Prize, you adjust your orange sash, denounce the charges as absurd, and—because you still live in the United Kingdom—sue or threaten to sue everyone in sight for libel, including the publisher, the journalist, and any U.S.-based online bookseller who dares offer the book for sale in the U.K.

Does this mean David Trimble is more thin-skinned than Henry Kissinger? Not exactly. It simply means that, in the name of the First Amendment, the libel regime in the U.S. actively discourages public figures from seeking legal redress against the media when they claim they are defamed. If you don't like what the media say, the Supreme Court says your status as a public figure will afford you a forum to issue your denials. But in the U.K, if you're a defamed public figure and you don't sue, you're perceived as a cowardly wimp or guilty as charged. Probably both.

Although there's only one book out there saying bad things about David Trimble, he's going to have to stand in line at the courthouse to sue. The 1998 book, *The Committee: Political Assassination in Northern Ireland*, and a 1991 British TV documentary also called *The Committee* have been the subject of no fewer than eight separate libel lawsuits, seven in the U.K. and one in the U.S., where it is a bestseller with more than 60,000 copies sold. (See "Tracking the Suits," page 42.)

The book's author is British journalist Sean McPhilemy, who was also the executive producer of the documentary that started it all when it was broadcast on Britain's Channel 4. The central thesis of the book and the program is that, starting in 1989, a committee consisting of high-ranking members of the Protestant establishment in Northern Ireland, including lawyers, businessmen, politicians, and ministers, used the services of Protestant paramilitaries in a terror campaign against Catholic targets in Northern Ireland. Victims were located and identified by members of the Royal Ulster Constabulary (London's Ulster police force), who, says McPhilemy, at best looked the other way or, at worst, actively assisted the hitmen. Trimble is accused in the book of being an associate of The Committee, rather than a member, and of providing political cover for its activities.

The implications of both the book and the litigation surrounding it are significant.

Of immediate importance is its impact on the Northern Ireland peace process, which, as this is written, is a

shambles. That's either because 1) Trimble has refused to allow the formation of a new Northern Ireland government that includes representatives of Sinn Fein (the political wing of the Irish Republican Army), as envisioned by last year's Good Friday Agreement, or because 2) the IRA has refused to commence the decommissioning of its arms, also part of the agreement. Take your pick.

The litigation will also provide a vivid contrast between the British and American libel regimes and how they handle what is essentially the same case. While libel defense lawyers in both countries prefer the American system with its many First Amendment defenses, the much-maligned British system may well go much further than the American in uncovering the truth about the sensational allegations. Finally, because U.S.-based online booksellers have been sued in the United Kingdom, the litigation may determine whether the U.K. libel regime's age-old custom of effectively banning a book by threatening a libel action will survive in an age of e-commerce.

By McPhilemy's account, the "Ulster Central Coordinating Committee" was an outgrowth of Protestant reaction to what they considered a "betrayal" by Margaret Thatcher in 1985, when Britain gave the Republic of Ireland a limited role in speaking for the Catholic population of Northern Ireland. There also was a growing frustration within the Protestant establishment and the RUC itself that the hands of the security forces were being tied by politicians in London. The IRA wasn't impressed by the Thatcher initiative and continued its relentless campaign of terror against Protestants, including prominent Protestant businessmen who, by the IRA's definition, had "collaborated" with the authorities by selling them goods or services. More extreme Unionists (so called because they traditionally supported union with Britain), including a then little-known university law lecturer named David Trimble, urged Ulster's independence from Great Britain, a view shared by The Committee. For the record, all the members of The Committee who are identified in the book have denied the group's existence.

In his book, McPhilemy identifies 18 victims whose murders were allegedly sanctioned and organized by The Committee between February 1989 and September 1991. All of these murders are officially "unsolved." This terrorist campaign, whether or not directed by The Committee and assisted by the RUC, continued to be chillingly effective. In 1992, the hit squads killed nearly twice as many Catholics as the IRA did Protestants. A serious IRA peace initiative followed in 1993.

McPhilemy's largely circumstantial evidence regarding Trimble is based on Trimble's alleged close association with many persons identified as members of The Committee, and on Trimble's efforts, in response to the documentary (which identified no Committee members by name), to discredit it and McPhilemy. Trimble attacked the documentary in interviews and, with full legislative immunity, on the floor of Parliament. McPhilemy interviewed his primary confidential source, James Sands, extensively on several occasions, including a lengthy videotaped interview in which he claimed to have sat on The Committee itself. According to McPhilemy and his investigators, the details of his story and his background checked out. He was who he said he was—a close political associate of many of the people he identified as being on The Committee.

As for the case against McPhilemy, it rests on the fact that the Royal Ulster Constabulary was able to identify James Sands as the source and, after substantial interrogation, to persuade him in 1992 to recant his Channel 4 interview. Unfortunately for the RUC, they didn't have access to the complete transcripts of Sands' interview with Channel 4, whereas McPhilemy was able to obtain from a U.S. court a complete transcript of the RUC's interrogation of Sands. In his book, McPhilemy examines in careful detail both the initial Sands interview with Channel 4 and the RUC-induced retraction and easily demonstrates the credibility of the initial version.

Additionally, Sands met with McPhilemy's American and British lawyers earlier this year and signed an

affidavit confirming that his original interview was true and accurate and his retraction to the RUC was induced by threats. Yet in subsequent interviews with the British press, Sands has again recanted (albeit not under oath). Moreover, McPhilemy had another anonymous source within the rogue element of the RUC who confirmed details of collaboration with anti-Republican terrorists (though not the existence of The Committee itself). McPhilemy claims to have more former RUC members as sources as a result of further research for the book. One of those has been identified in court papers as former RUC Sgt. John Weir, who claimed that an alleged Committee member, Belfast solicitor Richard Monteith, told him in December 1998 that “the book was basically accurate” and contained only “small mistakes.”

McPhilemy himself was a respected investigative journalist before producing *The Committee*. But he was not political, never having done an article or program on Northern Ireland. As a former colleague wrote earlier this year in *The Financial Times*, “McPhilemy, a Catholic who is married to a Northern Ireland Protestant, had deliberately made no programmes on sectarian strife in his native province because he was pessimistic about political progress and disinclined to immerse himself in the intransigence and bigotry that prevailed on both sides of the sectarian divide.”

These factors—McPhilemy’s reputation as a journalist, his lack of Irish Republican sympathies, his initial reluctance to do the program at all, the two confidential sources, the patent inconsistencies in his major source’s recanting, and the numerous (if anonymous) former RUC officers who supposedly confirm RUC complicity in the unsolved assassinations—have a direct bearing on the likely outcome of any libel suit brought into an American court. Taking them all into account, it is not unreasonable to conclude that McPhilemy has acted throughout with a good-faith belief in the truth of what he has broadcast and published. And if that is the legal issue in a libel case, it won’t get to a jury in the United States if the person suing is a public official or public figure.

That is among the reasons that most of the libel suits were filed only in the U.K., notwithstanding that the book is widely available in the United States. In the U.K., libel plaintiffs are thought to have it easier than in the U.S. For one thing, if you sue someone for libel in the U.K., it is the defendant who must prove the truth of what he published.

Also, plaintiffs in the U.K. can do more than sue the author and publisher of the alleged libel. They can sue anyone who disseminates it, including news dealers and booksellers. All they have to do is prove that the news dealer or bookseller had knowledge of the defamatory content and continued to sell the offending publication. The knowledge requirement is usually taken care of by the plaintiff’s helpful solicitor, who sends an ever-so-polite letter to the bookseller or news dealer advising him to remove the offending publication from his wares or he will have his pants sued off. This usually does the trick, given the low profit margins of most booksellers and news dealers.

On the down side, the plaintiff must pay his solicitor for the lawsuit as well as the barristers who actually try the case. Contingent fees are forbidden. And if the plaintiff loses, he must pay the attorneys’ fees for the defense. So while libel plaintiffs may have it easier in the U.K., the threat of losing and paying the other side’s attorneys’ fees acts as a deterrent to frivolous suits.

Unfortunately, there is no such deterrent in the United States. On average, far more frivolous libel actions are filed in the U.S. than in the U.K. So plaintiffs’ lawyers in the U.S. frequently take libel cases on a contingent basis. Inasmuch as America does not have a “loser pays” tradition on attorneys’ fees, the Supreme Court has helpfully placed a multitude of roadblocks in front of libel plaintiffs to keep them from raiding media treasuries. Plaintiffs have the burden of proof. And not only do they have to prove that the statements about them were false; they also have to prove that the media defendants were at fault. Specifi-

cally, if you are a private figure, you must prove that the reporter was negligent in doing his job.

If you are a public figure or a public official, the bar is raised even higher. A public official must show that the statements were false and defamatory, and that the reporter deliberately lied or was so reckless in his reporting that you could conclude he didn't care whether what he reported was true or not. This is commonly referred to by libel lawyers as the *New York Times v. Sullivan* rule, after a 1964 Supreme Court decision.

The Supreme Court has done all this in the name of the First Amendment, and the accepted dogma in the United States today is that it has been necessary to avoid a "chilling effect" on free speech. As a consequence, almost 90 percent of all U.S. libel actions are decided in favor of the media before trial on issues other than truth. It is by no means clear, however, that the constitutional standards of *New York Times v. Sullivan* are more of a deterrent to frivolous libel actions than the United Kingdom's practice of making the loser pay the winner's attorneys' fees.

Perversely, the U.S. system that makes it so hard for public figures and public officials to recover for damage to their reputation actually gives them a free pass when very bad things are said about them. All they have to do is issue a vigorous denial, because in the United States they are not expected to sue. They can hide behind *New York Times v. Sullivan* and say they don't want to spend tens of thousands in attorneys' fees to prove that a reporter was reckless when all they want to do is clear their good names, something the U.S. libel system is not designed to do if you are a public figure or public official.

But in the U.K., given all the advantages that a libel plaintiff possesses, public officials have long been under enormous pressure to issue libel writs if they have been defamed. If a public official merely satisfies himself with an angry denial, people start wondering, repeat the libel, and think, "If you don't sue, it must be true."

So which system better serves the public interest in terms of uncovering wrongdoing by public officials? It is probably impossible to quantify, but occasionally something comes along that allows you to draw a comparison. *The Committee* is just such an occasion, and in this case the U.K. system wins hands down.

None of the libel suits that arose in the U.K. in the wake of the 1991 broadcast of *The Committee* would have happened in the United States. Richard Monteith, the Belfast solicitor, filed both criminal and civil libel suits against McPhilemy even though the original documentary was careful not to describe any Committee members in any way that would allow them to be publicly identified. And even if it had, a U.S. public figure would have used the media, not the courts, to fight back. In addition to defending himself against Monteith, McPhilemy also was determined to rescue and restore his reputation as a journalist. That reputation had been battered by the media campaign against him and the program by the RUC, the Ulster establishment, and those media outlets that bought their spin. *The Sunday Express*, for example, accused him of lying to Channel 4 about threats to his life, and *The Sunday Times* accused him of perpetrating a hoax in the 1991 TV broadcast.

From the outset, McPhilemy contemplated libel suits against both papers in a way an American journalist would never have considered. It's fair to conclude that, but for the initial Monteith suits involving the documentary and the imperative to clear his own reputation, McPhilemy would not have undertaken the additional extensive research necessary to publish the book that identifies the names of The Committee members, and which resulted in the new lawsuits, including David Trimble's.

McPhilemy's suit against *The Sunday Times* is scheduled for trial in January in Britain; the only suit to be brought in a U.S. court is scheduled to come to trial here in March. While both trials will generate consider-

able heat, the British libel trial is the more likely to shed light on the book's essential allegations. This is because the defense in the American suit will focus on whether McPhilemy was reckless or negligent in his reporting, while *The Sunday Times* will focus its defense on the book's falsity.

McPhilemy attempted to limit the case to the *Times*' accusation that he was incompetent and careless at best, and a hoaxer and deceiver at worst. But in May, the Court of Appeal in London rejected McPhilemy's attempt. The Court of Appeal judge reasoned that *The Sunday Times* article at issue "comes close—I am inclined to say very close—to asserting that the programme's central thesis was untrue. I accept that in some circumstances a publication that the content of a programme is untrue may not be defamatory to the programme makers. But I consider that in this instance it adds to the defamatory sting to say, not only that the main content of the programme was based on obviously worthless evidence, but that it was, or probably was, untrue."

McPhilemy wanted to put himself and his journalistic methods on trial, not the truth of the central thesis of the program. *The Sunday Times*' lawyers finally figured out they might not win by an attack based on McPhilemy's incompetence or mendacity. Far better, *The Sunday Times* reasoned, to try and prove that McPhilemy's main source—James Sands—was unworthy of belief based on his erratic RUC-induced statements after the broadcast.

David and Albert Prentice aren't going to have it so easy in their U.S. trial next March. Last October, the Prentices, prominent Ulster businessmen and alleged members of The Committee, filed a libel suit in Washington, D.C., against McPhilemy, his production company, and the American publisher of *The Committee*. If they are determined by the court, as a matter of law, to be public figures, then only McPhilemy's conduct as a journalist (whether he knowingly lied or was indifferent to the truth) will be at issue, not the book's truth or falsity. Truth will be at issue if the case goes to a jury, and that won't happen unless the Prentices are private figures.

McPhilemy's American lawyer certainly believes the Prentice brothers will be found to be public figures. Recent court papers filed by him allege, among other things, that the Prentice brothers have extensively advertised their business throughout Northern Ireland, sought publicity for their many charitable contributions, financed an anti-Republican printing company, openly cooperated with *The Sunday Times* in its McPhilemy litigation long before they had been identified as Committee members, and actively sought publicity for their lawsuit against McPhilemy. If McPhilemy can prove all this to the court's satisfaction, the Prentice brothers will be just another U.S. libel plaintiff statistic, one of the 90 percent who lose before trial on issues other than truth.

One issue arising from this tangle of cases is straightforward. Does the David Trimble lawsuit against Amazon.com, along with policeman Trevor Forbes' lawsuit against Barnes & Noble, endanger the future of Internet book sales in Britain by U.S. booksellers? In a word, no.

While it is true that U.K.-based booksellers, including Amazon's U.K. subsidiary, have removed the book from their Web sites, the major U.S. online booksellers—Amazon, Barnes & Noble, and Borders—continue to sell and ship the book to customers in the U.K. (The book's U.S. publisher, Roberts Rinehart of Colorado, no longer accepts orders for the book placed by customers in the U.K. on its Web site.) When asked why Amazon had taken the book off its U.K. Web site but still made it available on its U.S.-based Web site for sale to U.K. customers, Simon Murdoch, managing director of Amazon.co.uk and vice president of Amazon.com, explained: "From a legal point of view, it's actually quite a big distinction. The situation is, if you actually buy the book from any company in the States, as I understand, you would be actually bringing the book in yourself as an individual."

David Trimble is maintaining his suit against Amazon.com despite the fact that the book is no longer available on Amazon.co.uk. But there are two additional reasons why Amazon.com need not be worried about it. First, any libel judgment against Amazon in the U.K. will be enforced only against its assets located in the U.K. And, assuming that Amazon.co.uk is a subsidiary corporation and not simply a division of Amazon.com, English solicitors maintain that its assets cannot be used to satisfy a judgment against the U.S.-based parent. Second, there is an increasing trend among U.S. courts to refuse to enforce English libel judgments transferred to the U.S. because they are the product of a system which is contrary to the public policy of the United States.

The ultimate outcome of the U.K. suits against Amazon and Barnes & Noble, therefore, is that the U.K. libel system will not be able to impose its standards on books shipped from the United States. Equally important, English solicitors will no longer be able to effectively ban books in the U.K. simply by threatening to sue a bookseller. They can limit access, but banned books in the U.K. are a thing of the past thanks to U.S.-based online booksellers.

As to the other issues, the bottom line is that the British libel regime has resulted in the publication of a bestseller in the United States that credibly accuses the first minister-designate of the new government of Northern Ireland of providing political cover for terrorists. The U.S. libel regime is far less likely to have produced such a result.

Politically, the timing could not be worse. The situation is again becoming critical in Northern Ireland, and McPhilemy is an inconvenient presence not only to David Trimble but to British Prime Minister Tony Blair as well. Trimble's lawsuit only serves to focus more attention on himself and the accusations against him.

Tony Blair has now gone much further in Northern Ireland than Margaret Thatcher ever dreamed: Genuine power sharing with the Catholic minority is at hand; the IRA's guns are once again temporarily silent; and the Republic of Ireland has formally dropped any claim to sovereignty over Northern Ireland. Yet David Trimble, as the first minister-designate, is refusing to allow the new government to be formed because the IRA won't commence decommissioning its arms.

Trimble and the IRA are playing a dangerous game. Each has a diametrically opposed view of what the British will do if the peace process breaks down, and the cease-fire with it. Trimble trusts that Blair will again send in the British Army to restore order.

But trusting the British to do the right thing is not a policy; it's a wish. That Blair was a hawk on Kosovo is no guarantee he will be the same in Northern Ireland, especially in the face of what is widely perceived as Unionist intransigence. If the IRA breaks the cease-fire and the British don't send their army back in, Ulster will end up being led by a politician who only 10 years ago was advocating Ulster independence. And if Ulster independence comes, so probably will a new Irish civil war between north and south, much to the delight of the IRA, if not Sinn Fein, neither of which ever made the mistake of trusting the British to do the right thing for Ireland.

If David Trimble really wants to live up to the legacy of his Nobel Peace Prize, he should spend less time on his reputation and more on his country, U.K. libel law notwithstanding.

Contributing Editor [Michael McMenamin](#) is a lawyer in Cleveland who has defended the media in libel cases.