DEFAMATION COUNTY COURT

Jonathan Barnes examines the High Court's effective monopoly on hearing defamation cases, and against a background of calls for county courts to get involved too asks, WHY NOT?

In October 2011 the Parliamentary Joint Committee on the then Draft Defamation Bill considered at paragraph 87 of its First Report that the availability of county courts to hear defamation cases, particularly outside London, should increase accessibility for ordinary citizens and would, in many cases, reduce costs as well. The Committee suggested that the Ministry of Justice should implement a pilot scheme to determine how this proposal might work in practice. In its Response of February 2012, the Government said it would consider the issue further in due course.

The Committee did not recommend that all defamation cases should be heard in the county courts, acknowledging that the most serious cases (and any jury trials) still merit being tried by specialist High Court judges in London. But what it had in mind was the "smaller" defamation case. That might be one such as *Mole v Hunter*, considered recently at [2014] EWHC 658 (QB), in the form of a 129 paragraph interlocutory judgment from the High Court judge in charge of the jury list, over internet postings made in the context of a residential landlord and tenant dispute. Both parties at the High Court hearing were self-represented, one being accompanied by her father as a McKenzie Friend. The matter had been transferred there by a county court, since the county court lacked jurisdiction over the claim in libel, which had been raised as a counterclaim.

To all intents and purposes, defamation claims currently have to be issued in the High Court. Unless the warring parties agree under section 18 of the County Courts Act 1984 to give the county court jurisdiction in their dispute, section 15 of the same Act provides that the county court does not have jurisdiction to hear and determine any defamation action. A claim can then find its way to the county court only if it is transferred there, by the High Court, under section 40 of the 1984 Act.

The criteria for transfer generally are set out under Civil Procedure Rule 30.3, but in practice transfer from the High Court to the county court occurs very rarely in defamation actions. *Davies v WM Morrison Supermarkets plc* [2007] EWCA Civ 294 is the only commonly cited example of a recent transfer, where the Court of Appeal reinstated a libel claim that had been struck out by the High Court, but accepted the respondent's submission that it had become a "storm in a teacup" and transferred the claim for further disposal to an appropriate county court. In that case, the claimant delivery driver had taken exception to an endorsement written by an employee of the receiving supermarket on a delivery note that stated he was now "banned from any Morrisons site". That followed an argument after he had unloaded the goods being delivered. He complained that when, as he had to, he provided the delivery note to the supplier who had contracted him for the delivery, the endorsement harmed him in the eyes of the supplier, his principal, in particular damaging him "in his livelihood". That too might safely be considered a smaller case.

Monopoly considerations

With the present concerns over the appropriate distribution of necessarily limited court resources, there may be reason to reflect on whether the High Court's effectual monopoly on defamation litigation, to the current exclusion of the county court, should be maintained. A review of the criteria for transfer under CPR 30.3, which are a non-exclusive but compulsory list of matters to which the court must have regard, may be instructive in itself as to where the more modest defamation claims may best be heard. First, the transferring court must have regard to the financial value of the claim. Experience shows that a "storm in a teacup" defamation claim might often be worth a few thousand pounds in compensatory damages, or sometimes a little more. Calibrate that against the minimum value of £100,000 to issue a non-specialist claim in the High Court, or £50,000 for a High Court personal injury claim, or even the non-personal injury small claims track allocation limit, recently raised to £10,000.

The court must also consider the availability of a judge specializing in the type of claim in question. This may be somewhat chicken and egg at the moment as concerns county court specialism in defamation. But it also draws attention to what "type" of claim a "smaller" defamation claim is. On the one hand it is a defamation claim, but on the other it is likely to be relatively low value, determinable on a handful of factual issues, and very often of little interest to anyone beyond those intimately involved. The latter factors might well qualify it soundly for the county court. In relation to the first element, specialism, the Joint Committee suggested that: "*…with some appropriate training, we see no reason why there could not be a county court judge designated to hear defamation cases in most major county court centres in the regions…*".

This anticipates training a number of county court judges in defamation, that is circuit and district judges. These are judges

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who typically already spend much of their time in court making decisions on "live" evidence that affect individual citizens in very real ways. For example, deciding housing possession disputes, ancillary relief and child custody and contact matters in the family courts, and bankruptcy and debt enforcement proceedings. These areas often have very significant outcomes for those involved – for example, the loss of a home, custody of a child or a major impact on financial autonomy. Low value civil trials are also a mainstay in the county courts, for example the fast track road traffic accident claim that, including *ex tempore* judgment, is finished in a day. Also, in the Crown Court circuit judges routinely decide questions of individual liberty, something likely to be far more serious and significant to those involved than the possible outcome of a relatively modest defamation action, were it to be placed in the same judge's hands.

After those considerations, the remaining commonly arising criteria for transfer focus largely on the practical and logistical facilities of competing venues, regardless of their position within the court hierarchy. However, in the relatively unusual circumstances of a declaration of incompatibility under section 4 of the Human Rights Act 1998 being sought, or proceedings involving the Crown, a claim will inevitably stay with the High Court.

Finally, the transferring court must consider discretely the importance of the outcome of the claim to the public in general. For reasons already indicated, the outcome of a smaller defamation case may often not be at all important to anyone other than the parties. The public in general does, however, retain an interest in seeing that justice in any particular case is done, but that does not have to be in the High Court. That said, that consideration may point towards the High Court as the appropriate venue where a claim involves the media directly, and so engages a "constitutional" right to free speech.

A demand for alternatives

Notably, however, it has been the media lobby that, in some quarters at least, has been calling for alternatives to the high court for defamation claims, for reasons of cost, expertise and speed of delivery. That was the suggestion of the Libel Reform Campaign in its evidence to the Joint Committee, and of the BBC too, citing the Patents County Court (now the Intellectual Property Enterprise Court) as an example from the field of intellectual property disputes. Index on Censorship/English PEN also put the same example forward as a model for change in their October 2011 report, the Alternative Libel Project.

Scope for further reform lies with the Government and the Ministry of Justice. If a pilot scheme is in the offing, then perhaps the Intellectual Property Enterprise Court (which as it happens has now become a specialist list in the High Court, Chancery Division) may indeed offer a useful blueprint. That court has a £500,000 damages recovery cap, truncated case management steps, scale costs with an overall costs cap set at £50,000, and a small claims track procedure for claims for not more than £10,000. It is presided over by a permanent circuit judge, but with any High Court patents judge able to sit, and small claims dealt with by a district judge. The aim is to dispose of the longest trial on the multi-track in no more than two court days. ●

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