Defamation Law Reform: A Missed Opportunity

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It is a strange contradiction that defamation, one of the most reliable sources of column inches, gets so little attention from our lawmakers. Defamation had to wait 44 years for a new Act of Parliament, and even that has had only a marginal impact on practice. Against this background, it is a great shame that the Law Commission's most recent visit to planet defamation has been to the area of "gagging writs": an issue of such monumental unimportance to modern defamation practice as to be unworthy of the Law Commission's attentions. Unsurprisingly, the Law Commission concluded that there was *"no evidence of abuse of defamation procedures by way of 'gagging' either by writ or letter"*.[1]

The Law Commission is immensely valuable. Its time is precious. Its reports are invariably the product of diligent scrutiny of an area of law after a consultation process which, it is hoped, will garner input from all those with experience and knowledge to offer. The end product report can be very influential in shaping the development of the law either by common law or by statute. But the Commission is only as good as the jobs it is given. The blame for this lost opportunity in the area of defamation must be placed with the Lord Chancellor. It was he who decided, of all areas of defamation law that needed review, "gagging writs" were top of the agenda.

But there are so many more pressing areas of concern in the law of defamation that are far more worthy of the attention of the Law Commission than "gagging writs". Indeed, some of these were highlighted in the Commission's Report (or to use its formal title *Scoping Study*). It is as if the consultees responded: *"Gagging writs? Pah! What about …?".*

Well, what about REYNOLDS?[2] This has to be the clear winner in the substantive law stakes and the leviathan is now making its presence felt in defamation practice as well. As Mr Justice Gray has remarked more than once from the Bench, REYNOLDS cases are almost completely impossible to try with a jury.

Whilst the Court of Appeal, at various moments, seems totally committed to the constitutional pre-eminence of the jury as the tribunal of fact in defamation actions (SAFEWAY v TATE[3]; ALEXANDER v ARTS COUNCIL OF WALES[4]; and WALLIS v VALENTINE[5]), on other occasions it appears to be countenancing (but without acknowledging) that the jury's days in REYNOLDS trials are numbered (see GREGSON v CHANNEL FOUR TELEVISION[6]).

The respective roles of the judge and jury in determining the mixed question of fact and law that present in any REYNOLDS defence have still to be worked out. What are the primary facts to which Lord Nicholls referred[7]?

What about the role of the jury in defamation? Judicial antipathy towards trial by jury is well known. Is the practical consequence of the REYNOLDS defence going to be the loss of the jury in defamation actions? Provided there is more than a handful of documents in the case, the complexity of most REYNOLDS defences will usually allow one party to apply under s 69 Supreme Court Act 1981 for trial by judge alone. From the practical side, what about conditional fee agreements and, in particular, success fees?

CFAs have arrived in civil proceedings because of the withdrawal of legal aid. The bulk area is personal injury. Success fees are justified, so the argument goes, to encourage and reward those solicitors and barristers who are prepared to back cases with their own money. Without them, personal injury practitioners would not make a living and would not take on the work. Success fees are therefore an "access to justice" safeguard following the withdrawal of legal aid.[8]

But the typical personal injury action has a set of economic factors that bears no relation to defamation. Total damages for personal injury cases (including both general and special damages) usually far exceed the lawyers' costs. Disputes over liability are rare. In defamation, however, liability is disputed vigorously in virtually all cases. In most cases, and certainly the ones that get anywhere near trial, the costs will almost always exceed the likely award of damages. In the larger cases the costs can be over ten times the damages awarded. The same "access to justice" considerations, whilst relevant to defamation, do not have the same impact. For example, take a company that has been libelled by a newspaper using the wrong photograph to illustrate a defamatory, but otherwise true story. It receives a prompt correction and apology from the newspaper for its mistake. There is no "access to justice" justification in rewarding the company's solicitors with a "success fee" for suing on the

article. Yet actions like this are going on and being funded by CFAs with success fees.

More seriously, access to justice (Article 6) must be seen in the context of Article 10 considerations. The one-size-fits-all approach to civil litigation, which bedevils the CPR, is just as inept in relation to CFAs. In personal injury litigation, Article 6 considerations win the day. Success fees are a necessary part of the process following the withdrawal of legal aid.

In defamation, Article 6 has to vie with the arguably more potent Article 10. Media defendants, in particular, have a very real complaint that success fees of anything up to 100% represent an interference with freedom of expression that is not proportionate to the aim of protecting the reputations of others, still less a justification that has been convincingly established. Ironically, perhaps, CFAs represent the strongest justification for the introduction of legal aid for defamation that there has been for some time.

The European Court of Human Rights held that the severity of the sanction is highly relevant to the consideration of whether Article 10 has been infringed:

> "The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued."[9]

In extreme cases, the severity of the sanction may be the sole basis of the complaint of interference.[10] Put at its simplest, requiring the Defendant to pay up to a 100% uplift on a claimant's legal bill, when one can easily be talking of figures up to £1m in the larger trials, is a very significant sanction. I seriously doubt whether the access to justice considerations would be found to be a sufficient or convincing countervailing justification.

Only the Lillie & Reed[11] case could arguably come close to being able to provide a convincing "access to justice" argument. In that case, the claimants would seem to have a good argument that it was imperative for them to have access to a Court, that they had no other option than to sue in libel and they could only do so under a CFA. The exceptional nature of that case perhaps demonstrates how vulnerable CFA success fees in the rather more mundane diet of the libel courts may be to Article 10 attack.

In the area of personal injury CFAs, Lord Hoffmann has already expressed "considerable unease about the present state of the law" and has suggested that, contrary to the view of the Court of Appeal that the problems would be ironed out when a corpus of authority was developed by the judges, legislative intervention might be necessary.[12] For his part, Lord Bingham recognised that CFAs were "obviously open to abuse": in particular (1) charging excessive fees for their basic costs; and (2) agreeing a success uplift grossly disproportionate to any fair assessment of the risks of failure in the litigation.[13] These issues are equally if not more important in the area of defamation actions, yet they have gone without any apparent consideration at all by Parliament or the Courts. Sooner or later the Courts will have to grapple with it.

These are difficult, but important, questions to which there are no easy answers. But there is a body ideally suited to this sort of job: the Law Commission. Such a shame, therefore, that it has recently been forced to spend its time looking at "gagging writs".

> Footnotes

1 Aspects of Defamation Procedure: A Scoping Study (29 May 2002)

2 [2001] 2 AC 127

3 [2001] QB 1120

4 [2001] 1 WLR 1840

5 [2002] EWCA Civ 1034; The Times 9 August 2002; unreported CA,18 July 2002

6 [2002] EWCA Civ 941; unreported CA, 4 July 2002

7 at 205d

8 see the discussion at §4 in Callery v Gray [2002] 1 WLR 2000; [2002] UKHL 289 Öztürk v Turkey, 28 September 1999

10 See eg Tolstoy v United Kingdom (1995) 20 EHRR 442

11 Lillie & Reed v Newcastle City Council and Others [2002] EWHC 1600 (QB); unreported QBD, 30 July 2002

12 Callery v Gray §5

13 §18

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