RECENT PRACTICAL ISSUES IN DEFAMATION

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1. Offers of Amends: the Jimmy Nail case:

1.1 The new offer of amends procedure created by ***s.2-4 Defamation Act 1996*** was only brought into effect on 28 February 2000, and initially media defendants were surprisingly slow to take advantage of it. But within the past two or three years it has been used more and more by media defendants to provide what Eady J has called "*a fair and reasonable exit route for defendants confronted with unreasonable demands from... manipulative or powerful claimants, who felt no doubt sometimes that they had them over a barrel*": ***Abu v. MGN Ltd (2003) 1 WLR 2201, [8]***.

1.2 It was not until November 2002 that guidance as to the operation of the new procedure was provided by Eady J in his judgment in ***Abu***. In it he traced the origins of the new procedure back to ***Chapter VII: Report of Sir Brian Neill's Committee on Practice and Procedure in Defamation.*** The Judge had himself been a member of that Committee and pointed out that times had changed, since the measures were first proposed in July 1991, when feelings were running high about massive jury awards ***[5]***. Perhaps conscious that the procedure was getting off to a slow start, the Judge tried to ensure that the statutory provisions were attractive to use, providing an incentive to defendants to make the offer and to claimants to accept. In either case, he said, a rational decision could only be made if it was possible to predict the range of outcomes to which a party was committing himself ***[8]***.

1.3 The Judge therefore emphasised that the offer of amends was to be construed as relating to the complaint *as notified* [his emphasis]: ***[9]***. This has important practical consequences for claimants' advisers in relation to what they put into their letter before action or particulars of claim. As Eady J said ***[8]***:

> "*..... before making an offer a defendant needs to be able to assess the gravity of*

the impact of the libel upon the complainant's reputation and feelings, and this will generally have to be done in the light of the particulars of claim and/or letter before action. It would not seem fair if an offer is made and accepted on one basis, and the complainant then reveals for the first time elements of pleadable damage not previously mentioned, such as for example that his marriage had broken down or that he had lost his employment."

1.4 Eady J went on to point out that the provisions of the Act were all the more attractive to defendants to use, since the restrictions proposed by the ***Neill Committee*** on the manner in which the defendant could mitigate damages had not found their way into the statute ***[10]***. The ***Neill Committee*** had accepted that defendants should be allowed to rely on matters in mitigation which were purely defensive in character, but proposed a ban on attacks on the claimant's character and on raising matters tending to show that he or she was not entitled to an unblemished character. The practical consequences for claimants are serious:

"So far as claimants are concerned.... they will have little option but to accept such an offer because otherwise they will find themselves up against a defence under section 4."

1.5 At first instance in ***Nail v. News Group (2004) EWHC 647 (QB), [66]*** Eady J stated that claimants were generally entitled, so far as possible, to be informed of anything disparaging which the defendants proposed to introduce before deciding whether to accept the offer. Since the rejection of an offer of amends was generally a complete defence, it was "*not proper under that very powerful incentive to lure a claimant into accepting what appears to be a genuine offer to put matters right, only for him to find that his reputation will be 'rubbished' anyway."*

1.6 There may also be cases where the claimant will need to consider whether to seek limited disclosure against the defendants before reaching the decision whether to accept the offer. Thus, in ***Rigg v. Associated Newspapers (2004) EMLR 52,*** Gray J ordered disclosure of the journalist's notes of an interview with the Claimant, where there was a dispute as to whether the offending article accurately recorded what had been said. The Judge ruled that the notes bore directly on the pleaded issues of false attribution and malice, and since they would be disclosable later whether or not the offer of amends was accepted, there was no sense in postponing the moment of disclosure.

1.7 Three weeks after the ***Abu*** judgment, the difficulties confronting a claimant seeking to overcome a ***section 4*** defence became clear with Eady J's judgment in ***Milne v. Express Newspapers (2003) 1 WLR 927***, where he struck out a claimant's reply alleging that the information available to the defendant was such that it reasonably should have known that the statement complained of was false. The Judge held that Parliament's intention in ***section 4(3)*** was that those who made an offer of amends which was rejected should only be deprived of the resulting defence in the event of bad faith, and not in cases of mere negligence or reasonable grounds to suspect falsity. The scale of the task confronting a claimant in such circumstances is shown by the way in which the Judge defined "bad faith": ***[41]***:

"... that is to say, where a defendant knows that what he is alleging is untrue... or where he has reason to believe that the words are false. What this means is that he has chosen to ignore or shut his mind to information which should have led him to ***believe*** **[the Judge's emphasis]** *(not merely suspect) that the allegation is false."*

1.8 Thus "*reason to believe"* in ***section 4(3)*** is not to be equated with either "reasonable grounds to suspect" or with constructive knowledge ***[44]***. The burden for the claimant to discharge is made still greater by the presumption in the section that, until the contrary is shown, the defendant did not know and had no reason to believe that the statement was both false and defamatory. The Court of Appeal dismissed the claimant's appeal, ***(2004) EMLR 461***, holding that ***section 4(3)*** imported the familiar concept of recklessness (in the sense of utter indifference to the truth) which was discussed by Lord Diplock in the classic passage in ***Horrocks v. Lowe (1975) AC 135, 149-150***.

1.9 With the exception of ***Cleese v. Clark (2004) EMLR 37*** and ***Nail v. News Group Newspapers (2004) EWHC 647 (QB)***, once the offer of amends has been accepted, the parties have been able to agree damages and it has not been necessary to proceed to a contested hearing under ***section 3(5)***. Doubtless this is because defendants have been willing to make realistic offers and, if necessary, well judged payments into court. At this stage the Act enjoins the Court to take account of any steps carried out in fulfilment of the offer and (so far as not agreed between the parties) the suitability of any apology and the reasonableness of the manner of publication. In

Cleese, [20], Eady J advised defendants who for some reason were unable to agree an apology "*to publish as prompt and generous apology as the circumstances permit, with a view to moderating the level of compensation".*

1.10 In ***Cleese, [22-4]*** Eady J noted that it was in accordance with Parliament's intention and the ***CPR*** for an informal round-the-table meeting to take place, if practical, to identify and resolve any issues still outstanding. The judge tried to discourage attempts to reach agreement through a prolonged exchange of solicitors' letters ***[24]***:

"Once solicitors enter into correspondence, there is a tendency to keep cards up sleeves and there is also scope for obfuscation and posturing. It is best avoided in this context... there can be no form of human communication more stilted than letters between litigation solicitors of the type with which we are all familiar, where endless points are scored of the 'We are surprised to note....' variety."

1.11 The cheapness of the exit route provided by the offer of amends procedure was underlined by the award in ***Cleese*** of a mere £13,500 damages for an article "obviously spiteful on its face" and "manifestly vitriolic" ***[41]***, which suggested "a long, slow decline in [the claimant's talents and professionalism had finally ended with a bump" ***[42]***. Such apology as was published was "without any great enthusiasm or generosity of spirit" ***[43]***.

1.12 In ***Abu, [22]*** Eady J pointed out that ***section 3*** does not artificially cap damages in a comparable fashion to ***section 9(1)(c)***, which is concerned with the summary disposal procedure under ***sections 8-10*** and provides for a ceiling of £10,000. Thus, not only may very serious allegations fall to be dealt with under the offer of amends procedure, but the claimant has effectually been deprived by the legislation of his constitutional right to trial by jury. The Judge therefore warned that there must be *"nothing in any sense 'rough or ready' about the assessment of a claimant's reputation under the offer of amends procedure".* Proportionality does not mean that corners need to be cut, and in the case of grave allegations, it may well be that justice requires that significant time and money be spent in arriving at the right answer.

1.13 The second case in which a contested trial on damages needed to take place was ***Nail***

v. News Group Newspapers & Harper Collins (2004) EWHC 647, where allegations of coarse sexual misconduct and arrogant bullying of those with whom he worked had been made against the actor, Jimmy Nail, in both a book and an article in *The News of the World*. Eady J awarded "modest but by no means nominal" damages of £7,500 for the book, and £22,500 for the newspaper article. In relation to the latter, he said that his "starting point valuation" had been £45,000, but that taking account of mitigating factors, he made a reduction of 50% ***[76]***. His view was that "a healthy discount" was in order ***[41]***:

"Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will generally be significantly reduced with immediate effect.".

1.14 In the Court of Appeal, Nail's counsel argued that the Judge had been wrong in principle to discount compensation in order to encourage other defendants to use the offer of amends procedure. The claimant ought to receive proper compensation, not discounted compensation which penalised him for being conciliatory. Irresponsible newspapers must not be tempted to make defamatory publications confident that, if they are sued, a relatively cheap procedure was available which was likely to result in modest compensation. Nevertheless, counsel accepted that £45,000 was an appropriate starting point for the newspaper article. The question for the Court of Appeal was therefore whether the discount of as much as 50% was excessive.

1.15 In his judgment delivered on 20 December 2004, May LJ acknowledged ***[39]*** that the court must be careful not to drive down damages to a level which publishers might with equanimity be tempted to risk having to pay, or to set the level of damages so high that freedom of expression was unduly curtailed. Whilst May LJ thought ***[42]*** that Eady J's use of the word "rewarded" was "superficially open to misinterpretation", he commented that:

"The adoption of the procedure will have what the judge referred to as a major deflationary effect upon the appropriate level of compensation because adopting the procedure is bound to result in substantial mitigation.... there is no distinction in substance between a reduction in compensation on account of the substantial mitigation bound to result from the use of the procedure and a 'reward' for using the procedure, providing that the mitigating factors are

not brought into play twice."

1.16 The Court of Appeal refused to increase ***[47]*** Eady J's award; he had made no error of principle and had given proper and full consideration to all relevant factors. Even if another judge might have reached a somewhat amount, that did not mean his conclusion was wrong. May LJ was at particular pains to *"reject entirely any idea that there might be a conventional or standard percentage discount when an offer of amends has been accepted and an agreed apology published."* Whilst it is true that each case will be different and require individual consideration, it seems likely that the 50% discount will set a benchmark in cases where an agreed apology has been published, and there are no unusual aggravating or mitigating features.

2. Recent Reynolds defences: the Jameel case:

2.1 No one could possibly forget the words of Lord Nicholls in ***Reynolds v. Times Newspapers (2001) 2 AC 127, 202E-F***, that *"the common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse".* A pointer to the fact that there are likely to be differing views as to what constitutes responsible journalism in any given case can be found in his earlier remark that *"the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence"*: ***202B***.

2.2 In two high-profile and hotly contested cases, ***Loutchansky v. Times Newspapers*** and ***Jameel v. Wall Street Journal Europe (2004) EMLR 218***, decided by Gray J and Eady J respectively, the media defendants have failed to establish ***Reynolds*** defences. Lengthy argument on a number of important points (including the presumptions of falsity and damage) has taken place before the Court of Appeal in the ***Jameel*** case last autumn, but unfortunately judgment has not yet been given. In the meantime, on 2 December 2004, Eady J delivered his much publicised judgment awarding George Galloway MP damages as high as £150,000 against *The Daily Telegraph.* At first sight the result perhaps appears surprising, but it is necessary to examine the detail of the judgment in some depth to do justice to the manner in which Eady J arrived at his conclusion.

2.3 *The Telegraph's* articles published on two consecutive days in April 2003 were said to be based on documents found by their reporter in the badly damaged offices of the Foreign Ministry in Baghdad. The main allegation, which the defendants never sought to justify, was that Mr Galloway had been receiving at least £375,000 a year from Saddam Hussein's regime under the UN oil for food programme. An editorial was in damning terms: *"There is a word for taking money from enemy regimes: treason. What makes this allegation especially worrying, however, is that the documents suggest that the money has been coming out of Iraq's oil-for-food programme..... out of the revenue intended to pay for food and medicines for Iraqi civilians; the very people whom Mr Galloway has been so fond of invoking."*

2.4 On meaning the Judge rejected as "quite unsustainable" ***[62]*** the defendants' argument that the words did not impute personal greed at all. He thought that the imputation was of both personal greed on Mr Galloway's part and of hypocrisy over his professed concern for the suffering of Iraqi people ***[65]***. He construed the first day's coverage as conveying the clear message that, despite his protestations and despite the lack of any enquiry into the authenticity or veracity of the documents, the newspaper had concluded that the evidence was overwhelming. Thus, the defendants' reliance on the doctrine of neutral reportage, derived from ***Al Fagih v. HH Saudi Research Marketing (2002) EMLR 215*** and Strasbourg cases such as ***Thoma v. Luxembourg (2003) 36 EHRR 21,*** failed because they had effectively adopted the allegations as their own ***[159]***:

"... here the Defendants were not neutral. They did not merely adopt the allegations. They embraced them with relish and fervour. They then went on to embellish them...".

2.5 In reading the Judge's application of Lord Nicholls' ten non-exclusive criteria in ***Reynolds*** to the facts of the case, it quickly becomes apparent that even-handed reporting is regarded as critical to responsible journalism.

* There could be no doubt about the seriousness of the allegations.

* The subject matter was undoubtedly of public concern; but the Judge cautioned that this was a different question from whether it was in the public interest to publish the specific

allegations about Mr Galloway at the particular time in question ***[160]***.

* The sources of the information, if the defendants were correct, were operatives in Saddam's regime. Whether or not they had "axes to grind", they could hardly be classified as inherently reliable.

* No steps were taken to verify the information, because the defendants did not think that they were capable of carrying out any meaningful verification. That would have required powers which a newspaper lacks ***[161]***.

* As regards the status of the documents, the allegations were not contained in some official report compiled after full enquiry, nor had they been (to quote Lord Nicholls again) "the subject of an investigation that commands respect". Eady J pointed out that the documents were not even "public documents", like the pre-trial records which were at the heart of ***Selisto v. Finland***, a decision of the ECHR handed down on 16 November 2004, the second day of the Galloway trial ***[162]***.

* Considering the urgency of the matter, the Judge distinguished between an urgent need for the public to be told of untested allegations and the defendants' need to maintain security for what they later called a scoop ***[163]***. Whilst news was "a perishable commodity", this story (if it could be stood up) was of interest at any time and would not become stale. The urgency from the public point of view was not so great as to justify either not giving Mr Galloway a proper opportunity to comment on the Baghdad documents or omitting to carry out any attempt at all at verification ***[164]***.

* Eady J held that the defendants should have put to Mr Galloway for comment in advance of publication the allegation that he had been in receipt of hundreds of thousands of pounds from Saddam Hussein, but they had not done so ***[166]***. Nor had they put to him "with complete frankness" the underlying factual basis for the charge of treason contained in the leader. Thus the gist of what Mr Galloway said related to a different story from that published ***[167]***.

* Finally, the Judge considered the tone of the coverage to be "dramatic and

condemnatory". It did not merely "raise queries or call for an investigation, it chose to "adopt allegations as statements of fact". Indeed, said Eady J, it went beyond the documents and drew its own conclusions ***[168]***.

2.6 Eady J thought that in the last analysis, the question to be answered was the objective one stated by Lord Phillips MR in ***Loutchansky v. Times Newspapers (2002) QB 783, [23]***, "whether in all the circumstances the 'duty-interest test or the right to know test' had been satisfied so that qualified privilege attaches". He concluded ***[172]***:

"To put it another way, did ***The Daily Telegraph*** *have a* ***duty*** **[Judge's emphasis]** *to publish the material to the effect that Mr Galloway was an 'MP in Saddam's pay' at all ? Did they have a duty to do so without putting that allegation to him ? To my mind the answer must clearly be in the negative."*

2.7 If lessons are to be gleaned from the ***Galloway*** case, they relate to the importance of caution and care prior to publication: caution in ensuring that a neutral stance is adopted in relation to the reporting of a third party's allegations, and care in putting to the subject of the article for comment the real gist of what is to be published. As Lord Nicholls said in ***Reynolds***, ***203G*** "failure to report the plaintiff's explanation is a factor to be taken into account", and "depending on the circumstances, it may be a weighty factor". An article which fails to accompany a serious charge with the gist of any explanation given faces "an uphill task" in claiming privilege if the allegation proves to be false, ***206D-E.***

2.8 It would not be right to draw any definitive conclusions about the protective effect of ***Reynolds*** for the British press merely from ***Galloway*** (or indeed from ***Loutchansky*** or ***Jameel),*** since these three cases merely reflect the outcome of the trial process. The experience of most practitioners is surely that ***Reynolds*** introduced a sea-change in British journalism so that almost invariably the subject of a defamatory story is now approached for his response in advance of publication. Sometimes this has the effect that the story is not published at all, and sometimes that it is published but in a somewhat attenuated form. Naturally it is impossible to quantify the very many cases where claimants are advised not to sue or settle early, because the gist of their comments has been properly sought and then published. One's impression is that the existence of

the defence does serve to dissuade claimants from suing, not least because it is often difficult for a claimant to be able to assess at the start of litigation the full extent of the efforts made by the newspaper before publication to investigate and verify the story. This leaves the weaker ***Reynolds*** cases to be raked over at trial. There is no reason to think that ***Reynolds*** could never have protected the publication in a neutral fashion of the contents of the documents found by the *Telegraph* in Baghdad. But as Lord Phillips MR said in ***Loutchansky, [40]***:

"In the final analysis it must be for the court, not the journalist, to decide whether he was acting responsibly."

2.9 The eagerly awaited judgments of the Court of Appeal in the appeal from Eady J's judgment in ***Jameel v. Wall Street Journal Europe SPRL (No.2): (2004) EMLR 196*** promise to resolve a number of important practical issues regarding the defendant's obligations in a ***Reynolds*** case. In the course of argument the Court indicated a provisional view that the defendant effectively undertook the burden of disproving malice. This led them on to considering the mental attitude which the defendant had to establish. In ***Jameel*** the article alleged that Saudi officials were monitoring the bank accounts of certain named individuals and businesses, with a focus on those with "Potential terrorist ties". The inferential sting of the defamation was therefore the implication that there were grounds to suspect that the claimants were involved in transferring funds to terrorists. The Court of Appeal considered that this raised the issue whether ***Reynolds*** privilege could extend to the neutral reporting of the fact of an investigation which carries a defamatory implication, *notwithstanding* that the reporter does not have an honest belief in the truth of the implication. In other words, is all that is required an honest belief on the part of the reporter that an investigation was being carried out ?

2.10 The issue raised by the Court of Appeal in argument was not the way the case was run at trial. At trial the vital issue was seen as being whether the defendants honestly and reasonably believed that there was a list of those to be monitored and that the claimants were on it. The approach provisionally indicated by the Court of Appeal would seem to indicate that in future it will be necessary to consider the honesty of the defendant's belief not merely in the truth of what they state explicitly, but also of what they imply *inferentially*.

2.11 Another matter raised by the Court of Appeal was the question of sources. Counsel for the Wall Street Journal accepted the proposition of Sedley LJ that *"it must be for the defendant to decide to what extent he or it is prepared to disclose its sources as part of the qualified privilege issue and not to rely on anything that cannot be established without disclosure of sources".* So far the Court has not had to deal with an application to order the disclosure of sources in a ***Reynolds*** case, but the protection afforded by ***s.10 Contempt of Court Act 1981*** is not absolute (see ***Maxwell v. Pressdram Ltd. (1987) 1 WLR 298***. The ***Jameel*** case may very well tempt claimants' counsel to pursue the identity of sources in a manner they have not done up till now.

2.12 Finally, the Court of Appeal after hearing substantial argument refused the appellants permission to appeal on the presumption of falsity point. *The Wall Street Journal* had argued that the existence of such a presumption was inconsistent with ***Article 10***. It may be recalled that an attempt by Lord Lester QC in the House of Lords to introduce a provision into the ***Defamation Act 1996*** reversing the incidence of the burden of proof was withdrawn. However, it does not follow from the fact that the burden of proof on justification is upon the defendant that the jury should presume that the words are false when they are considering the underlying facts supporting the ***Reynolds*** plea. Just how far the presumption reaches is a matter the Court of Appeal will have to resolve, since the appellants attacked Eady Js' reference in his summing up to the presumption of falsity in the context of the factual findings the jury was asked to make on privilege.

2.13 On occasions the perceived liberality of the ***Reynolds*** doctrine has led to hopeless defences being raised in cases where little or nothing had been done by the defendants to verify

the information published or to put it to the claimant in advance of publication. Where this occurs, claimants should consider invoking ***CPR Pt.24*** to strike out on the ground that the defence has no realistic prospect of success. It is also open to the claimant, if he is willing to confine his damages to £10,000, to apply for summary disposal under ***s.8 Defamation Act 1996***. One such case was ***Gilbert v. MGN Ltd. (2000) EMLR 681***, where Eady J held that the tests under ***CPR Pt.24*** and ***section 8*** were the same.

2.14 ***Armstrong v. Times Newspapers Ltd (2004) EWHC 2928 (QB)*** is another very recent instance at the end of last December of Eady J striking out a ***Reynolds*** plea with no prospect of success. The Claimant, the multiple winner of the *Tour de France*, complained of a *Sunday Times* article suggesting he had taken drugs to enhance his performance. The allegation had not been the subject of any official report or public investigation ***[87]***, and the newspaper did not appear to have taken any steps to verify its article or to contact the claimant for his comments on the full range of the serious allegations it intended to make.

2.15 In ***Armstrong*** Eady J contrasted the factual position there with that in ***Selisto v. Finland: ECHR: 16 November 2004***, where the articles about the surgeon claimant were derived from a public document, the police's pre-trial record ***[60]***. The ECHR noted that the surgeon had been provided with an opportunity to comment *after* publication of each article, but not in advance ***[67]***, but they also attached "considerable weight" to the fact that at no point was his name, age or gender mentioned ***[64]***, nor was it claimed that the actual facts in the contested articles were erroneous as such ***[60]***.

2.16 The approach of the ECHR inevitably strikes the English domestic lawyer as a little

curious, which perhaps explains Sir Nicholas Bratza's trenchant dissent from the majority view of his colleagues that there had been a breach of ***Article 10***. For a start, the Court did not find it necessary "*to resolve the question as to how the newspaper articles would be interpreted by the ordinary reader" **[58]***. They therefore did not consider whether the inferential meaning of the article as a whole was justifiable, even though it was agreed that the articles concerned factual statements and not value judgments ***[55]***.

2.17 The Finnish court based its conviction on what was *not* mentioned in the article (namely the public prosecutor's decision not to press charges and a statement of the National Medico-Legal Board that it had found no negligence or mistake) and thus on the overall impression conveyed to the reader ***[57]***. The ECHR ignored this impression and thought that what they described ***[63]*** as "a certain selectiveness of quotation" could not be regarded as a sufficient and relevant justification for the applicant's criminal conviction:

"Generally, journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation".

2.18 Important though it undoubtedly is, it is difficult to draw any definitive conclusion from the decision in the ***Selisto*** case. Strasbourg jurisprudence is concerned with reviewing the facts of particular cases overall, and not with the domestic legal rules of contracting states. ***Selisto*** is certainly a reminder of Lord Nicholls' warning in ***Reynolds, 203G,*** that failure to report the plaintiff's explanation was a weighty factor against the existence of privilege, but should not be elevated into a rule of law. Eady J bore this warning in mind in ***Armstrong [89]***, but added that where the allegations were as serious for the claimant as in that case, *"it is likely to be very rare*

that an approach will not be regarded as necessary".

3. Abuse by relitigation: can claims and defences be run more than once ?

3.1 The same article in *The Wall Street Journal* alleging the monitoring of suspect bank accounts which led to the proceedings in ***Jameel*** also resulted in proceedings by a leading Saudi bank, Al Rajhi. In the ***Al Rajhi*** case, the defendants raised a late plea of justification as well as of ***Reynolds*** qualified privilege, and the ***Jameel*** action came on for trial first. In a judgment in January 2004, ***(2004) EMLR 196,*** Eady J rejected the plea of qualified privilege, holding that whatever might be the position in relation to the supposed list maintained by the Saudi central bank, there was no conceivable duty to publish the names of those alleged to be on it at that stage ***[75]***. It was notable that the newspaper had published a story about the list, but not naming names, only the day before.

3.2 Basing itself on Eady J's decision in ***Jameel,*** Al Rajhi successfully applied to Gray J to strike out the plea of qualified privilege in their action: ***(2004) EWHC 752 (QB)***. The Judge based his decision on abuse of process, holding that there was no reason in principle why a defendant should not be guilty of abuse, even though the claimant could not say that it was being harassed by serial litigation ***[55]***. He went on:

"In my judgment, the concept of abuse is applicable in the case of a claimant who is faced with the prospect of having to re-litigate an issue already decided in previous litigation, as it is applicable to a defendant newspaper which is faced with the prospect of having to establish all over again a defence which has already been proved against the same claimant in

earlier litigation. It is in this connection worth remembering that the burden of proof of qualified privilege rests on the defendant."

3.3 Because it was the same article by the same journalist relying upon the same supposed sources in ***Al Rajhi*** as it had been in ***Jameel***, the Judge thought that it would be an abuse for the defendants "to run the same or effectively the same privilege defence" ***[57]***. The Judge was particularly concerned about the position of the journalist, whose evidence as to his sources was in large part rejected by the ***Jameel*** jury. Even so the defendants intended to invite the second jury to return different answers to those returned by the first. This raised the prospect of the second jury giving answers which were inconsistent with the answers of the first on the basis of very much the same evidence. The Judge thought that a disturbing prospect, which would be bound to bring the administration of justice into disrepute ***[58]***.

3.4 An appeal against this ruling of Gray J was one of a number of matters due to be considered by the Court of Appeal along with the ***Jameel*** appeal, but shortly beforehand the litigation was settled. This meant that the argument raised by the newspaper that the striking out affected not just their ***Article 10*** rights, but also their rights under ***Article 6,*** remain unresolved. Nevertheless, it would be difficult to question Gray J's analysis at ***[30]*** of the correct approach to questions of re-litigation abuse of process drawn from the House of Lords' decision in ***Johnson v. Gore Wood (2002) AC 1***, in particular the speech of Lord Bingham at ***31***.

(1) The public interests which underlie the doctrine of re-litigation abuse include the desirability of finality in litigation, which is reinforced by the current emphasis on efficiency and economy in litigation.

(2) It is not necessary that before an abuse is found, there should be some "additional element" such as a collateral attack on a previous decision or some dishonesty, although where those elements are present, the later proceedings will be much more obviously abusive.

(3) In the words of Lord Bingham, the court should make *"a broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."*

3.5 There have been a number of recent cases where the Court has refused to allow a *claimant* with more than one libel action involving the same subject-matter to proceed with a second action against a different defendant after the failure at trial of the first action. The first in point of time, the decision of Eady J in June 1999 in the case of ***Schellenberg v. BBC (2000) EMLR 296***, was all the more striking for the fact that the first action never even reached the stage of a verdict. Five weeks into the trial of the action against the newspaper defendants, the Judge (Morland J) indicated that if he had been trying the case alone, he would have been likely to find that sufficient facts had been proved to establish the defence of fair comment. The Claimant was then driven to settle the action on disadvantageous terms.

3.6 Eady J's decision in ***Schellenberg*** proceeded on two grounds (as Gray J pointed out in the later decision of ***Pedder & Dummer v. News Group Newspapers (2004) EMLR 348, [26]***)***:***

(1) Having regard to the similarity of the meanings between the *Sunday Times* article and the BBC broadcast, the Judge at ***p319*** was not willing to accept that there was *"any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources".*

(2) Turning from the ***CPR*** and the overriding objective, Eady J also considered what he called at ***p319*** "the separate but very closely related subject of abuse of process" and applied the well-established principle in ***Henderson v. Henderson (1843) 3 Hare 100***. In his view at ***p321***, *"all disputes should be brought into one piece of litigation, in so far as they can, and not left to be dealt with piecemeal in serial court hearings."*

3.7 In ***Oates v. Associated Newspapers: 19 May 2000*** the Court of Appeal refused to allow the trial of a second action, where a first action against another newspaper had resulted in the *award of a mere penny. Nor were they persuaded by the claimant's argument that at the second* trial he would want to challenge the witnesses at the first on the ground of perjury: see Mance LJ at **[15]**. It is clear that Mance LJ at **[27]** regarded the issues of no real prospect of success and abuse of process as running together. Similarly, in ***Vassiliev v. Amazon Com. Inc.* (2003) EWHC 2302**, Eady J considered that the two bases "to a very large extent overlap" **[12]**. The latter case is of interest, since the defendant additionally supported its argument by invoking ***Article 10***, and the Judge concluded that the continuance of proceedings seemed unnecessary and could not be justified by any pressing social need ***[26]***.

3.8 The cases cited and ***Pedder & Dummer*** demonstrate the court's willingness under the

CPR to take a realistic and practical attitude, and (in the words of Eady J in ***Schellenberg, 318***) "to be more pro-active even in areas where angels have traditionally feared to tread". The re-litigation of substantially the same issue before a different jury was regarded by Gray J in ***Pedder & Dummer*** as likely to be perceived, and rightly perceived, not least by the witnesses themselves as allowing the claimants "a further impermissible bite of the cherry" ***[35]***.

4. Libel injunctions: the impact of Cream Holdings:

4.1 In October last year the House of Lords handed down its judgment in ***Cream Holdings v. Banerjee (2004) UKHL 44***, dealing with the interpretation of the word "likely" in ***section 12(3) Human Rights Act 1998***. ***Section 12*** was introduced in the belief that it would bolster the right to freedom of expression by directing the court that when it was considering whether to grant relief which might affect the exercise of the Convention right, it must have particular regard to the importance of that right. In relation to the grant of interlocutory injunctive relief, ***section 12(3)*** imposed a threshold test which must first be satisfied:

"No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

4.2 In July 2002 Lloyd J granted ***Cream Holdings*** an injunction restraining the publication of confidential information about their business on Merseyside. Ms Banerjee had been the former financial controller of one of their companies, and when she was dismissed, she took with her copies of documents which she claimed showed illegal activity and passed them to *The Liverpool Echo*. It was not disputed that the information was confidential; the defence was that disclosure

was in the public interest. The Judge held that it was seriously arguable each way whether the defence was likely to succeed, and that the claimants had satisfied ***section 12(3)***: *"I do not say it is more likely than not, but there is certainly a real prospect of success".*

4.3 In the Court of Appeal the defendants unsuccessfully contended that "likely" meant "more likely than not", and that it was insufficient for the claimant merely to demonstrate a real prospect of success. Simon Brown LJ held at ***(2003) 3 WLR 999, 1003C-D [12(i)],*** that the test was *"not that of the balance of probabilities but rather that of a real prospect of success, convincingly established."* Only by that construction, he thought, could ***section 12(3)*** be made compliant with the Convention and the Court given the ability to apply it compatibly with competing human rights. One such right is naturally the right to privacy under ***Article 8***, and the right to reputation is one of the specific qualifications in ***Article 10(2)*** on the right to freedom of expression.

4.4 The House of Lords all agreed with Lord Nicholls that "more likely than not" as a test of universal application would set the degree of likelihood too high. In cases where the claim was weak but the consequences of disclosure (such as a grave risk of personal injury) were extremely serious, application of such a test would achieve the antithesis of a fair trial. For that reason, some flexibility was essential ***[20]***. In order to achieve the necessary flexibility, the degree of likelihood of success at trial needed to satisfy ***section 12(3)*** must depend on the circumstances. There could be "*no single, rigid standard governing all applications for interim restraint orders"* ***[22]***.

4.5 As regards "the general approach" to be adopted by the Court, Lord Nicholls said:

".... courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include..... where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

4.6 The speech of Lord Nicholls did not touch specifically on the approach to ***section 12(3)*** in defamation cases, where the long-established and inflexible rule has been to refuse an interlocutory injunction out of hand in cases where the defendant indicates an intention to raise a defence of justification: see ***Bonnard v. Perryman (1891) 2 Ch 269***. Perhaps it was Lord Nicholls' reference to article 10 and "countervailing Convention rights", which encouraged the claimant in ***Greene v. Associated Newspapers (2004) EWHC 2322 (QB)*** to mount the argument that ***Cream Holdings*** had qualified the apparently absolute rule in ***Bonnard v. Perryman***. The issue arose because the Judge at first instance, Fulford J, held that if the test was whether the claimant had demonstrated that the alleged libel was clearly untrue, she had failed. On the other hand, it was a different matter if the test was that derived from ***Cream Holdings***.

4.7 The decision of the Court of Appeal upholding the primacy of ***Bonnard v. Perryman*** is all the more striking for the fact that the claimant had introduced strong computer evidence that

the e-mails upon which the defendants sought to rely to demonstrate an association between the claimant and the convicted con-man, Peter Foster, were forgeries. Giving the judgment of the Court, Brooke LJ stated that they had no hesitation in holding that there was nothing in ***section 12(3)*** that could properly be interpreted as weakening in any way the force of the rule in ***Bonnard v. Perryman [66]***. The rule that there should be no prior restraint on publication in defamation "unless it is clear that no defence will succeed at trial" was said to be founded on a number of considerations ***[57]***:

* The importance the court attaches to freedom of speech.

* The necessity of a judge not usurping the constitutional function of the jury unless he is satisfied there is no case to go to the jury.

* The fact that until there has been disclosure of documents and cross-examination at trial, a court cannot safely proceed on the basis that what the defendants wish to say is not true.

If the defence failed at trial, the defendants would have to pay damages (which might include aggravated and/or exemplary damages).

4.8 The decision in ***Greene*** comes as no great surprise. The false allegations against the claimant could not possibly be said to intrude on her private life. It could well have been a more interesting debate, if the false allegations had related to her sexuality or private life. Then it could have been argued that ***Article 8*** was brought into play just as much (if not more so) than if the allegations were true. This raises issues for another day, including whether the cause of action in

privacy/confidentiality catches only true allegations. But it is notable that Brooke LJ ended his judgment ***[81]*** by stressing *"the distinction between a defamation case (where the claimant's right to a reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality."*

5. Foreign claimants suing on Internet publications: the Don King case:

5.1 Following the decision of the House of Lords in ***Berezovsky v. Michaels (2000) 1 WLR 1004*** it was only a matter of time before a foreign claimant who could demonstrate a reputation in this country successfully initiated proceedings against a foreign defendant in respect of Internet publication within the jurisdiction, even though the publication was directed from off-shore and even though the bulk of the publication took place outside the jurisdiction. The claimant must, however, confine his complaint to publication within the jurisdiction, since it is impermissible to obtain leave to serve out of the jurisdiction on the basis of publication within it and then to add a claim in respect of publication outside: ***Diamond v. Sutton (1866) LR 1 Ex 130, 132*** (approved by Lords Steyn and Hope in ***Berezovsky*** at ***1012h*** and ***1032d-e*** respectively).

5.2 In ***Lennox Lewis & Others v. Don King (2004) EWCA Civ 1329*** the Court of Appeal dismissed an appeal by the Defendants from Eady J who had allowed an action by the boxing promoter, Don King, to proceed on words published on an American boxing website which the evidence showed had been extensively downloaded in this jurisdiction. The Court reached its decision by applying the following well-established principles of defamation law to the technology of the Internet:

* Publication takes place where defamatory words are heard or read: ***Bata v. Bata (1948) WN 366***, approved by Lord Steyn in ***Berezovsky*** at ***1012***.

* Each publication is a separate cause of action. This rule goes back to ***Duke of Brunswick v. Harmer (1849) 14 QB 185***, approved by Lords Steyn, Hoffmann and Hope in ***Berezovsky*** at ***1012c, 1024f & 1026g*** respectively.

* The law presumes damage upon proof of the publication of words which are defamatory of the claimant: ***Ratcliffe v. Evans (1892) 2 QB 524, 529***, cited by Lord Steyn in ***Berezovsky*** at ***1012***.

* There is no *de minimis* principle when it comes to establishing publication: ***Harrods v. Dow Jones & Co. Inc. (2003) EWHC 1162, [39]*** per Eady J. In that case there had been publication of a mere ten copies to subscribers and some very limited Internet publication, but Eady J considered ***[41]*** that a claimant whose reputation was damaged within the jurisdiction was entitled to seek vindication here.

* Publication on the Internet takes place where the website is accessed or downloaded by the user: ***Godfrey v. Demon Internet (2001) QB 201, 208***, cited with approval by the Court of Appeal in ***Loutchansky v. Times Newspapers (2002) QB 783, [58-59]***.

5.3 A challenge to the applicability of these guideline principles was mounted unsuccessfully before the High Court of Australia in ***Gutnick v. Dow Jones Inc.*** at the end of 2002. Gleeson CJ held:

(1) that those who post material on the worldwide web do so, knowing that their material is available to all and sundry without any geographic restriction ***[35]***,

(2) publication takes place within the jurisdiction where it is downloaded ***[44]***.

(3) a claim for damage to reputation will warrant an award of substantial damages only if the claimant has a reputation in the place where publication takes place ***[53]***.

5.4 Where leave is required to serve English proceedings on a defendant outside the jurisdiction, the burden is upon the claimant to show that England is the appropriate forum. Publication here is sufficient to ground the jurisdiction of the English court, even if the defendant is outside the jurisdiction. ***CPR Pt.6.5(1) & 6.20(8)*** permits service out of the jurisdiction in claims founded on a tort, where the damage was sustained, or resulted from an act committed, within the jurisdiction. Once jurisdiction is established, the issue then becomes one of the convenient forum. It is open to the defendant to apply to stay the action on the ground that another competent court in a different jurisdiction can try the case more suitably for the interests of the parties and of justice: ***Spiliada v. Consulex (1987) AC 460***. Evidence concerning expense and convenience usually dominate the hearing of such applications.

5.5 In discharging the burden of showing England to be the appropriate forum, the claimant has an important weapon in that he is entitled to rely on the principle that *prima facie* the jurisdiction in which the tort is committed is the natural forum to try the dispute. This principle is applicable to all torts, and not simply to defamation: see ***Distillers Co. (Biochemicals) Ltd. v.***

Thompson (1971) AC 458, 468e per Lord Pearson. In ***The Albaforth (1984) 2 Ll LR 91, 96*** Goff LJ stated:

"... it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis [viz. that it was the forum where the tort was committed] must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum."

5.5 The approach in ***The Albaforth*** was treated by Lord Steyn in ***Berezovsky, 1013h,*** as applicable to defamation. The two dissenting members of the House, Lords Hoffmann and Hope, agreed at ***1019e-f*** and ***1031d-e*** respectively. The decision in ***Berezovsky*** establishes the following propositions:

* The jurisdiction in which the tort was committed is a weighty circumstance pointing to that jurisdiction as the place where the tort should be tried. Lord Hoffmann referred at ***1020a*** to a dictum of Phillips LJ in ***Schapira v. Ahronson (1999) EMLR 735*** in which the latter described the displacement of the burden as "an uphill task".

* If the claimant has a reputation to protect in England, that adds a further significant English dimension to the case: see Lord Steyn at ***1015***. As Lord Nolan put it at ***1017e***, *"a businessman... takes his reputation with him wherever he goes, regardless of the place where he acquired it."*

* Where a case is solely concerned with the claimant's reputation in England, and he seeks to have his reputation judged by English standards, England is the natural forum: see Lord Nolan at ***1017***.

5.7 In the Court of Appeal in the ***Don King*** case ***(2004) EWCA Civ 1329***, the defendants attacked Eady J's refusal to set aside service on the ground that he had misapplied the law in a case involving parties resident in the USA on both sides and a publication on a US website. There was no challenge to the rule that words on the Internet are published at the place where they are downloaded ***[2]***. Equally it was accepted by the claimant that the Judge would have adopted an impermissible approach, if he had allowed Don King the juridical advantage of suing in this country because he would not have been able to maintain an action in New York ***[20]***. However, the Court of Appeal rejected this as a construction of Eady J's judgment ***[42]***.

5.8 In giving the judgment of the Court, Laws LJ said that he discerned four relevant "strands in the learning", of which the first three had more to do with discretion than law ***[23]***.

(1) The Court confirmed the existence of the initial presumption that the natural or appropriate forum will be the courts of the place where the tort is committed ***[24]***. The starting point was therefore to identify where the tort has been committed ***[27]***.

(2) But the place of publication is not definitive; "*the more tenuous the claimant's connection with this jurisdiction (and the more substantial any publication abroad), the weaker this consideration becomes"* ***[27]***.

(3) The Court rejected the appellants' invitation to adopt a special rule for "trans-national" or Internet libels. However, it agreed that the court must consider what Lord Steyn in ***Berezovsky*** at ***1012*** called "the global picture". Because a defendant who published on the web might in theory find himself vulnerable to multiple actions in different jurisdictions, the place where the tort was committed ceased to be a potent limiting factor ***[28]***. However, there was no "single-publication rule", and *"a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant"* ***[31]***.

Laws LJ concluded that in an Internet case the court's discretion would tend to be more "open-textured" than otherwise, for that was the means by which the court might give effect to the publisher's choice of a global medium. However, the Court rejected "out of hand" any consideration of whether the defendant *intended* to target the publication towards the jurisdiction in which he was sued ***[33-4]***, since in truth he had targeted every jurisdiction where the text might be downloaded.

(4) Finally, the Court turned to the issue of juridical advantage as a result of suing in England when no remedy was available in the US. It is clear that in deciding which is the most appropriate forum, the court must ignore juridical advantage. But, although the law was said to be undoubted, Laws LJ added that the Court was *"not sure that we have grasped the idea of a principle which first enjoins ascertainment of the appropriate forum, but then allows the claimant to proceed in an inappropriate forum because he has acted reasonably in relation (for instance) to differential time bars applicable in the candidate jurisdictions"* ***[38]***.

5.9 Since the ***Don King*** case, Eady J has also refused to set aside service out of the

jurisdiction in another case involving an English journalist, who claimed to have been sexually assaulted by Arnold Schwarzenegger, and sued him and his spokesman. In ***Richardson v. Schwarzenegger (2004) EWHC 2422 (QB)*** the claimant relied on the spokesman's denial in an interview with *The Los Angeles Times* that Schwarzenegger had engaged in improper conduct. She claimed that this made her appear a liar, and that the denial had been published in England. In deciding that the action should be tried in the UK, Eady J took account of the following features of the case:

* The correct forum was the one where it was just and reasonable for the defendants to answer for their alleged wrongdoing.

* The claimant was a UK citizen, living and working here and with an established reputation here. England was the place where the damage to her reputation was to be presumed.

* The claimant had no comparable connection with any other jurisdiction, and the underlying events in the action (the interview at which the assault allegedly took place) took place here.

5.10 Although US media groups are naturally resentful of the long reach of the English court, provided that they have no assets within this jurisdiction or one where an English judgment can be enforced, they will usually be able to ignore an English judgment with impunity. The American courts have consistently declined to enforce English libel judgments on grounds of public policy, ruling that English law flies in the teeth of the protection afforded by the First Amendment.

5.11 Issues in relation to publication on the Internet will continue to be controversial. The ***Law Commission in their Scoping Study in December 2002*** acknowledged that there was a problem, but did not think that it could be solved within the short or medium term. They expressed "sympathy" about the levels of global risk to which Internet publishers were exposed, but considered that *"any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation."*

6. A footnote on damages:

6.1 Since the decision in ***Lillie & Reed v. Newcastle City Council (2002) EWHC 1600***, the ceiling on general damages for defamation has conventionally been treated as being £200,000. In ***Lillie & Reed*** the allegations of child abuse were as grave as can be imagined, they had led to the claimants having to go into hiding and were sought to be justified during a trial over many months. The same Judge's award of £150,000 to George Galloway therefore came as something of a surprise, even when account is taken of what the Judge called the "undoubtedly aggravating features of the conduct of the trial" ***[218]***. Eady J rightly reminded himself that general damages must be proportionate to the objectives the tort of defamation sets out to achieve (including both solatium and vindication) and to the harm done. So was £150,000 too high ?

6.2 In ***Galloway [212]*** Eady J explained that it had been important to him in ***Lillie & Reed*** to identify the maximum permitted, since he intended to award compensation on that scale. By contrast, in the ***Galloway*** case, he felt he could compensate the claimant *"without needing to isolate that cut-off point (if indeed there still is one) with any degree of precision".* This remark makes it sound as if the Judge's mind had been influenced by the citation to him of the Privy

Council decision in ***The Gleaner Co. Ltd. v. Abrahams (2004) 1 AC 628***. On the other hand, the Judge expressly stated that he did not consider that "the somewhat uncertain state of the law in this area [was] going to have any effect on the compensation exercise" in the ***Galloway*** case.

6.3 In ***The Gleaner*** case, the Privy Council declined to interfere with an award of £533,000 general damages made by the Jamaican Court of Appeal in substitution of a jury award of £1.2m. The Claimant, a former Minister of Tourism, had been accused of taking bribes, and a plea of justification stood on the record for some seven years before it was struck out in the absence of pleaded facts to support it. An apology was then published, but the claimant produced strong evidence of a ruined career, public humiliation and prolonged stress.

6.4 The Jamaican Court of Appeal declined to follow the English practice derived from ***John v. MGN Ltd (1997) QB 586*** of using personal injuries damage as a reference point in the quantification of libel damages, and the Privy Council held that they had not erred in this respect. It was a question of policy "open to legitimate differences of opinion" and did not, in Lord Hoffmann's view ***[62],*** involve any question of legal principle:

"[The Court of Appeal] were entitled to hold the opinion that a conventional figure established for an award performing one social function was no guide to what should be the conventional award for an award performing a different social function."

6.5 Whilst the Privy Council expressed no view on the current practice in England, Lord Hoffman acknowledged that it was arguable that the assessment of general damages in both personal injury and libel cases was far more complicated than trying to value the damage ***[50]***.

Other factors entered into the calculation. These included:

* Personal injury awards were almost always made in actions for negligence or breach of statutory duty rather than intentional wrongdoing.

* Personal injuries damages are almost always paid out of public funds or by insurers under policies not very sensitive to the claims records of individual defendants. The cost is therefore borne by the public at large.

* The exemplary or deterrent elements in personal injury awards are minimal or non-existent.

* The total sums of compensation paid for personal injury are very large, and have an effect on the economy which libel damages do not.

6.6 Lord Hoffmann pointed out that defamation cases had important features not shared by personal injury claims ***[53]***, particularly in relation to deterrence:

"The damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims.... Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens."

6.7 Eady J ***[209]*** picked up this passage from Lord Hoffmann, and commented that *"it may indeed be thought that deterrence is a function not confined to punitive damages".* He is not the only judge to have considered deterrence recently in the context of the assessment of libel damages. In ***Kiam v. MGN Ltd (2003) QB 281, 304 [75],*** Sedley LJ commented that *"the ineffectiveness of a moderate award in deterring future libels is painfully apparent".* But he pointed out that there was a conundrum:

"... compensation proportioned to personal injury damages is insufficient to deter, and... deterrent awards make a mockery of the principle of compensation."

6.8 Deterrence is normally considered to be an aspect of punishment, and the courts may have to wrestle in the future with its appropriateness as a consideration when quantifying compensatory damages, even when they include an aggravated element. In the meantime the award in the ***Galloway*** case poses the question whether damages in future will be fixed at a level intended to *deter* the press from conduct which fails the ***Reynolds*** test of responsible journalism. If that is to be the case, the level of damages will inevitably start to rise.