

# The jury's out



Abolishing juries in defamation cases would not only keep costs down for both sides, but would also open up the verdicts to scrutiny, says **William Bennett**

**EXCESSIVE LITIGATION COSTS** in defamation claims can unduly restrict freedom of speech and hinder access to justice.

If claimants cannot risk bringing reasonable claims in defamation because the cost of losing would be too much to bear, untrue information will continue to be published (and newspapers might be less scrupulous in what they publish). If a defendant cannot risk defending a reasonable case for the same reason, it will have to concede that an allegation is false when it might well be true. Alternatively, a publisher might conclude that it was simply not worth the risk of publishing the relevant allegation in the first place – and thus fall prey to what is known as the chilling effect.

Before the introduction of conditional fee agreements and recoverable after-the-event insurance premiums, the vast majority of claimants were shut out from bringing newspapers to account. In *My Learned Friends: An Insider's View of the Jeffrey Archer Case and Other Notorious Libel Actions* (1989 WH Allen), Adam Raphael concluded: "You have, in fact, to be not just very rich but also supremely confident to pursue a libel case to the bitter end."

The pendulum then swung in the direction of claimants with the introduction of the current CFA and ATE regime. There will be a significant correction if the recommendations made by Lord Justice Jackson in his review of civil litigation costs are implemented.

It is apparent from the review that the only respect in which the cost of defamation litigation is different from other civil litigation is in the litigants' right to jury trial. Trial by judge alone will only take place in a defamation claim if all parties agree to it or in a number of

situations specified by statute; for instance, where the case will involve the consideration of a large number of documents.

The right to jury trial causes costs to be significantly higher and the course of justice slower than would be the case if this right were abolished.

Jury trials last longer than those tried by judges (perhaps twice as long). There is also the problem of an expensive trial ending with a hung jury and the whole process having to be repeated again; a prospect feared by litigants. Judges always have to reach a decision.

### Range of meanings

While few defamation cases conclude with a trial of any description, the costs in a defamation case will be significantly increased simply because it is due to be finally determined by a jury trial (even if this never actually takes place). This is because judges are restricted in the extent to which they may trespass upon the jury's ultimate role as fact finder. The most notable example of this concerns the issue of meaning. The meaning which the court concludes that the words complained of bear is fundamental to defamation litigation. If it could be determined at the outset of litigation, huge costs would be saved because each party would prepare cases and evidence which was relevant to that single meaning (or the claim or its defence) might be dropped if the finding was adverse to one party's case. However, under the current system the parties have to prepare cases which cover the range of meanings which the jury might conclude the words in issue bear. If the case is to be ultimately tried by a jury, all a judge can do beforehand is to

strike out meanings which the words complained of are not capable of bearing or which, put another way, a jury would have to be perverse to find. The judge cannot decide on the actual meaning.

If there was no right to jury trial in defamation actions, would there be a good reason for introducing it?

### Judge-alone trials

Trial by judge has positive advantages. A judge must give a reasoned judgment; a jury need only give a bare verdict. A judgment can be scrutinised by an appeal court whereas a jury verdict can only be set aside if perverse (in which case another jury will usually have to be sworn in order to determine the same issue). Decisions by judges are subject to scrutiny in a way in which jury verdicts are not. Would we want to dispense with openness as to how a decision had been reached and replace it with inscrutable jury verdicts?

Of course, there are arguments that trial by jury is better. For instance, a jury might be said to be better able to decide what meaning the ordinary person would derive from an article in a tabloid. However, the other advantages of trial by jury tend to rely on what Professor Glanville Williams described as "folk-lore", vague notions about the superiority of verdicts made by a group of laypersons rather than by an expert. But even if those advantages existed, do they really justify the continuation of a mode of trial which is having adverse consequences for access to justice and freedom of speech?

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