LIBEL UPDATE – September 2004

A survey of recent developments in the field

1. Offers of Amends – How have they worked so far?

Issues raised:

- ***'Delay' – does it affect the level of compensation?***
- ***Is the defendant stuck with the claimant's pleaded meaning?***
- ***Cross-examine or not – do you need the 'aggravation'?***
- ***Mitigation – what's allowed and what's not?***

Recent Cases:

Nail v News Group Newspapers Ltd & Others [2004] EWHC 647 (QB); [2004] All ER (D) 501 (Mar); [2004] EMLR 20 (Eady J) - 26 Mar 2004

In 1998 Harper Collins published a biography of the Claimant entitled "Nailed". He decided not to arouse interest in it by suing. In 2002 extracts from "Nailed" were published in the News of the World and the book attracted new consumer interest, selling about a hundred copies. The Claimant sued the News of the World for the offending article and, separately, Harper Collins for the editions of the book sold in 2002.

Both Harper Collins and the News of the World made offers of amends under s2 Defamation Act 1996 which the Claimant accepted. The court had to determine the appropriate levels of damages.

The Claimant was awarded £7,500 for the Harper Collins book and £22,500 for the News of the World article. The Judge held that, as there was a public interest in encouraging media defendants to make offers of amends, damages awards in such cases ought to be "healthily discounted". The discount he gave in that case was 50%.

Note: The Court of Appeal is due to hear the Claimant's appeal in November 2004.

Judicial Highlights:

** *It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively 'won'* ** [35]

** *If [media defendants] do not feel confident of getting a 'healthy discount' for adopting what is, in effect, a conciliation process, then I suspect… that there may be a return to the tactic… of using their considerable resources to complicate and prolong litigation with a view to discouraging less wealthy litigants* ** [40]

Milne v Express Newspapers (CA) [2004] EWCA Civ 664 - 27 May 2004

The Claimant, a solicitor, reported Keith Vaz MP to the Parliamentary Commissioner for Standards for not declaring payments made to him by a solicitor, Sarosh Zaiwalla, when twice recommending him for an honour. Following a finding by the relevant Parliamentary Committee upholding the Claimant's complaint, the Sunday Express published an article quoting Mr Zaiwalla. The agreed meaning of the article was that the Claimant was reasonably suspected of giving false evidence to the Parliamentary Commissioner. The Defendant made an offer of amends which the Claimant rejected.

This was the Claimant's appeal against the first instance judge's interpretation of s.4(3) Defamation Act 1996 about what was the relevant state of knowledge of a journalist such as to entitle a claimant to reject an offer of amends. The judge held that the journalist had to have been "malicious", in the sense he was recklessly indifferent to the truth, at the time of publication. The first instance Judge's decision was therefore upheld.

Judicial Highlights:

** *The word 'reckless' was not retained. Instead s4(3) uses the expression "knew or had reason to believe"… Mr Parkes invites us to suppose that this change shows a parliamentary intention to moderate in favour of the claimants the Neill Committee recommendation as to recklessness. … We do not consider that this difference of expression… carries any implication of parliamentary intention* ** [26]

** *We do not consider that… there is a distinct possible meaning of the words 'had reason to believe' lying between recklessness on the one hand and constructive or imputed knowledge based on negligence on the other. … shutting your eyes to an obvious truth is the same as reckless indifference to that truth. Move away from that, and you immediately arrive at constructive knowledge"* ** [35]

2. Damages – Where are we now? What is the relevance of *Gleaner*?

Issues raised:

- ***Has Gleaner had any effect at all for media defendants?***
- ***Where are we with Jury or Judge-made awards ?***

Recent Cases:

Gleaner Co v Abrahams (PC) [2003] UKPC 55; [2004] 1 AC 628; [2003] 3 WLR 1038; [2003] EMLR 737 - 14 Jul 2003

In 1987 the two daily newspapers in Jamaica, the Daily Gleaner and the Star, both owned by the Appellant company, published defamatory articles about the Respondent, the former minister for tourism for Jamaica. The Appellant relied on defences of justification and qualified privilege but these were both struck out. After a trial on the issue of damages only, the jury awarded 80.7 million Jamaican dollars (approximately £1.2 million). The Court of Appeal of Jamaica reduced the award to 35 million Jamaican dollars (approximately £533,000). The Appellant appealed to the Privy Council, arguing that the award was still excessive and would have an inhibiting effect on the exercise of the constitutional right to freedom of expression.

The appeal was dismissed, the Council holding that restrictions on the freedom of expression were necessary to protect the reputations of others. The test in *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670, namely whether a reasonable jury could have thought that the award was necessary to compensate the claimant and re-establish his reputation, was correctly applied by the Court of Appeal of Jamaica. The argument that the award was still too large failed. The Court was also right to include punitive and deterrent elements in the award.

Judicial Highlights:

** *defamation cases have important features not shared by personal injury claims. The damages often serve not only as compensation but also as an effective and necessary deterrent… the effectiveness of the deterrent is the whole basis of Lord Lester's argument that high awards will have a 'chilling effect' on future publications. Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens* ** [53]

Howlett v Holding
A former mayor was awarded £65,000 libel damages by a jury against a businessman who flew a plane towing banners over the neighbourhood accusing her of shoplifting.

Jameel v Wall Street Journal Europe
A jury awarded Mr Jameel £30,000 and his company £10,000 over allegations of links with terrorist organisations.

Wood v CC of West Midlands Police
A jury awarded Mr Wood £45,000 for allegations by a Detective Chief Inspector that Mr Wood had aided and abetted the commission of numerous serious criminal offences.

Campbell v News Group
Lords Nicholls and Hope and Lady Hale dismissed, without giving reasons, the appeal by Alan Campbell against the Court of Appeal's decision in July 2002 to cut his damages from the jury award of £350,000 to £30,000.

Bates v Associated
Former Chelsea chairman Ken Bates was awarded £9,000 damages by a jury over an allegation in the *Evening Standard* that he foul-mouthed a potential business partner.

Bin Mahfouz v JCB Consulting & Brisard
Saudi businessman Sheikh Khaled Bin Mahfouz was awarded £10,000 damages by a judge for allegations of links to Al-Qaeda

3. Qualified Privilege – Application of the '*Reynolds* defence' and the sliding scale of responsible journalism

Issues raised:

- ***Seriousness of the allegations – is this just a single factor?***
- ***Urgency – is the interest being served the newspaper or the public?***

Recent Cases:

Jameel & Another v Wall Street Journal Europe [2004] EWHC 37 (QB); [2004] EMLR 196 (Eady J) - 20 Jan 2004

The Defendant published an article in the Wall Street Journal Europe to the effect that the Saudi Arabian authorities were monitoring, at the US government's request, certain bank accounts in connection with the actual or potential funding of terrorism. Accounts of the Abdul Latif Jameel Group were named as being on the list of such accounts. In an action brought by the main company in the Group and by its President, the Defendant contended that the publication was protected by Reynolds privilege and took issue with the Claimants' meaning, which was at the 'reasonable grounds to suspect' level. The jury by their findings of fact rejected much of the journalist's account of his sources for the story and his attempt to verify it with the Claimants in advance of publication. Subject to the trial judge's ruling on privilege, they awarded damages of £30,000 to the President and £10,000 to the company.

The defence of *Reynolds* privilege failed. The jury's findings of fact had made it look somewhat forlorn. Although the subject-matter of the article was of the plainest public interest there was no duty to publish an article in these terms, and the Defendant would be adequately protected by the defence of justification. Key factors were: the underlying imputations in the article were at the higher level of gravity; there was no public interest in naming names, given that, on the Defendant's own account (a) the monitoring was supposed to be secret and (b) the US government had agreed not to name names in return for the Saudi government's cooperation; there was no urgency such as to justify publishing the story without having given the Claimants a meaningful opportunity to comment, especially since the Defendant had published the same story on the previous day without naming names.

Note: The Court of Appeal is due to hear the Defendant's appeal in October 2004.

Judicial Highlights:

*** The question is whether the particular defamatory allegations about the claimant, notwithstanding their gravity, were such that they should be communicated to the public at the material time – irrespective of their truth or falsity… Naturally, if the allegations are true there will be a defence of justification, but qualified privilege will protect defendants in respect of damaging information that turns out to be false – provided always that the public needed to have that information straight away true or not *** [31]

4. Injunctions in Libel Claims

Issue raised:

- ***Has the rule in Bonnard v Perryman been undermined by s12(3) of the HRA?***

Recent cases:

Coys Limited v Autocherish Limited & others [2004] EWHC 1334 (QB) (Tugendhat J) - 4 Mar 2004

The Claimants, auctioneers of classic cars and automobilia, applied for an injunction against five out of seven defendants (a mixture of car dealers, ISPs and a former customer of the claimants) to restrain them from publishing or maintaining a website containing defamatory material about the claimants, such as fraud, dishonesty, improper business practices etc.

Dismissing the application, the correct approach on interim injunctions in defamation cases is still as set out in *Holley v Smyth* [1998] QB 726 and the Court is bound by it. If it was open to the Court to rule on the applicability of *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] Ch. 650 to defamation cases then that decision did not apply. On the facts the words complained were unarguably defamatory and there was evidence of an intention to repeat by some of the defendants. However, the Defendants raised affirmative defences of qualified privilege, fair comment and, in respect of a lesser meaning contended for by the claimants, justification. Since that was the position the rule in *Bonnard v Perryman* applied and the Court could not be conclude that there was nothing in them to go before a jury for determination, *R v Galbraith* (1981) CLR 648 applied; *Alexander v Arts Council of Wales* [2001] WLR 1840 considered.

Note: The House of Lords has heard argument in the appeal in *Cream Holdings* and judgment is awaited. It is hoped the decision will shed light on the inter-relationship between section 12 of the Human Rights Act and the various causes of action that can restrict freedom of expression.

Tillery Valley Foods Ltd v Channel Four Television Corpn & Another [2004] EWHC 1075 (Ch) (Mann J) - 11 May 2004

Channel Four ("C4") proposed to transmit secret footage recorded by an undercover reporter who had got a job working in the Claimant's food manufacturing plant. The footage showed numerous examples of unhygienic practices. C4 put a number of the allegations to the Claimant for comment. The Claimant applied for an injunction to restrain the transmission of the programme until they had been provided with an adequate opportunity to review the undercover footage and comment on the allegations.

Refusing the injunction, Mann J held as follows:

(1) the footage was not confidential. It was not sufficient simply to point to the breach of the employee's contract to establish the necessary degree of confidence. The issue was whether the information was confidential and *ABC v Lenah Game Meats* [2001] 185 ALR 1 showed that this type of information was not confidential.
(2) The public interest clearly favoured transmission;
(3) the law did not recognise the "right of reply" contended for by the Claimants;

(4) the reality was this was a defamation claim dressed up as a breach of confidence in order to attempt to get round the rule in *Bonnard v Perryman*.

Fawcett v *Associated*; Fawcett v *Guardian*

Former Royal aide Michael Fawcett was granted injunctions against the *Mail on Sunday*, preventing it from publishing a story that he and the Prince of Wales were seen in a compromising situation, and, somewhat unusually, against the *Guardian* preventing it from naming him as the person who got the injunction, although agreement was subsequently reached between Fawcett and the *Guardian*, allowing the paper to name him.

5. Fair Comment

Issue raised:

- ***The broadening of the law of fair comment does not mean that the 'traditional' requirements no longer apply***

Recent cases:

Oliver v Chief Constable of Northumbria Police [2003] EWHC 2417 (QB) (Gray J) - 14 Oct 2003

The Claimant was a police inspector who brought this action for slander against his chief constable (the Defendant) in relation to four statements made on the Defendant's behalf, in response to journalists' questions about a murder enquiry into the alleged mercy killings by a nursing sister at Victoria Infirmary in Newcastle. The Defendant relied on qualified privilege, justification and fair comment.

It was settled law that in order to be defensible as fair comment, the facts upon which the comment was based needed to be sufficiently stated or indicated in the words complained. The words spoken in this case did not contain such information, and thereby deprived those to whom the press release was published or republished of the opportunity to make up their own minds as to the validity of comment. Therefore, the defence of fair comment was not available to the Defendant. The publication was however protected by qualified privilege, and there would be a trial on the issue of malice.

Hamilton & Hamilton v Clifford [2004] EWHC 1542 (QB) (Eady J) - 22 Jun 2004

The Claimants sued the Defendant over words published by him as the publicist of Nadine Milroy-Sloan. The statements were made following the arrests of the Claimants by police in respect of allegations by Miss Milroy-Sloan that the Second Claimant raped her and the First Claimant encouraged or participated in the assault. The allegations were wholly untrue and maliciously made and Miss Milroy-Sloan was later sentenced to three years imprisonment for perverting the course of justice. The Defendant admitted the publications but denied the meaning alleged, namely, that the allegations made by Miss Milroy-Sloan were true. He raised defences of justification (to a meaning of reasonable grounds to suspect guilt of the criminal offences alleged), fair comment and qualified privilege based on 'reply to attack'. He also pleaded general bad reputation.

In holding that the defence of fair comment would be struck out, Eady J rejected the submission that following *Branson v Bower (No 1)* [2001] EMLR 800 and *(No 2)* [2002] QB 737, statements of belief or inferences about states of affairs were now defensible as comment. What was required in order to accommodate Article 10 within the relevant law was that defendants should not have to prove the unprovable, ie matters incapable of objective verification (referring to *Lingens v Austria* (1986) 8 EHRR 407). Nothing in the *Branson* decisions was intended to undermine the repetition rule; the fair comment defence cannot be called in aid when the defamatory sting is one of verifiable fact, such as the rape allegation here.

6. 3 levels of meaning - in libel cases involving an investigation by the police or other authorities

Issues raised:

- ***The 3 levels of meaning – Chase v News Group***
- ***To what extent do the repetition and conduct rules apply to level 3 meanings?***

Recent cases:

Jameel v Wall Street Journal Europe (CA) [2004] EWCA Civ 1694; [2004] EMLR 6

The Claimants contended that the words complained of meant that they were reasonably suspected of having terrorist ties and of funnelling funds to terrorist organisations. WSJ disputed that the words were defamatory and alternatively contended for a lesser defamatory meaning. They further contended that the words were published on an occasion of qualified privilege.

The judge held that the words complained of were not capable of bearing a lesser defamatory meaning than that of 'reasonable grounds to suspect' reflected in the second tier of gravity identified in *Chase v News Group Newspapers Ltd* (2003) EMLR 11, para.45.

Allowing the appeal in part, the Court of Appeal held that there was a high threshold for a meaning to be excluded as in doing so the judge was in effect ruling that a jury would be perverse to take a different view on that question. Therefore the judge should be wary of withdrawing meanings unless there were good reasons for doing so. The distinction here between the level 2 meaning (reasonable grounds to suspect) and the level 3 meaning (grounds merely for investigation) was somewhat blurred, and it was not a case in which the imputations were so plain as to justify the judge withdrawing from the jury, in terms of qualified privilege, the possibility of finding at least that the author could reasonably have been intending to convey some lesser defamatory meaning than reasonable grounds for suspicion, even if they were ultimately to regard that level 2 meaning as the single meaning of the words. Therefore the appeal against the judge's first ruling was allowed.

Hamilton & Hamilton v Clifford [2004] EWHC 1542 (QB) (Eady J) - 22 Jun 2004

(See above)

(1) The meaning of 'guilt' pleaded by the Claimants would not be struck out. The Court should only intervene at that stage to pre-empt perversity (*Jameel v Wall Street Journal Europe SPRL* [2004] EMLR 6).
(2) The Defendant's Lucas-Box meaning would be struck out in the case of one publication only by virtue of the operation of the repetition rule. As to the remaining publications the Lucas-Box meaning could stand.
(3) None of the particulars of justification was capable of supporting reasonable grounds to suspect the Claimants of participating in the alleged rape: *Musa King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [22]; *Shah v Standard Chartered Bank* [1999] QB 241.

Jameel & Another v Times Newspapers Ltd (CA) [2004] EWCA (Civ) 983 - 21 Jul 2004

The Claimants sued on an article published in the Sunday Times under the headline "Car Tycoon 'linked' to Bin Laden" which named Yousef Jameel and referred to his involvement and that of his family in owning and running Hartwell plc, the second Claimant. The Defendant contended that the article was incapable of bearing the meanings attributed to it by the Claimants, that it was incontrovertibly true in the only defamatory meaning which it was capable of bearing of the first Claimant, and that it was incapable of defaming the company. It applied for summary judgment accordingly. At first instance Gray J ruled out the first Claimant's higher (Chase 'level 2') meaning but dismissed the Defendant's application for summary judgment; he also struck out the second Claimant's claim altogether. The Claimants appealed.

Allowing the first Claimant's appeal, the Court of Appeal held that the article was arguably capable of bearing the first Claimant's higher meaning. However, dismissing the second Claimant's appeal, the article was incapable of bearing the company's meanings or any meaning defamatory of it: the article did not suggest that the company was itself implicated in the wrongdoing or suspicion of wrongdoing attributed to the individual.

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21 September 2004

CLAIMANT	DEFENDANT	S. 8 OR OFFER OF AMENDS?	ALLEGATION COMPLAINED OF	APOLOGY PUBLISHED?	COMPENSATION AWARDED	JUDGE	LIVE EVIDENCE?
Sir Alex Ferguson	Associated Newspapers Ltd	s.8	That C was so greedy that he was happy to give pre- and post-match interviews only if he was paid a substantial sum of money for doing so.	No – but a factual correction was published to the effect that it was untrue that C was paid £10,000 a game to give interviews and he was in fact not paid at all.	£7,500	Eady J	No
John Cleese	(1) Peter Clark (2) Associated Newspapers Ltd	Offer of Amends	That C's latest US television show attracted a vitriolic response from the American nation and had caused him humiliation which was richly deserved on account of his arrogance.	Yes, but not agreed with C and not to his satisfaction. (His solicitors were not in fact informed when it was published).	£13,500	Eady J	Yes, by video-link
Jimmy Nail	(1) Geraint Jones (2) Harper Collins Publications Ltd	Offer of Amends	Matters of a sexual, personal & professional nature	-	£7,500 **ON APPEAL TO CA**	Eady J	Yes
Jimmy Nail	(1) News Group Newspapers Ltd (2) Rebekah Wade (3) Jules Stenson	Offer of Amends	[Repetition of matters published in the Harper Collins book]	**Yes (shortly after offer of amends accepted)**	£22, 500 ['50 %' discount] **ON APPEAL TO CA**	Eady J	Yes