Reduced ‘uplifts’ on libel CFAs – why the hurry?

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A month is a long time in politics. On 3 March 2010, the previous Justice Secretary Jack Straw laid before Parliament a Statutory Instrument by which the maximum ‘uplift’ in defamation and privacy cases would be reduced from 100% to 10%. On 18 March, the House of Lords Merits of Statutory Instruments Committee drew the SI to the special attention of the House, regretting that ‘insufficient time has been allowed to produce a solution based on more robust evidence or on which there is broad agreement, and that might seem more likely to achieve the policy objective without the potential side effects’. Neither Sir Rupert Jackson’s ‘Review of Civil Litigation Costs: Final Report’ nor the Report of the Culture Media and Sport Select Committee had supported the 10% cap as the solution, their proposals each differing in important respects from the Government’s.

Then on 30 March 2010 the House of Commons First Delegated Legislation Committee (which had a Labour majority) voted down the Conditional Fee Agreements (Amendment) Order 2010 by 11 votes to 5. Faced with concerted opposition amongst members, the beleaguered Minister in attendance, Bridget Prentice, conceded: ‘Wow. Well as I said earlier, this is my last Statutory Instrument Committee - thank God for that’. Nevertheless the Ministry of Justice attempted to reintroduce the SI to the Commons but on April 6, the day before Parliament was prorogued, the Leader of House announced, ‘It might be on the Order Paper now, but it is not going anywhere’.

This piece of legislation had a short and inglorious life. It was ill-considered, rushed through with unseemly haste by Mr Straw and his colleagues, and, in the end, counter-productive. As with much of the debate that surrounds media law issues, it was bedevilled by ignorance, exaggeration and muddled thinking. The irony is that had Mr Straw adopted a more moderate approach to what was, on his own account, only supposed to be an interim measure, he would have been able to achieve meaningful reform of a kind that nearly everyone agreed was warranted. But the manner in which it was handled cannot help but give rise to a suspicion that, with a general election looming and a Government in need of friends in the media, appearance always mattered more than substance.

The timing of this reform always looked odd. The Ministry of Justice produced its Consultation Paper ‘Controlling costs in defamation proceedings’ on 19 January 2010, only 5 days after Jackson’s comprehensive Final Report had been formally published. An abridged consultation period of only 4 weeks was allowed (as compared with the usual 12-week minimum laid down by the Government’s Code of Practice). The stated justification was: ‘in order to be in a position to implement the proposal as soon as possible (subject to consultation), it will be necessary to shorten the consultation period to four weeks’!

A request for an extension of time was made by some respondents (including the Bar Council) so as to allow informed and evidence-based responses to be collated. It was refused, essentially on the ground that this was an issue that the Government had already consulted on in the past. But not only had such a significant reform never been put forward, on the last occasion that the level of success fees in media cases *had* been consulted upon – in 2007/2008 - the Ministry of Justice had positively endorsed the Civil Justice Council’s recommendation that a fixed staged success fee regime be given the force of law. Under this regime (known as the ‘Theobalds Park Plus’ protocol) the recoverable success fee ranges from 0% where the case settles within 14 days of receipt

of the letter of claim, via 25%, 50% and 75%, up to 100% for cases which go to trial or settle shortly before trial.

At the heart of Mr Straw's reform were two premises:

- First, that 'the vast majority of defamation claims succeed'.
- Secondly, that a 100% uplift 'is regularly applied and appears to have become the norm'.

From here it was but a short step for him to conclude that libel lawyers were being substantially over-rewarded by success fees, since the risks that they were running in taking on CFA cases were in truth negligible.

The consultation paper cited 'data' provided by the Media Lawyers Association to Sir Rupert Jackson which was based on a 'sample' of 154 libel and privacy cases that the media had lost in 2008. Interestingly, only 27 of these had been funded by a CFA (17.5%), but these included two of the three cases that had gone to trial and lost, leaving the newspapers with a very large bill indeed. Also, the proposition that CFA cases were just too easy to win sat oddly with the media's protests, in the early days of recoverable uplifts, that the CFA system was encouraging unmeritorious cases.

As an evidence base upon which to build a drastic change in the law, the data was seriously inadequate. The 'sample' did not include cases against defendants who were not members of the MLA (and so omitted three trials where claimants lost, including two against media publishers), and the data contained no information about the actual level of success fees paid to those CFA-funded claimants who won. Could three trials lost in one year by MLA members really be said to amount to evidence that the defendants always lose? And if they had such high prospects of success, what on earth were the newspapers doing defending them? They are not short of expert advice from leading practitioners.

The respondents who opposed the change included the Bar Council's CFA panel, the Master of the Rolls, the Senior Costs judge, the Law Society, firms of solicitors who do claimant work, and several barristers who act for defendants as well as claimants. Some had doubts about the validity of the data, since it did not accord with their general experience of defamation practice. These were confirmed when a more comprehensive list of defamation matters substantively resolved by judge or jury between 2005-2009 was published (based on records compiled by Mr Benjamin Pell, the well-known habitué of the libel courts), which showed that of the 16 contested trials involving media defendants in that period, the claimant won 8, the defendant won 5, and 3 were inconclusive.

As for the notion that uplifts of 100% have become the norm, this was simply untrue. Leading players in CFA-funded work have been using the staged success fee protocol for years. Staged success fees are now the norm, at least for the firms doing the great majority of this sort of work. Thus an uplift of 100% will generally only be triggered in cases which fight to the bitter end – in other words, where the defendant estimates its chances at no worse than 50-50.

In addition, it is one thing to stipulate for a 100% success fee, but quite another to recover it *inter partes*. Not only are deals frequently done on costs which result in payments that reflect a success fee considerably lower than 100%, but Costs Judges have shown themselves to be well capable of assessing recoverable uplifts downwards (in one media case, from 95% right down to 40%).

Of the 57 respondents to the consultation, 27 opposed it and 30 supported it. The 30 included all the major newspapers publishers, the BBC, the MLA, the Society of Editors, the Press Association, the Publishers Association and three firms who rely on defendant instructions for their work. The decision to carry on by Straw apparently on the basis that 'more than half of those who responded agreed with our proposal' begins to look a little suspect.

It is time to address a few mathematical facts. In order to achieve 'costs neutrality', a case with a 10% uplift must carry with it prospects of success of over 90%. Such cases are rare indeed. That is why I and those of my colleagues who opposed the reform stated that it would be tantamount to a return to the old days. The only CFA cases we would take on would be those exceptionally deserving ones where we would have formerly been prepared to act without any reward for risk or even *pro bono*.

A 50% uplift implies prospects of success of 67%, but that is *before* any account is taken of the fact that losing cases tend to cost very much more than the winners. Those of us who favoured a reduction to this maximum did so because it seemed a reasonable interim position, pending the availability of reliable data upon which to ascertain whether or not lawyers really are being over-rewarded for CFA work. It also allows *defendants* to obtain access to CFA funding such as Simon Singh, who recently won his appeal against the British Chiropractic Association. One Commons Committee member reported on 30 March 2010 that Singh is one of four cases of scientists or academics using CFAs with a 100% uplift to defend themselves.

It is possible to be sceptical about the media's cry that CFAs have a chilling effect on journalism (as opposed to on the way in which claims are defended) whilst having considerable sympathy with their exasperation at a system which penalises them with potentially 100% of their opponent's costs bill for choosing to defend those cases which it was most reasonable for them to defend. All the more so when there is no means testing for those using CFAs.

Any system of recoverable success fees imposes a disproportionate burden on litigants (and not just media defendants). But that is an argument based on principle. There is also a much-needed ongoing debate as to how to bring down the costs of libel litigation. In the meantime, and pending the introduction of an alternative system of providing access to justice, it would surely have been better to seek to change the existing system proportionately, and after due consultation, rather than precipitately and on the basis of flawed evidence.

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