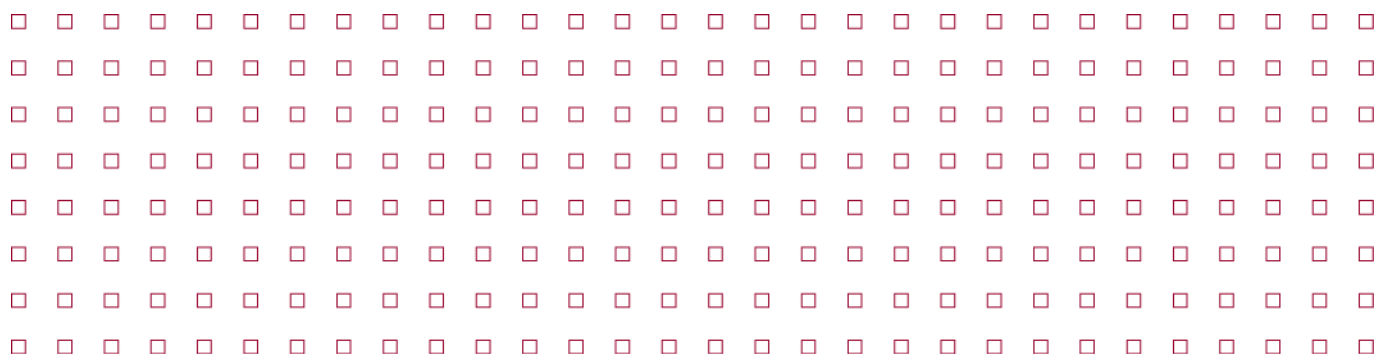


# Report of the Libel Working Group

23 March 2010





## **Report of the Libel Working Group**

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## Foreword

### Justice Secretary:

Shortly before Christmas, you asked me to chair a Working Group to consider:

“whether the law of libel, including the law relating to 'libel tourism', in England and Wales was in need of reform and, if so, to make recommendations as to solutions.”

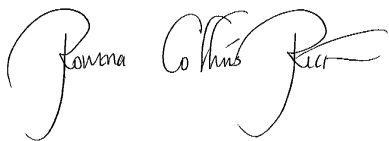
The Working Group's membership, which is listed at Annex A to this Report, brought together perspectives on this question from the legal profession, the media, non-governmental organisations, academia and the scientific community. The members' generosity in sharing their considerable expertise and experience, and in working collaboratively and constructively to a demanding timetable, has enabled me to present this report to you today. Our work has benefited enormously from their contributions.

As you will see, the report focuses on four principal areas in which the case for reform has been urged with particular emphasis in recent times:

- 'libel tourism',
- the role of public interest considerations in establishing a defence to a libel action,
- the rules about multiple publication, with particular reference to the internet, and
- procedural and case management issues relating to the conduct of libel litigation.

The report gives an indication of the range of views that exist on these and identifies options for action.

The Working Group would wish me to record its thanks to the secretariat, not least in the preparation of the text of this report, provided by Michelle Dyson, Anthony Jeeves and Alexandra Horton in our Legal Directorate's legal policy team.



Rowena Collins Rice  
Director-General, Democracy Constitution & Law  
Ministry of Justice

## Libel tourism

### Introduction

1. There is a widespread perception that London has become the forum of choice for those who wish to sue for libel and that this is having a “chilling effect” on freedom of expression throughout the world. This has been the subject of intense debate both in this country and abroad, particularly in the United States of America. This section of the report looks at the extent to which this is a real problem and at possible solutions.

### Definition

2. There is no clear definition of “libel tourism” and the term has been used to cover a number of different situations where cases have a tenuous link to the jurisdiction. However, it usually involves the situation where a person from outside England and Wales issues proceedings in a court of England and Wales in order to sue another person from outside England and Wales. Additional factors may involve the extent to which parties are connected to England and Wales, for example, whether the claimant has a reputation which is particular to England and Wales; the extent of the defendant’s relationship to this jurisdiction compared with elsewhere; where the allegedly defamatory material is primarily published and targeted at; and the extent of publication in this jurisdiction compared with elsewhere.

### Is there evidence that libel tourism is a real problem?

3. Non-governmental organisations (NGOs), in particular English PEN and Index on Censorship in their recent report, highlight libel tourism as a major problem:

“The multiple publication rule, coupled with the global reach of the internet, has contributed to the phenomenon of forum shopping and libel tourism. A book that would once have been available only in the United States can now be bought here. An online publication or article can be downloaded anywhere. The number of cases that can be, and are, brought to the English courts has multiplied as a result. This exposes the English legal system to abuse by claimants with no reputation to defend in this country.

We propose that libel cases should be heard in this jurisdiction only if it can be shown that at least 10 per cent of the total number of copies of the publication distributed have been circulated here. Cases relating to publication on a foreign internet site should only be heard if the article in question has been advertised or promoted in England and Wales for or on behalf of the defendant. This reform would address the international embarrassment of the UK being used as an



international libel tribunal – and would introduce a more equitable system for hearing libel cases in the age of global communication.”<sup>1</sup>

And in a speech to the Society of Editors last year, the Lord Chief Justice commented:

“...I am not proud of reading, as I frequently do, that ‘London is the libel capital of the world’. I do not regard it as a badge of honour. I am deeply unsympathetic to ‘forum shopping’...”<sup>2</sup>

4. Some lawyer members, on the other hand, do not recognise libel tourism as a significant problem. They say that they encounter only a handful of cases where both the defendant and claimant are based outside the jurisdiction. It was pointed out that England is not a particular magnet for cases. Costs are significantly cheaper in Belgium and Germany and in Spain the damages are much higher than in England. All of these things are attractions for claimants. Some considered that the issue of libel tourism had been blown out of proportion due to a lobbying campaign initiated in the United States, which had been taken up by sectors of the press in the UK. Particular attention is drawn to recent comments by Lord Hoffmann:

“...we ought to inquire whether in practice libel tourism is a serious problem, not just for the odd American who would prefer us to have the rule in *New York Times v Sullivan*, but for the administration of justice and the public interest in this country. I do not get the impression that there are large numbers of litigants with no connection to this country who are coming here to bring actions for libel. If there are, I would like to see some figures. If the *Ehrenfeld* case and the *Don King* case are the best that the campaigners for a change in the law can do, their argument seems to me far from overwhelming.”<sup>3</sup>

5. The Culture, Media and Sport Committee of the House of Commons in their Second Report of Session 2009-10: *Press standards, privacy and libel*<sup>4</sup> reported on evidence given on jurisdiction issues and libel tourism:

“...we have received repeated submissions suggesting that, because of the combined effects of the rules on jurisdiction and of global publication on the internet, what are said to be blatantly inappropriate cases, involving foreigners suing foreigners, are reaching the UK courts. Witnesses have told us, further, that defendants in such cases, who find themselves obliged to fight actions in a foreign country under

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<sup>1</sup> *Free Speech is not for Sale – The Impact of English Libel Law on Freedom of Expression - A report by English PEN & Index on Censorship* (2009) at page 9.

<sup>2</sup> Speech by the Right Honourable The Lord Judge (Society of Editors Annual Conference, Stansted, 16 November 2009) at page 4.

<sup>3</sup> Speech by the Right Honourable The Lord Hoffmann on *Libel Tourism* (Fifth Dame Anne Ebsworth Memorial Lecture, 2 February 2010) at pages 19-20.

<sup>4</sup> HC 362-I

foreign law, are often placed at a disadvantage, to the detriment of freedom of expression.”<sup>5</sup>

6. The Committee noted in particular that some of the most trenchant criticism has come from media organisations in the United States.<sup>6</sup>

### Statistics and cases

7. Statistics produced by the Ministry of Justice (at Annex B) show the numbers of defamation claims with a “foreign connection” issued in the High Court in 2009. This gives a rough snapshot of the nature of claimants and defendants involved in English libel proceedings during that year.
8. Media and NGO members were concerned by the lack of available information on numbers of cases in which permission to serve a claim form out of the jurisdiction had been refused. This would be useful to inform the debate. It was noted that the statistics which had been produced (Annex B) were a positive step given the general lack of available information in this area but that analysis based on addresses given by claimants on the claim form has its limitations as claimants’ addresses can be given care of their lawyers or agents. In any event, there was concern not to narrow the focus to domicile of parties only. However, it was recognised that relevant European laws focus on the domicile of the defendant as a jurisdictional basis.<sup>7</sup> Annex D includes legal background on jurisdictional and procedural issues.
9. Members of the group were asked to identify evidence of cases or other experiences which would illustrate libel tourism in practice. A table was compiled by the Ministry of Justice of the cases identified. That table is at Annex C. It includes cases such as *Mahfouz v Ehrenfeld*<sup>8</sup> and *Lewis and others v King*.<sup>9</sup> Members also mentioned:
  - A case brought by a foreign businessman involving articles in a foreign-based English language newspaper with only 100 subscribers in the UK (but which also had an on-line version) and published on a foreign-language news-site also based outside the jurisdiction (*Rinat Akhmetov* – case N).

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<sup>5</sup> Paragraph 187

<sup>6</sup> Para 189

<sup>7</sup> Under Article 5(3) of the Brussels Regulation (Council Regulation (EC) No. 44/2001 of December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters) an action may also be brought in the jurisdiction where the harmful event occurred or may occur (this applies to all matters relating to liability for wrongful acts – tort, delict or quasi-delict - not defamation exclusively).

<sup>8</sup> [2005] All ER (D) 361 (Jul). See case ZF in the table of libel tourism cases raised by members of the Working Group.

<sup>9</sup> [2004] EWCA Civ 1329. See case ZJ.

- A case involving a foreign-based celebrity issuing proceedings against a foreign magazine with limited internet readership in the UK (*Cameron Diaz v National Enquirer* – case U).
- A case involving an off-shore hedge fund and an American newspaper (case G).
- Numerous cases in which proceedings are brought against foreign newspapers, publishers etc.

Claimant lawyers highlighted that some of the cases which had been identified were old or had been struck out and a few were not true libel tourism cases. For example, one case involved a UK citizen suing an American broadcaster and other UK companies, where the offending allegations had been extensively published in England and Wales (case F).

10. Evidence from members of the Working Group indicated that a substantial reason for concern about libel tourism relates to *threats* of proceedings which in themselves may have a chilling effect on publication. Anecdotal examples include the following:
  - A number of specific instances where NGOs have been threatened with proceedings by organisations and public authorities in relation to reports exposing allegations of (for example) corruption. It appears that in the majority of these cases the NGOs are based in this jurisdiction. In one instance an NGO is said to be considering shifting its publishing arm to the USA to seek an added layer of protection.
  - A trend towards financial institutions such as off shore hedge funds threatening and bringing proceedings here, for example in relation to the reporting of losses made as a result of the recent banking crisis.
  - Regular threats received by US publications on behalf of celebrities and businessmen in relation to the online publication of articles which have little or no print publication in the UK, which are either settled by the publisher because of the cost implications or which inhibit publication of the article in the first place. However, this is controversial. A claimant lawyer considered that the opposite is true: requests made to US publications or internet service providers are often ignored because of the lack of enforceability of an English judgment against them, and there is no chilling effect on US publishers in such circumstances.

### The substantive law

11. Following *Jameel*<sup>10</sup> it is necessary for the claimant to demonstrate that a “real and substantial” tort has been committed within the jurisdiction. Some members thought that there was no problem with the substantive law, provided that *Jameel* was dynamically applied. To the extent that there was a problem, it was with the way the tests in the substantive law

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<sup>10</sup> *Jameel (Yousef) v Dow Jones Co Inc* [2005] EWCA Civ 75

were being applied by the court before proceedings were permitted to be served out of the jurisdiction.

12. However, particular controversy has arisen from the case of *Mardas v New York Times Co and Another*.<sup>11</sup> In that case, the High Court allowed the claimant's appeal against a Master's decision striking out the claim and noted that it will only be in rare cases that it is appropriate to strike out an action as an abuse on the basis described in *Jameel*. The Master's decision in *Mardas* had been reached on the basis that there had been very limited publication here (estimated as approximately 177 hard copies of a New York Times article and approximately 31 hits on the online version of the article and a similar article in the International Herald Tribune) and that the claim related to matters that had happened some 40 years ago. The High Court considered that there was no basis for concluding that there was no real and substantial tort in this jurisdiction, and commented that "[a] few dozen is enough to found a cause of action here, although the damage is likely to be modest". The court also noted that the evidence on the scale of publication was in dispute and held that contested questions on this point could not be resolved summarily and should be left to trial.
13. One member representing the media raised concern that the doctrine of *forum non conveniens*, on the basis of which a defendant can challenge the jurisdiction of the court, has little practical application because the requirements established in *Spiliada*<sup>12</sup> (a commercial case) are of limited use in the context of libel proceedings. In practice courts focus on whether the claimant has a substantial reputation here but this is generally an easy matter for wealthy international claimants to demonstrate. In addition, as was emphasised in *Berezovsky v Michaels*,<sup>13</sup> a claimant seeking permission to serve a claim form out of the jurisdiction must confine his or her claim to damage sustained within it.

### **The current practice of applying for a claim to be served out of the jurisdiction**

14. Where European Community legislation applies,<sup>14</sup> there is little or no scope for any change to be made at present. The basic principle of the Brussels Regulation is that jurisdiction is to be exercised by the Member State in which the defendant is domiciled, regardless of his or her nationality. The Civil Procedure Rules do not require a claimant to apply for permission to serve a claim form out of the jurisdiction in such cases.
15. In Annex D there is a short description of the current procedure for applying for permission to serve a claim form out of the jurisdiction.

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<sup>11</sup> [2008] EWHC 3135 (QB)

<sup>12</sup> *Spiliada Maritime Corp. v Cansulex Limited* [1987] A.C. 460 (House of Lords)

<sup>13</sup> [2000] 2 All ER 986

<sup>14</sup> See Annex D

### **Implications for publishers based abroad**

16. An NGO member highlighted unfairness which could result from libel tourism. A Croatian magazine, for example, may have few readers outside Croatia and it may not be reasonable to expect such a magazine to understand the substance of English law and the requirements of the principles of responsible journalism.

### **Summary**

17. Overall, there were differing views as to whether libel tourism was a real problem but more of a consensus that something should be done to improve existing procedures in relation to applications for leave to serve proceedings out of the jurisdiction in defamation cases.

### **To the extent that there is a problem, what are the possible solutions?**

18. The working group focused on changes which might be made to the procedure for defamation claims to be served out of the jurisdiction under CPR rules 6.36 and 6.37. A number of options were identified.

### **Notice**

19. It was suggested that, at present, claimants' applications to serve a claim form out of the jurisdiction are insufficiently tested and part of the reason for this may be that the application is initially made on an *ex parte* basis. In addition, once permission is given to serve a claim out of the jurisdiction, the onus is then upon the foreign defendant to persuade the court it has no jurisdiction, or should not exercise any jurisdiction that it may have. This must be done within 14 days of filing an acknowledgement of service, so time is short. Some members considered this made it very difficult for defendants to challenge effectively orders permitting service out of the jurisdiction and it would be better if the defendant were able to engage in the argument at the earlier stage when the claimant initially applies for permission.
20. It may be possible to generate a more intensive testing of applications to serve out of the jurisdiction if the defendant is given notice by the court of a hearing of the application for permission and given the option of attending. It is not envisaged that the defendant's attendance would be compulsory (and if the defendant did not attend, the application could proceed on an *ex parte* basis as at present). Alternatively, an obligation could be placed on the claimant to inform the defendant of the pending application and the defendant could be given the option of contacting the court to request an *inter partes* hearing. However, enabling issues of service to be determined on an *inter partes* basis could lead to complexity. In order not to have the perverse result of making it easier for claimants to achieve service out of the jurisdiction, the default position should not be that the court would automatically grant permission to serve out, if a defendant chose not to engage in the process. In addition, if an

obligation was placed on a claimant to inform the defendant of the pending application, this might be satisfied if the claimant could show that he or she had taken reasonable steps to notify the defendant (perhaps by demonstrating that a draft of the claim form had been sent to the defendant's address in the foreign jurisdiction). One option to ensure compliance would be to attach costs sanctions to this.

21. It is suggested that any such procedural changes should apply only to applications for leave to serve out of the jurisdiction in defamation cases because the solutions mooted have been raised to address particular perceived problems with defamation cases. The Working Group did not explore in any detail the suitability of such changes to other types of case and indeed it was suggested by some that additional procedural hurdles in some commercial cases would not be helpful or welcome.
22. It was queried whether, in order to test a claimant's application, there might be room for independent research by a judge but this seems unlikely to be practical. Such a proposal would also introduce a degree of inquisitoriality into English civil procedure, which has at its heart an adversarial approach, and this could also be very costly.

### **Improving the evidence available at application stage**

23. One approach might be to ensure the Court follows practice guidelines similar to those set out in Appendix 15 (Service out of the Jurisdiction: related practice) of the Admiralty and Commercial Courts Guide<sup>15</sup> (included at Annex E) ("the Commercial Court Guidelines") which covers the *ex parte* procedure for service out of the jurisdiction in Commercial Court cases. This procedure could be used as a model to help ensure consistency in the Queen's Bench procedure. In particular, it was noted that, when a claimant makes an *ex parte* application, there is a requirement to draw to the attention of the judge anything which might affect the decision sought (the recent case of *Metropolitan Schools v Google*<sup>16</sup> demonstrates what may happen if the court is misled). Paragraph 2(c) of the Commercial Court Guidelines acts as a reminder to claimants of the detail of this obligation:

"The claimant should also present evidence of the considerations relied upon as showing that the case is a proper one in which to subject a party outside the jurisdiction to proceedings within it (stating the grounds of belief and sources of information); exhibit copies of the documents referred to and any other significant documents; and draw attention to any features which might reasonably be thought to weigh against the making of the order sought. Where convenient the written evidence should be included in the form of application notice, rather than a separate witness statement. The form of application notice may be extended for this purpose."

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<sup>15</sup> 8<sup>th</sup> Edition: 2009

<sup>16</sup> [2009] EWHC 1765 (QB) – case J in Annex C.

### **Elevating consideration of the application to judge level**

24. Media members and claimant lawyers suggested that there was a case for the consideration of applications for permission to serve a claim form out of the jurisdiction to be undertaken by judges rather than Masters. It was suggested that there was a need to look at this in context. The current procedural rules were introduced at a time when physical publication of material was the norm. This was relatively straightforward. However, now we are in an era of internet publication and some think this has made the issues much more complicated and more suitable for a judge. This would be a matter for the Civil Procedure Rules Committee to consider.

### **Should the current test which applies to tort claims be changed for defamation claims?**

25. Where a claimant needs the permission of the court to serve a claim form out of the jurisdiction, one of the grounds in paragraph 3.1 of Practice Direction 6B needs to apply. For a claim to be made in tort cases damage must have been sustained either (a) within the jurisdiction; or (b) resulting from an act committed within the jurisdiction.<sup>17</sup> The application must set out which ground in paragraph 3.1 of Practice Direction 6B is relied on (CPR 6.37(1)(a)) and the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim (CPR 6.37(3)). The Working Group considered whether these provisions are sufficient in the context of defamation or whether there is a case for amendment.
26. Some do not think there is a need to alter the grounds in paragraph 3.1 of Practice Direction 6B. A claimant lawyer noted that when you drill down through those grounds, there are far higher hurdles than may at first appear to be the case. Paragraphs (a) and (b) are broad but in effect well-defined. The doctrine of *forum conveniens* is relevant here and the test needs to be applied consistently with *Jameel* and other cases.
27. It was suggested that problems with CPR 6.36 and 6.37 would, in time, be solved by application of the *Jameel* abuse doctrine, which is a practical and flexible test. There has been academic commentary to the effect that the decision in *Mardas*, described above at paragraph 12, restricts the *Jameel* abuse doctrine to “the most egregious and extreme cases of forum shopping”<sup>18</sup> and there was some disagreement as to the extent to which a body of precedents where the court strikes out abusive libel tourism cases is likely to emerge here. There are two examples of cases from last year in which at first instance the judge considered *Jameel* before striking out a claim: *Lonzim plc v Sprague*<sup>19</sup> and

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<sup>17</sup> Paragraph 3.1(9)

<sup>18</sup> Entertainment Law Review 2009, 20(4), 161–163

<sup>19</sup> [2009] EWHC 2838 (QB). The claimants, who were a company set up to invest in Zimbabwe (first claimant), its chairman (second claimant) and executive director (third claimant), complained of two publications by the defendant, a non-executive

*Peter Williams v MGN Ltd.*<sup>20</sup> *Lonzim* is a libel tourism case whereas *Williams* is not.

28. If an amendment were to be made to paragraph 3.1, to address concerns, it would seem to need to address a range of factors. Consideration was given to whether a test could be based on where a publication is primarily aimed at. There may be difficulties with this. In the internet age, a publication's main readership may not be where one might naturally expect to find it. Some mainstream British publications, for example, have the bulk of their readership abroad. In addition, what usually matters to a claimant is whether a statement has been published in his or her community. A publication may be aimed at a Russian readership and therefore targeted abroad but a claimant who is living in a Russian community in the UK would be affected by this. There would therefore need to be some flexibility of application here.
29. There may also be difficulties with requiring evidence which goes to the intention or level of foresight of an overseas defendant. This might be needed in order to demonstrate targeting of a publication.
30. An alternative might be to have some rule of thumb for a level of publication which was required within the jurisdiction. English PEN and Index on Censorship have proposed that libel cases should be heard in this jurisdiction only if it can be shown that at least 10% of the total

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director of a subsidiary of an investment bank based in South Africa. The first publication was an alleged slander at the annual general meeting of the investment company held in London. The second publication was alleged to be through the online edition of a South African weekly magazine. The claimants' case was that it was suggested the second and third claimants had mismanaged the first claimant's assets and engaged in improper self-enrichment to the detriment of shareholders. The main issue in relation to the libel claim was whether there was any evidence of publication within England and Wales. Tugendhat J held that, taken at its highest, there was evidence of at best minimal publication of the words complained of and there was no evidence of a substantial tort committed within the jurisdiction. Assuming there was minimal publication within the jurisdiction, there was no prospect of an award of damages greater than a very modest sum and the costs and court resources necessary to achieve that would be disproportionate. The slander part of the claimant's claim was held to be vexatious and an abuse of process.

<sup>20</sup> [2009] EWHC 3150 (QB). MGN applied to strike out a claim concerning a report in the *Daily Mirror*. This primarily concerned a man who was described as a ruthless crime boss. There was a picture of the claimant, a short caption which described him as one of the "henchmen" and a part of the article which described what he had confessed to police. Eady J noted that the abuse of process doctrine has not been used very much in libel cases, at least successfully, but a recent example could be found in the *Lonzim* case. Having considered the way that *Jameel* was applied in *Lonzim*, Eady J concluded that the instant case was one of those where it is right for the court to rule, having regard to the claimant's background and serious criminal convictions, that it would be inappropriate to regard the article in the *Daily Mirror* and its references to him as constituting a "real and substantial" tort. He therefore upheld the application based on abuse and struck out the claim under CPR 3.4.



number of copies of the publication distributed have been circulated here. Some think that such a requirement is arbitrary and would not give sufficient weight to the significance of damage to someone's reputation in England.<sup>21</sup> As an example of how readership levels of publications in this jurisdiction may not be what one might expect, it was noted that the Economist website might ordinarily be considered "British" but some 6.5% of that website readership is in the United Kingdom.<sup>22</sup>

31. It might be helpful to view the grounds as a series of relevant considerations, rather than a series of boxes all of which need to be ticked in order to bring a claim. Therefore Practice Direction 6B which defines the grounds which a claimant must demonstrate to be granted permission to serve a claim out of the jurisdiction could be amended so that in defamation cases a list of non-exhaustive criteria are considered. These might include the following:
  - The level of targeting of a publication at a readership in this jurisdiction compared with elsewhere
  - The level of publication in this jurisdiction compared with elsewhere
  - Whether the claimant has a reputation to protect specifically in England and Wales
  - Whether a significant amount of damage is done in this jurisdiction compared with elsewhere
  - The level of connection of the claimant to England and Wales (including domicile) compared with elsewhere
  - The level of connection of the defendant to England and Wales (including domicile) compared with elsewhere
32. It was highlighted that a possible hook for the provision of further rules or guidance is paragraph (3) of CPR 6.37 which provides "The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim". It was suggested that this rule is too vague and further rules or guidance as to what this means in a defamation case could be added here. On one view, the *forum conveniens* and *forum non conveniens* doctrines had been developed in a commercial context (see paragraph 13) where the issue of forum is approached from the perspective that a case should be heard in this jurisdiction unless there is a very good reason why it should not be. However, in line with that view, the principle should, in defamation proceedings, instead be that jurisdiction should *not* be assumed in this jurisdiction unless there is a very good reason why it should be.

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<sup>21</sup> For example Lord Hoffmann at paragraph 27 of his Ebsworth Memorial Lecture (see footnote 3) and Professor Alastair Mullis (UEA) and Dr Andrew Scott (LSE) at paragraph 22 of their paper "*Something rotten in the state of English Libel Law? – A Rejoinder to the Clamour for Reform of Defamation*" (January 2010).

<sup>22</sup> Source: Alexa.com

33. Other members of the Working Group believed that the flexibility afforded by the existing *forum non conveniens* and *Jameel* principles provided an established (and developing) framework within which a judge could decide whether permission to serve out of the jurisdiction should be granted on the facts of each specific case.
34. Issues were raised by legal and academic members of the group as to whether it would be possible to deprive persons of a right of action using procedural rules as opposed to primary legislation.<sup>23</sup> It was noted that there were issues with Article 6 of the European Convention on Human Rights (ECHR) here.
35. The extent to which an amendment to the rules applying to service out of the jurisdiction would help address some perceived libel tourism cases is also a relevant consideration here. NGOs highlighted the case of *Wilmshurst*<sup>24</sup> which is often criticised given that the place that the tort was primarily committed was in the United States and the claimant was a US medical manufacturer. However, in that case the defendant was a British cardiologist and therefore this would be a case to which the Brussels I Regulation would apply. The claimant in such a case does not need to apply for permission to serve the claim form out of the jurisdiction so rules 6.36 and 6.37 of the CPR are not relevant.

### Pre-Action Protocol

36. It was noted that a Pre-Action Protocol letter provides a good opportunity for the claimant to explain why this jurisdiction is the proper place to bring a claim. The Pre-Action Protocol which applies to defamation claims is at Annex H. This could be amended to, for example, require claimants to set out the evidence of the extent of publication both in England and Wales and elsewhere.
37. It may be more difficult to include a requirement to set out the level of damage within the jurisdiction. Lawyers expressed a view that it would be difficult to show this and it would be inconsistent with the fundamental principle of the substantive law that damage is presumed. Moreover, it would be difficult to justify the disparity between requiring a claimant to demonstrate damage when that damage was alleged to have been

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<sup>23</sup> The argument in favour of being able to amend the jurisdictional base through rules of court derives from the fact that the jurisdiction to entertain a claim against a defendant domiciled abroad has a procedural base. The common law position was that jurisdiction was primarily based on service. Service on a defendant domiciled abroad, being in excess of the immediate territorial jurisdiction, was possible only with the prior authority of the court, hence the requirement for permission to serve out of the jurisdiction. The grounds on which the court would give permission were drawn together in the rules. Originally these rules were set out in RSC O.11, subsequently CPR Part 6 and in 2008 they were moved to Practice Direction 6B. The provisions set out in Practice Direction 6B are jurisdictional propositions and amendment of them would amend the basis of jurisdiction.

<sup>24</sup> *NMT Medical v Wilmshurst*

caused by a defendant domiciled outside the EU, but not to have to do so when the damage is alleged to have been caused by a defendant domiciled within it. It could be argued that these factors can be taken into account under the broader and flexible *forum non conveniens* test and *Jameel* principles. However, while the substantive law does not require the claimant to show damage, in practice it is always best for claimants to gather some evidence of damage to reputation. Therefore there might be some scope for a provision along these lines.

### **Substantive law solutions: bringing the English jurisdiction more into line with other jurisdictions**

38. A media perspective was that the reason that libel tourism is a problem in England is that our jurisdiction is more favourable to claimants and offers less protection for freedom of expression than elsewhere. Therefore, a possible solution is to bring England more into line with other jurisdictions. Others questioned which jurisdiction would be more appropriate. The US example is unusual and not in line with other European legal systems.<sup>25</sup> Some other jurisdictions provide protections for claimants which are not available at present in England. For example, in Belgium, people who are expressly or impliedly named in articles or broadcasts, even if the content is accurate, can require the publisher to publish, unedited and in full, a reply piece up to a maximum of 1000 words long, or a maximum of double the size of the article complained of.

### **Conclusion**

- The Working Group considered available evidence of “libel tourism” and members had widely varying views as to how widespread a problem this is. To the extent that there was a view that there was a problem to be addressed, it was considered that tightening and more rigorous application of the rules/practice relating to service out of the jurisdiction would be appropriate. The critical issue is enabling courts at an early stage to identify cases which constitute an abuse and where no real and substantial tort has been committed within the jurisdiction.
- Five main options for addressing the issue of libel tourism were identified by the group:
  - *Option 1:* Give the defendant an option to attend the initial hearing of the application for permission to serve a claim out of the jurisdiction.
  - *Option 2:* Take steps to improve the evidence available at this application stage by setting out more detailed rules/procedure.
  - *Option 3:* Elevate consideration of the application to judge level.

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<sup>25</sup> Indeed, Lord Hoffmann has recently said the US example is unique (Ebsworth Memorial lecture as noted in footnote 3 above)

- *Option 4:* Amend the grounds on which the court may grant permission to serve a claim out of the jurisdiction so that tighter rules apply for defamation claims.
- *Option 5:* Amend the Pre-Action Protocol to require claimants to set out information as to the extent of publication both in this jurisdiction and elsewhere, and why England and Wales is the proper place to bring the claim.
- The group recommends that the Civil Procedure Rule Committee consider whether there are ways for defendants to be given the option of involvement in the hearing of the application for permission to serve a claim form out of the jurisdiction and whether that would be desirable. It is generally considered that *ex parte* applications are more likely to be granted than applications which are subject to an *inter partes* hearing so this could help to stop claims which are not suitable for hearing in this jurisdiction at an earlier stage (Option 1).
- The group considers that it is essential that a claimant applying for leave to serve a claim form involving defamation proceedings out of the jurisdiction file detailed evidence of the considerations relied upon as showing that the case is a proper one for service out of the jurisdiction. The group thinks guidelines clearly articulating best practice would be helpful and this should be drawn to the attention of the Civil Procedure Rule Committee. The Commercial Court Guidelines in Annex E are a useful model (Option 2).
- The group recommends that the Lord Chancellor invite the Master of the Rolls and Civil Procedure Rules Committee to reflect whether, in light of the group's report, it would be appropriate for applications for service out of the jurisdiction in defamation cases to be decided by judges (Option 3).
- The group also recommends that the Pre-Action Protocol be amended to require claimants, insofar as is reasonably practicable, to set out information as to the extent of publication both in this jurisdiction and elsewhere, and why England and Wales is the proper place to bring the claim (Option 5).
- As regards imposing a stricter set of grounds for defamation cases where the court's permission to serve out is required, this could be achieved by amendment to the Civil Procedure Rules (or indeed by primary legislation). Given the difficulties around this option, the group does not recommend any immediate legislative action but rather that the other recommendations above (assuming they are implemented) and any other relevant changes to the law relating to libel, are monitored to assess their impact on the perceived libel tourism problem. If that monitoring reveals a continuing problem, legislative change could be considered at that point. In this regard, the non-exhaustive list of factors listed at paragraph 31 is helpful (Option 4).

## The multiple publication rule

### Introduction

39. It is a longstanding principle of the civil law that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the “multiple publication rule”). Issues in relation to the multiple publication rule (MPR) have become more prominent in recent years as a result of the development of online archives. The effect of the MPR in relation to online material is that each “hit” on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed.
40. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication. This is also the case with offline archive material (for example a library archive), but the accessibility of online archives means that the potential for claims is much greater in respect of material accessed online.
41. The MPR stems from the 19<sup>th</sup> century case of *Duke of Brunswick v Harmer*<sup>26</sup> in which the Duke’s agent bought a back issue of a newspaper published 17 years earlier. The court held that this constituted a separate publication that was actionable in its own right. Under the Limitation Act 1980, each separate publication is subject to its own limitation period of one year which runs from the time at which the material is accessed. The rule was upheld by the Court of Appeal in relation to archived material in *Loutchansky v Times Newspapers Ltd.*<sup>27</sup> It is generally thought, however, that a claimant bringing a case in the same circumstances as in the Duke of Brunswick’s case would not today survive a defendant’s application for a strike out for abuse of process (see *Jameel v Dow Jones & Company Inc*<sup>28</sup> per Lord Phillips MR).

### Recent consideration

42. The Ministry of Justice published a consultation paper on 16 September 2009 to consider the issue of the MPR. The paper considered the arguments for and against the MPR and the alternative of a single publication rule (SPR). It also sought views on one alternative approach

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<sup>26</sup> [1849] 14 QB 185

<sup>27</sup> [2002] 1 All ER 652

<sup>28</sup> [2005] EWCA Civ 75

that had been suggested. This was to extend qualified privilege to publications on online archives outside the one year limitation period, unless the publisher refuses or neglects to update the archive, on request, with a reasonable letter or statement by the claimant by way of explanation or correction.

43. In addition, the Culture Media and Sport Select Committee considered the issue in its report on *Press Standards, Privacy and Libel* published on 24 February. The Select Committee recognised that a balance must be struck between allowing individuals to protect their reputations and ensuring that newspapers and other organisations are not forced to remove from the internet legitimate articles merely because the passage of time means that it would be difficult and costly to defend them.<sup>29</sup>
44. The Select Committee recommended that there should be a one year limitation period on actions brought in respect of publications on the internet, which could be extended if the claimant could satisfy the court that he or she could not reasonably have been aware of the existence of the publication. It also recommended that in these circumstances the claimant could be barred from recovering damages in respect of the publication, but could obtain a court order to correct a defamatory statement. In addition, it agreed with the suggestion raised in the MoJ consultation of extending qualified privilege to protect electronic archives.<sup>30</sup>

### Is there a problem?

45. The Working Group considered MPR issues further in the light of the recent developments mentioned above. It was recognised that, while the problems raised by the MPR may not be widespread, difficulties do arise in practice. It was also recognised that there was a need to ensure that any provisions extended not just to newspaper archives, but also to blogs, discussion forums and other contexts where the allegedly defamatory material could be circulated outside the control of the original publisher.
46. The group considered that it is important to recognise that different situations existed where the allegedly defamatory material was republished by the same publisher (for example, through its presence on the publisher's archive) and where there is republication of the same material by a different publisher, and that there are issues to be resolved regarding what constitutes publication online and who should be treated in law as the publisher (for example where material was downloaded or where links were provided on other websites).
47. It was also highlighted that, when considering this problem, it is relevant to bear in mind that the Strasbourg court in *Loutchansky*<sup>31</sup> recognised

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<sup>29</sup> See paragraph 229 of the report.

<sup>30</sup> See paragraphs 230–231.

<sup>31</sup> At paragraph 48 (see footnote 27 for case reference).

that claims concerning internet material brought after too long a period might infringe Article 10 ECHR.

### **Possible solutions**

48. Some members of the group supported the Select Committee's recommendation for the introduction of a SPR with a one-year limitation period and discretion to the court to extend the period where appropriate. One option for the exercise of this discretion could be to adopt the Select Committee's proposal i.e. to allow an extension where the claimant could show that he or she could not reasonably have been aware of the existence of the publication. However, it might be difficult in some circumstances for the claimant to produce evidence demonstrating how they meet this test.
49. Another option would be to follow the approach taken in section 11 of the Defamation Act 2009 in Ireland, which provides that only one cause of action exists in relation to a multiple publication subject to a discretion for the court to grant leave for a further action "where it considers that the interests of justice so require". There was some doubt as to whether the Irish model had been introduced primarily to deal with the issue of multiple suits rather than to provide for a multiple publication rule. In any event, it could afford flexibility which would take into account the situation where, for example, circumstances changed to make it just to allow a claim or there was significantly greater publication after the expiry of the one year limitation period. However, on the other hand, there would also be uncertainty involved in this model and, as a result, litigation concerning the scope of the discretion would be likely.
50. It was also recognised that section 32A of the Limitation Act 1980 (as amended by the Defamation Act 1996) already gave the courts a broad based discretion to allow an action to proceed, which included taking into account circumstances where the claimant was not reasonably aware of the publication. There were mixed views on the need to depart from these established provisions and on whether doing so might create difficulties and uncertainty in practice.
51. Some members of the group considered that a SPR would provide legal certainty for publishers, clarity and prevent the possibility of open-ended liability. It was suggested that claimants would not be disadvantaged because search engines and the widespread use of alert services mean that potential claimants are in a better position than ever before to know very quickly if material is published about them. It was also suggested that this was consistent with the underlying rationale for limitation periods i.e. the desirability of protecting defendants from stale claims which might be difficult to counter due to the passage of time and therefore to prevent injustice.
52. If a SPR is introduced, as proposed by the Select Committee, another option would be that, after the expiry of the one year limitation period, and subject to any extension, the claimant could be debarred from recovering

damages in respect of the publication. The claimant would, however, be entitled to obtain a Court order to correct a defamatory statement.

53. The majority of the group considered that it would be appropriate to move to a SPR (with an appropriate discretion) in circumstances involving the republication of the allegedly defamatory material by the same publisher.
54. Some members of the group considered that a SPR should also be introduced in circumstances involving republication of the allegedly defamatory material by a different publisher. However, other members preferred an approach which retains the MPR, but introduces a defence protecting a publisher from legal action outside the one year limitation period (running from first publication) subject to requirements relating to the attachment of a notice to the online archive. Two options were identified for doing this. Firstly, the scope of qualified privilege under section 15 of, and Schedule 1 to, the Defamation Act 1996 could be extended as suggested in the MOJ consultation paper (and approved by the Select Committee) to provide that the material in question is covered by qualified privilege unless the publisher refuses or neglects to update the electronic version, on request, with a reasonable letter or statement by the claimant by way of explanation or contradiction.
55. The second option would be to introduce a free-standing defence which would protect the publisher subject to him or her attaching a notice, on request, indicating that a challenge to the accuracy of the original story had been made. Concerns were raised that the appending of a simple notice that the article in question was so challenged would not go far enough to provide adequate balance particularly as if these proposals were accepted, a claimant would be deprived of a remedy at law in respect of that continued publication after one year, and that the meaning – and therefore sting – of the original article would not be truly nullified nor would it be countered by a simple notice stating that the article was subject to a complaint.
56. Members who preferred the approach of introducing a SPR were concerned that this approach might not give sufficient certainty against the threat of ongoing legal action, and were doubtful whether an extension of qualified privilege or the introduction of a notice requirement would be workable in all the circumstances in which cases might arise. It was also recognised that difficulties could arise if there were to be a requirement to publish a statement by the claimant in all circumstances, for example where the views expressed were unacceptable. It should however be noted that the publisher would only be required to publish a reasonable letter or statement and they could elect not to publish anything at peril of having to rely on other defences.



## Conclusions

- The Working Group considers that there are two broad options for protecting a publisher from legal action outside the one year limitation period running from the date of first publication. Either a single publication rule could be introduced (with the court having discretion to extend the one year limitation period where appropriate) or the multiple publication rule could be retained but with a new exception (either extending the scope of qualified privilege or introducing a similar free-standing defence based on a notice requirement).
- It is possible that different considerations should apply depending on whether allegedly defamatory material has been republished by the same (originating) publisher or by a different publisher.
- Whilst recognising that the decision is finely balanced, the majority of the Working Group believes that a single publication rule (with discretion) should be the preferred option in circumstances where the republication of allegedly defamatory material is by the same publisher.
- In relation to republication of the material by a different publisher, there is no consensus or majority view as to which of the options described above should be preferred.
- With a new single publication rule, there are mixed views on the nature of the discretion that would be appropriate. Some of the group prefer the option proposed by the Select Committee (i.e. allowing an extension where the claimant could show that he or she could not reasonably have been aware of the existence of the publication). Others see merit in the broader discretion introduced in Ireland, while others consider that the existing discretion in the Limitation Act 1980 should be retained.

## A statutory public interest defence

### Introduction

57. There have recently been calls for legislation to provide a more robust public interest defence to a libel claim. For example, in their report, English PEN and Index on Censorship state:

“We would like to see a stronger public interest defence that also extends to journalists and writers who may not appear to be obvious candidates for a *Reynolds* defence. Such a reform would significantly strengthen the right to free expression in the UK.”<sup>32</sup>

The Culture, Media and Sport Select Committee in their *Press standards, privacy and libel* report have also expressed the opinion that there is potential for a statutory responsible journalism defence “to protect serious investigative journalism and the important work undertaken by NGOs”.<sup>33</sup> What is meant by “a public interest defence” can be debated since there are competing interests in relation to reputation and the right to freedom of expression.

58. There is a line of case law establishing a defence at common law to a libel claim where publishers have acted responsibly in all the circumstances, and the extent to which the subject matter of the publication is of public interest is a key factor. The defence may be relied on even where the defendant cannot prove the truth of what has been published.
59. This defence was first established in the case of *Reynolds v Times Newspapers*.<sup>34</sup> The House of Lords held that the elasticity of the common law principle of qualified privilege enabled interference with freedom of speech to be confined to what was necessary in the circumstances of the case. That elasticity enabled the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. In his speech, Lord Nicholls defined ten non-exhaustive matters to be taken into account, depending on the circumstances:
- i. the seriousness of the allegation;
  - ii. the nature of the information and the extent to which the subject matter was a matter of public concern;
  - iii. the source of the information;
  - iv. the steps taken to verify the information;

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<sup>32</sup> *Free Speech is not for Sale* (see footnote 1 above) at page 9.

<sup>33</sup> At paragraph 163

<sup>34</sup> [1999] All ER (D) 1172

- v. the status of the information;
  - vi. the urgency of the matter;
  - vii. whether comment was sought from the claimant;
  - viii. whether the article contained the gist of the claimant's side of the story;
  - ix. the tone of the article; and
  - x. the circumstances of the publication, including the timing.
60. The House of Lords went on to say that in general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it and it should always be remembered that journalists acted without the benefit of the clear light of hindsight. Above all, the court should have particular regard to the importance of freedom of expression, and should be slow to conclude that a publication was not in the public interest, especially when the information was in the field of political discussion.
61. The *Reynolds* defence has subsequently been developed in several cases which have confirmed or established a number of principles in relation to its application. These include that:
- the ten point test of responsible journalism is to be applied flexibly – each element is not a rigid hurdle which the publisher must overcome;<sup>35</sup>
  - the defence is not confined to the media but applies to all forms of public speech;<sup>36</sup>
  - the defence can be deployed even when no attempt is made to verify allegations (including in circumstances where it might be difficult or dangerous for a publisher to do so) or put them to the target of an article;<sup>37</sup>
  - allowance has to be made for editorial judgment;<sup>38</sup> and
  - any doubt as to whether or not the defence has been made out should be resolved in favour of the publisher.<sup>39</sup>

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<sup>35</sup> *Jameel & Another v Wall Street Journal (Europe) (No 2)* (HL) [2006] UKHL 44

<sup>36</sup> *Seaga v Harper* [2008] UKPC 9

<sup>37</sup> *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] All ER (D) 48

<sup>38</sup> See *Jameel*

<sup>39</sup> See the comments of Lord Nicholls of Birkenhead in *Reynolds*. However, there has subsequently been judicial comment that it is no longer correct that any lingering doubts should be resolved in favour of publication (see footnote 46).

## What Problems Exist

62. The main concerns in this area were expressed by members of the group from NGOs, the scientific community and the regional press and lawyers involved in representing defendants. It was considered that the uncertainty experienced by organisations in this area is a major factor in creating a chilling effect on freedom of expression and investigative reporting. For example, many publishers and potential publishers would rather settle claims out-of-court or avoid publication altogether rather than face the uncertainty of mounting a *Reynolds* defence. From the perspective of these members of the group, flexibility is needed in relation to determining what constitutes “responsible” behaviour. For example, in some circumstances it should be recognised that it may be irresponsible or even negligent not to publish material (for example, NGO reports relating to corruption and cases of “whistleblowing” involving deficient or harmful medical products).
63. NGO and scientific community members referred to a lack of certainty as to how the *Reynolds* defence applies beyond the context of mainstream journalism, and the particular aspects of the defence that may be relevant in different types of case. The lack of a significant body of case law developing *Reynolds* in a range of contexts was considered to be a particular problem. This uncertainty has led to organisations having to be extremely cautious in assessing what steps need to be taken prior to publication to ensure that they are “*Reynolds* compliant”. They incur substantial legal costs, which are not provided for in any grants received for researching and producing reports. This is particularly burdensome for smaller organisations and such costs are beyond the reach of most academic journals,<sup>40</sup> small publishers and individual writers. Members connected to the regional media also expressed concern that the uncertainties of the *Reynolds* defence mean that it is always likely to be tested in court, thus making it expensive. Regional media editors often have limited budgets and therefore see *Reynolds* as a defence of last resort.
64. A related issue is the doubt and difficulties that exist in relation to the evidence that a court would require to satisfy the requirement of “responsible journalism”. In the case of organisations publishing reports which may be critical of foreign governments or public authorities, there may often be significant problems in substantiating evidence and protecting sources.
65. At Annex F are responses received by Index on Censorship and English PEN from NGOs in response to a questionnaire which provided an opportunity for them to present views on their experiences of English libel law and the efficacy of the *Reynolds* defence. This gives more detail on some of their concerns.

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<sup>40</sup> The problem is exacerbated by the rapidly growing trend towards open access in scholarly publishing which means that papers are easily obtained through internet searches.

66. Claimant lawyers on the other hand, say that any uncertainty around *Reynolds* works very much more to the disadvantage of claimants than publishers. Publishers will know what steps they have taken to verify the information, whether their research may be considered to have been diligent etc; whereas a claimant may not find out until disclosure takes place, and, even then, the position may not be clear (where, for example, a journalist may claim to have received information from confidential sources). An independent academic member agreed that, as far as NGOs are concerned, provided the enquiries which they make prior to publication are as diligent as may be considered reasonable in all the circumstances, and provided the material published does not overstate or otherwise misrepresent the quality of the evidence on which it is based, the *Reynolds* defence should in general provide them with adequate protection.

### Scope of *Reynolds*

67. Following the clarification provided in *Seaga v Harper*<sup>41</sup> it appears that the key issue is not whether the *Reynolds* defence applies beyond mainstream journalism, but how it applies in different circumstances and what steps need to be taken to be confident of satisfying its requirements.
68. Claimant lawyers have also suggested that those who are concerned about the application of the *Reynolds* defence in the context of scientific papers (and in some cases NGO reports) may take comfort from the decision of Eady J in *Vassiliev v Frank Cass & Co.*<sup>42</sup> In *Vassiliev* it was decided that the subject matter of the published material was so “arcane, scholarly and complex” that, even though it was available to download from certain websites, it was likely in practice to have been read only by those with an interest in the particular subject. Accordingly, it was held that the publication was protected by qualified privilege. This is, however, a judgment only of first instance and it appears that the defence of qualified privilege will not be available where there is publication to a group of more general readers in addition to specialists.<sup>43</sup>

### Is codification of *Reynolds* desirable?

69. NGO and scientific community members of the group considered that codification of the *Reynolds* principles would not improve the current situation; rather the problems need to be met with a better definition of a

<sup>41</sup> See footnote 36 above.

<sup>42</sup> [2003] EWHC 1428 (QB)

<sup>43</sup> *Trumm v Norman* [2008] EWHC 116 (QB) and *Brady v Norman* [2008] EWHC 2481 (QB) concerned the publication of material in the *Loco Journal*, a specialist publication. The evidence was that 18,000 copies were distributed to members of the Associated Society of Locomotive Engineers and Firemen, 1,332 to retired members and 202 copies to others; of these 202 it was decided that somewhere in excess of 100 readers did not have any particular interest in the subject matter (above or beyond any member of the public) and therefore the defence of qualified privilege did not apply in respect of the publication to these few readers.

public interest defence. In addition, there are some elements of the *Reynolds* guidelines to which NGOs object. In particular, concerns were expressed over the principle of notifying subjects of any allegations before publication and over the dangers of strict requirements of “responsible journalism” in certain exceptional contexts (for example, cases of “whistleblowing” as outlined at paragraph 62 above).

70. Some media members of the group also did not consider that codification of *Reynolds* would be beneficial. From their perspective, the complexity of the current *Reynolds* defence meant that it was generally only relied on alongside other defences and could sometimes be treated as a series of points of criticism which the defendant needed to provide evidence to refute.
71. Claimant lawyers did not consider that codification of *Reynolds* was necessary. They took the view that the chain of case law begun by *Reynolds* had significantly improved the position of defendants. They considered that time was needed for the courts to develop case law further and for a body of authorities to be built up, and that codification was only likely to fuel further argument over the nature and terms of the defence. It was also suggested that, if there is any uncertainty over the application of *Reynolds*, codification would not alleviate this as any statute would need interpreting. Some lawyer members of the group pointed out that the real benefit to the media of the *Reynolds* defence was unseen – namely the numerous cases where practitioners advised potential claimants not to bring proceedings because they would be met by the defence.
72. Claimant lawyers also envisaged problems with a codified *Reynolds* defence because it might lead to inflexibility at odds with the necessity to enable a fair and proper balance to be found between Article 8 and Article 10 ECHR rights. The *Reynolds* line of defence (variations of which have since also been adopted in Australia, Canada and Republic of Ireland) provides a framework with the necessary flexibility which can then be applied to the facts of a particular case, in keeping with the approach taken by most European countries, and the ECHR.
73. In the light of these considerations, the Working Group considered that pure codification of *Reynolds* would not be of value (the next section considers whether a new statutory defence that is broadly in line with *Reynolds* but expressed much more clearly and simply would be helpful).

### **Other forms of a statutory public interest or ‘responsible journalism’ defence**

74. In connection with options for putting a public interest defence on a statutory footing, the Culture, Media and Sport Select Committee has said:

The desirability of affording greater protection to genuinely responsible journalism begs the question of whether the law should be amended to put the *Reynolds* defence, or an expanded version of it, on a statutory

footing, perhaps through an amendment to the 1996 Defamation Act. However, there is a risk of unforeseen consequences. It could be maintained that Reynolds/Jameel applied more flexibly is sufficient and we are concerned that codifying the defence and the 'public interest' in law may in itself introduce rigidities or make for less accurate reporting. However **it is our opinion that there is potential for a statutory responsible journalism defence to protect serious, investigative journalism and the important work undertaken by NGOs.** We recommend that the Government launches a detailed consultation over potentially putting such a defence, currently available in common law, on a statutory footing. We welcome consultations already launched by the Ministry of Justice in the field of media law. Such a further exercise will provide an opportunity to gain more clarity and show the Government is serious about protecting responsible journalism and investigations by the media, authors and NGOs in the public interest.<sup>44</sup>

75. One option aimed at making the law clearer and easier to use was proposed by members of the group associated with NGOs and the scientific community. They considered that a new statutory defence aiming to articulate matters of public interest, but not linked to *Reynolds*, together with appropriate guidance, would be helpful to clarify the law in this area. It was suggested that such a defence might be as follows:
  1. It shall be a defence to show that the publication:
    - 1.1. dealt directly with a matter of public interest, including but not limited to the following:
      - 1.1.1. politics;
      - 1.1.2. science;
      - 1.1.3. commerce;
      - 1.1.4. sport;
      - 1.1.5. healthcare;
      - 1.1.6. the environment;
      - 1.1.7. public administration;
      - 1.1.8. **or** that the publication represented a form of artistic expression;
    - 1.2. **and** that the publication was made in good faith;
    - 1.3. **and** that any relevant professional codes or standards were followed by the publisher.
  2. If there is any doubt the court should find in favour of publication.
76. These members consider that there is a need to rebalance the law towards free expression and that appropriate statutory provision would increase the confidence of publishers, leading to a reduction in the chill

<sup>44</sup> In their recent report: *Press standards, privacy and libel*, at paragraph 163.

effect. A statutory defence may provide a better basis for enshrining a public interest defence in public understanding than one based on complex case law. It was also noted that the time needed to take forward primary legislation (possibly two years) is probably very little compared with the time it would take for sufficient judgments to come through the courts to develop a body of case law, even just to expand *Jameel*, let alone develop a more robust public interest defence. The view was that a statutory defence would lead to earlier settlements and reap savings in costs.

77. It was recognised, that if a new statutory public interest defence were to be formulated, it would not be possible to achieve a position of absolute certainty on what steps would protect organisations against the risk of a libel claim, and that some degree of uncertainty in relation to individual cases was inevitable.
78. Some members of the group from the media were particularly interested in supporting a statutory public interest defence which identified categories of speech which are in the public interest and other members also expressed the view that there are some categories of speech which are of higher value than others and are therefore worthy of a higher degree of protection. It was also recognised by larger publications that smaller publishers, NGOs and writers involved in investigative work face huge hurdles in defending libel claims and such a defence would be likely to improve their position. A member from the regional media was strongly in favour of the draft defence proposed by NGO and scientific community members at paragraph 75 above.
79. On the other hand, strong concerns about the draft public interest defence at paragraph 75 were raised by some lawyer members (as well as an academic member). This was because it is considered the proposal would introduce a defence which could in effect permit publication of any allegation made with an absence of malice which touched upon a broad category of public interest themes, thus risking rewarding irresponsible journalism (the provision relating to professional codes would assist on this but not provide the full answer – see further the last bullet point of paragraph 80 below). In order to avoid ECHR incompatibility issues, it was considered imperative that any reform of the public interest defence retains some of the requirements of responsible journalism.<sup>45</sup>

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<sup>45</sup> The underlying argument for this proposition is that the European Court of Human Rights has established that a person's reputation is an aspect of their rights under Article 8 ECHR. This is clearly accepted by the UK's Supreme Court in *Application by Guardian News and Media Ltd and others in Ahmed and others v HM Treasury* [2010] All ER (D) 178 (Jan). It is therefore necessary to give sufficient protection to the protection of reputation. A vital aspect of this protection is the notion that journalists do not have a free hand in publishing defamatory material, even where the subject-matter is clearly of proper public concern. The Strasbourg court has emphasised the "duties and responsibilities" of the press. Therefore, to free the media from liability for defamation purely on the basis of the subject matter of the publication being of legitimate public concern, without imposing any standards of



80. Particular objections raised by one or more of these members include:

- Where the public interest lies should be assessed on a case by case basis. It is too broad to simply ask whether the publication was in an *area* in which there is a public interest.
- The term “all artistic expression” is unclear and likely to lead to satellite litigation (for example, the question could be asked whether journalism is a form of artistic expression).
- There would be carte blanche for anyone to publish any allegation that they are prepared to claim they believe is true and this would not truly serve the public interest. It would be paradoxical to call this a public interest defence.
- The key question would be the mental state of the publisher (or what they are willing to say their mental state is) and this would remove any real objective assessment of the publication, particularly given that a journalist’s sources are often confidential so there is often no scope to dispute the legitimacy of a belief.
- Poor reporting would be encouraged as it would be in the publisher’s best interests not to seek both sides of the story.
- The defence would have universal application and this would be open to abuse by the unscrupulous.
- The proposed new defence would add uncertainty where clarity is emerging following *Reynolds* and *Jameel*. This is undesirable and unnecessary.
- It would worsen the situation of defendants who want more certainty in the law as higher court authorities would need to clarify what is meant.
- Requiring publishers to follow any professional codes or standards would lead to difficulties because:
  - a) this would lead to litigation over the meaning of codes such as the PCC and OFCOM;
  - b) while compliance with the relevant ‘professional standards or codes’ might be enough to satisfy the requirements of responsible journalism, if those codes laid down only minimal standards, it would not. There would be a perverse incentive to water down those codes or produce an undemanding set of standards in the first place;
  - c) very few potential publishers have regulatory bodies (for example, there is no known regulation of bloggers, book

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responsible journalism, would under-protect reputation and could well therefore violate Article 8. Even if Article 8 was found not to apply in a particular case, such a measure would probably be found by the courts as providing insufficient protection for reputation as part of the “rights of others”, recognised in Article 10(2) ECHR.

publishers or NGOs), so the regulatory hurdle would be of no effect in the case of such publishers; and

- d) membership of existing regulatory bodies is often optional so there could be unfair results and unintended consequences within sectors.

81. These members emphasised the importance of ensuring that articles and reports are properly researched and checked (for example, in cases relating to the harmfulness of medical products) and that any provision needed to adopt a balanced approach which did not impede ordinary people from protecting their reputation. They stressed that protection of reputation is itself in the public interest and the circumstances in which untrue information is irresponsibly published should not be encouraged.
82. Questions were also raised by group members about the extent to which it would be possible to go beyond codifying the existing law to introduce presumptive priority to Article 10 ECHR rights of freedom of expression. There is debate as to whether a clause that requires any doubt to be resolved in favour of publication is lawful.<sup>46</sup> Some members noted that section 12 of the Human Rights Act 1998 is effectively a statutory presumption in favour of not restraining publication and perhaps provides a precedent.

### **An alternative?**

83. Some members considered that there could be some value in seeking to place the basic principles represented by the current *Reynolds* test, as interpreted by *Jameel*, on a statutory footing. However, this should not involve significant changes of principle because the common law tests are broadly satisfactory and in accordance with the Strasbourg case law. Such an approach should clarify the existing law to give stronger guidance to all concerned on the legal position but the extent to which this would help should not be overstated since the law would need to be drafted in sufficiently flexible terms to leave room for manoeuvre in particular cases. If undertaken, the recent Canadian Supreme Court decision in *Grant v Torstar Corp.*,<sup>47</sup> which sets out a public interest

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<sup>46</sup> It is noted that in *Reynolds* Lord Nicholls held that “any lingering doubts should be resolved in favour of publication.” However, there has been judicial comment that this should no longer stand following subsequent statements of the House of Lords. In *Flood v Times Newspapers* [2009] EWHC 2375 (QB) at para 146, Justice Tugendhat quoted from the judgment of Lord Nicholls in *Reynolds* ending with the words ‘Any lingering doubts should be resolved in favour of publication’ and said: ‘In my judgment Mr Price is correct when he submits that the last sentence cannot stand as the law today, in the light of the subsequent statements of the House of Lords in *Re S* and *In re BBC*.’

<sup>47</sup> 2009 SCC 61

defence that is similar to *Reynolds* but in a clearer, simpler form, might provide useful guidance.<sup>48</sup>

84. In relation to including in any statutory defence a presumption that doubt should be resolved in favour of publication, it was highlighted it should be noted that that this would be consistent with *Reynolds*; but that if courts treat Article 8 ECHR (right to respect for private and family life) as being always applicable in defamation cases, they are bound not to apply any presumption in favour of Article 10 ECHR (right to freedom of expression) (see footnote 46). The issue of whether Article 8 is always engaged in defamation cases seems at present to be open to doubt.<sup>49</sup> The legislation could therefore be used to clarify the position as to the relevance and weight of Article 8 in defamation cases. Given the ambiguity in the Strasbourg case law on this point, it could provide that doubt should be resolved in favour of publication, but that, so as not to violate the presumptive equality between Articles 8 and 10, this should not apply in cases in which the facts plainly related to an individual's private life. It might further be possible to define a class of case in which the allegations were plainly relating to public, rather than private life, and establish a stronger presumptive priority for freedom of expression in such cases.

<sup>48</sup> The Court found that there were two requirements for the new defence: First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to:

- (a) the seriousness of the allegation;
- (b) the public importance of the matter;
- (c) the urgency of the matter;
- (d) the status and reliability of the source;
- (e) whether the plaintiff's side of the story was sought and accurately reported;
- (f) whether the inclusion of the defamatory statement was justifiable;
- (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
- (h) any other relevant circumstances.

<sup>49</sup> See the *Guardian News* decision of the Supreme Court in footnote 45 above; but note the different view expressed on this point by the European Court of Human Rights in *Karakó v Hungary*, (application no 39311/05), 28 April 2009; further, there are a large number of recent Strasbourg decisions on defamation and Article 10 that do not mention Article 8 including: *Kobenter v Austria* (application no. 60899/00) 2 November 2006; *Standard Verlagsgesellschaft mbH (no. 2) v. Austria* (application no. 37464/02) 22 May 2007; *Arbeiter v. Austria* (application no. 3138/04); 25 April 2007); *Kita v Poland* (application no. 57659/00) 8 October 2008; *Filipović v. Serbia* (application no. 27935/05 (20 February 2008); *Flux v. Moldova* (no. 7) (application no. 25367/05) 24 November 2009); *Krutov v Russia* (application no 15469/04) 3 December 2009; *Sorguç v. Turkey* (application no. 17089/03) 23 September 2009; *Karsai v. Hungary*, (application 5380/07) 1 Dec 2009); *Romanenko and others v Russia* (application no 11751/03) 8 October 2009; *Kuliš and Różycki v. Poland* (application no. 27209/03) 6 January 2010); *Fedchenko v. Russia (no. 2)* (application 48195/06) 11 February 2010; *Kubaszewski v. Poland* (application no. 571/04) 2 February 2010.

85. In summary, this proposal for a statutory defence to replace *Reynolds* (an alternative to the suggestion set out in paragraph 75) suggests that it could:
- (a) capture the underlying notion of ‘responsible communication on a matter of public interest’ (*Grant v Torstar*), but in much clearer and simpler language, drawing perhaps on the formulation in *Grant* in this respect;
  - (b) set out a non-exhaustive list of areas of public discourse of particular importance (as in paragraph 75);
  - (c) seek to resolve the issue raised in *Times v Flood*<sup>50</sup> about whether, and if so when, doubt may still be resolved in favour of publication, by aiming to clarify the applicability and weight of Article 8 in defamation cases.

## Further proposals

### Wider reforms

86. NGOs and members of the scientific community suggested that a further possible solution would be more far-reaching reform of the law so that there is a presumed right to free speech, exercised responsibly. This would involve the law requiring one question: on the facts, is it justifiable to displace the right to free speech on the basis of the claimant’s argument about reputational damage? It was recognised that this would involve a need for further definitions. It is considered that defining “exercised responsibly” is likely to entail building in the principles of responsible journalism and it is perhaps therefore more helpful to consider the issues in the context of a proposed new statutory responsible journalism or public interest defence as discussed above. In addition, this proposal encounters the same problems as to the lawfulness of presumptions outweighing Article 8 ECHR rights.
87. Some members who are concerned about the costs of using the *Reynolds* defence were of the view that, even if the law was changed, forms of responsible journalism defences are always going to be susceptible to testing in court and therefore expense. As a result it is important to ensure that costs of libel proceedings are minimised so far as possible. It was noted that proposals for changes to success fees may be helpful in this respect.

### Amendment of Schedule 1 to the Defamation Act 1996

88. A proposal received from a regional press perspective was that the categories of statutory qualified privilege in Schedule 1 to the Defamation Act 1996 should be amended by order to address particular difficulties which are encountered by this group of publishers. Schedule 1 protects fair and accurate reports of what is said or produced by a range of public

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<sup>50</sup> See footnote 46.

bodies. Background and further information on the problems encountered and ambit of the amendments proposed are included in Annex G. Also included in that Annex is a description of the views on this proposal expressed by members of the national media and lawyers representing claimants. There are varying views as to the extent and ways in which it would be appropriate to amend Schedule 1. However, it does appear that there is consensus that Schedule 1 has become out-of-date and it is therefore suggested that the Ministry of Justice should undertake a review of its content, taking account of particular problems experienced.

## Conclusion

- While *Reynolds* and *Jameel* have had an important impact, there is a measure of agreement that the current state of the law in this area is not satisfactory.
- The Working Group considered a spectrum of options for making the law clearer and easier to use. The group does not recommend pure codification of *Reynolds*, but rather recommends that the Ministry of Justice undertake further work on a statutory public interest defence with a view to exploring how and whether it is possible to reconcile the competing interests in relation to reputation and the right to freedom of expression in a way which clarifies *Reynolds* in light of *Jameel*. Given the competing public interests, it is clear that there will always have to be a degree of flexibility inherent in any test – and therefore uncertainty in terms of its application in any particular situation. Any new proposals would require full public consultation.
- The Working Group noted issues raised about the current content of Schedule 1 to the Defamation Act 1996, and considers that further work should be undertaken by the Ministry of Justice to identify any areas in which it would benefit from being updated.

## Procedural issues

### Introduction

89. Many of the criticisms which have been made of English libel proceedings raise issues relating to how proceedings operate in practice, and this is closely linked with the widespread perception that the costs of such proceedings are prohibitive. The Working Group therefore focused part of its considerations on procedural issues, and identified a range of different areas which it felt merited consideration. In working through these it focused on what steps could usefully be taken in the shorter term, and what aspects would be likely to need longer term consideration in the context of primary legislation. As an overarching point it emphasised the need for more pro-active case management by the courts throughout the defamation claims process.

90. This section considers the following issues:

- The role of juries
- Early resolution of the meaning of the allegedly defamatory material
- The Defamation Pre-Action Protocol
- A fast track/summary procedure
- Use of declarations of falsity
- Use of specialist judges

### The role of juries

91. A central issue affecting the timing and manner in which cases progress is the right to trial with a jury established by section 69 of the Senior Courts Act 1981<sup>51</sup> and section 66 of the County Courts Act 1984. A background note on the current nature of the role of juries in defamation proceedings is at Annex I. The Working Group considered whether any changes to juries' involvement in proceedings are appropriate.

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<sup>51</sup> Section 69(1) provides:

"Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—

(a) a charge of fraud against that party; or

(b) a claim in respect of libel, slander, malicious prosecution or false imprisonment;  
or

(c) any question or issue of a kind prescribed for the purposes of this paragraph, the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."

92. The evidence in Lord Justice Jackson's report suggests that fewer libel cases are now being heard with a jury rather than by a judge alone. The working group differed as to whether it would be appropriate to dispense with juries entirely. Some took the view that it was important that a right to trial with a jury should be available given the focus of defamation proceedings on people's reputation in the eyes of society. However, others pointed to the fact that jury trials tend to be longer, more complex and more costly.
93. It was also considered that if juries were to be retained problems could arise in developing proposals in relation to a public interest defence, as difficulties had been experienced in juries considering issues relating to the *Reynolds* guidelines because of the range and complexity of the issues requiring determination as questions of fact.
94. The possibility of amending the current legislation to require the claimant to justify why a jury trial was sought was considered. However, it was recognised that this would effectively be removing the right to trial with a jury, and concern was also expressed that this could lead to more satellite litigation.

## Conclusion

- There is no consensus on whether the right to trial with a jury should continue to be available in defamation proceedings. In the event that juries are retained, the increased costs, length and complexity of trials with juries are of concern.
- The group agrees that one area in which a change to the role of juries would be appropriate would be in relation to the early resolution of meaning (see next section).

## Early resolution of meaning

95. The Working Group considered whether the current procedure for the early resolution of the meaning of allegedly defamatory words is inadequate, in particular in view of the fact that the judge can only give a preliminary ruling on whether the words complained of are capable of a defamatory meaning, and the question whether the meaning is in fact defamatory is a matter for the jury at trial stage.
96. This has led to uncertainty over meaning which some members of the group consider has impeded the use of the offer of amends procedure (which the group considered otherwise generally worked well) and greatly increases the time taken to resolve claims and the costs involved. There was general agreement in the group that resolving this difficulty could help to encourage early settlement and the greater use of mediation and other forms of alternative dispute resolution, and, where cases are still contested, would help to narrow the issues in dispute and assist the parties in focusing their case.

97. The group therefore considered whether it would be appropriate for the question of whether the meaning is in fact defamatory to be decided by the judge alone at an early stage. It recognised that this approach would affect the right to a trial with a jury. In the light of this it was considered that primary legislation may be needed to remove the issue of determining meaning from the jury.
98. The group considered whether, as an alternative to removing the determination of meaning from the jury, a jury could instead be convened at an early stage to decide the issue at the same time as the question of whether the words complained of are capable of bearing a defamatory meaning is considered by the judge. The majority of the group considered that if this option were used there would be no need for the same jury to consider issues at interlocutory stage and trial stage, and that separate juries could be convened at each stage.
99. However, it was considered that practical problems might arise if the two juries took different views of the meaning of the words complained of. One member suggested that a jury which has not itself considered, debated and decided the meaning of the words complained of may have difficulty in assessing whether, with a defence of justification, an allegation is “substantially” true; that there could also be difficulties for the trial jury in applying section 5 of the Defamation Act 1952,<sup>52</sup> and, in cases where the first jury had already decided that the words bear a more serious meaning than that argued by the defendant, the trial jury may be unable to take account of the evidence in support of the lesser meaning in mitigation of damages. However, these difficulties could also arise if different judges were involved. In addition, there is the risk that extending the issues to be determined at an interlocutory stage and involving a jury could add to the costs incurred (although these would hopefully be offset by a reduction in the overall costs involved in the case).
100. A possible alternative to the use of a jury at an interlocutory stage might be the establishment of an independent panel consisting of a lawyer and two lay people to determine meaning. An approach of this type has been used by The Times on a voluntary basis in the context of mediation. Times Newspapers has found this process very successful both in identifying inappropriate claims and in settling matters early on by agreeing to make an offer of amends should a more serious level of meaning be determined than it had contended.

## Conclusion

- The Working Group notes the recommendation of the Select Committee in this area and agrees that it is desirable to resolve the difficulties currently

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<sup>52</sup> Section 5 provides “In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges.”



experienced in relation to the early resolution of meaning. There have also been recent proposals in this area by the Libel CLAF Working Group in the context of Lord Justice Jackson's review of costs,<sup>53</sup> which are currently being developed further by a group chaired by Sir Charles Gray, known as the Early Resolution Procedure Group. The ERPG is looking at developing detailed provisions to enable the question of whether the meaning of the words complained of is in fact defamatory to be determined at an early stage, at the same time as consideration of whether the words are capable of having a defamatory meaning.

- The Working Group supports these developments. It considers that it would normally be preferable for the procedure to be heard by a judge alone. However, it recognises that this would potentially have implications for the right to trial with a jury, and that any change to that right is likely to require primary legislation. In the event that juries are retained generally, it considers that a possible option might be that, where a party opts for trial with a jury, a jury should be convened to deal with the issue of meaning at the interlocutory stage. However, there are concerns about the potential cost implications of this, which would need careful consideration. The group also recognises that difficulties might arise if separate juries were to be convened at interlocutory and at trial stage, but the majority of members consider that it would not be necessary for the same jury to be convened at both stages.
- The group also considers that further work would be needed to decide whether a revised procedure should apply in all cases or only on application or at the court's discretion.
- It also considers that when parties engage in mediation and meaning is disputed, the involvement of an agreed independent panel to determine meaning may be helpful in the interests of achieving early settlement.

### **Defamation Pre-Action Protocol**

101. The group considered whether there is a need for changes to strengthen the terms of the Defamation Pre-Action Protocol (included at Annex H). The protocol (and other civil pre-action protocols) are the responsibility of the Civil Justice Council (CJC), which makes recommendations to the Lord Chancellor and the Civil Procedure Rule Committee. The CJC are currently in the process of reviewing all the civil protocols.
102. One area of difficulty identified by some Working Group members related to non-compliance with the protocol, in particular by non-specialist claimant solicitors. Concerns were expressed that the courts do not treat breaches of the protocol sufficiently seriously. The media perspective was that strengthening of the provisions on costs sanctions so that these operated on a mandatory basis would be helpful in ensuring compliance, and would ensure that any issue over non-compliance could be argued

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<sup>53</sup> *Review of Civil Litigation Costs: Final Report*, published 14 January 2010

before the court. Paragraph 3.7 of the protocol currently provides that “Parties are warned that if the protocol is not followed...then the Court must have regard to such conduct when determining costs.”

103. Members from the media considered that, as this provision is contained in the part of the protocol which deals with alternative dispute resolution, there is a risk that it is primarily read in the context of settlement attempts, and that the provision in paragraph 2 which states “...the extent to which the protocol has been followed both in practice and in spirit...will assist the Court in dealing with liability for costs and making other Orders” is less clear and less prescriptive. They suggested that a separate section on compliance to emphasise its importance and the consequences of failure to comply, including examples of non-compliance and the sanctions available, would be helpful, and also that the court should be required to take any breach into account at the earliest opportunity. In that context, they suggested that the claimant should be required to state whether the protocol has been complied with prior to the issue of proceedings.
104. The claimant lawyers’ view was that the current terms of the protocol already gave the courts discretion to apply costs sanctions where appropriate, and that the introduction of mandatory sanctions would increase the likelihood of disputes between parties and satellite litigation over whether the protocol had been complied with. One member also identified a more general risk that if the requirements placed on the parties become more rigid and onerous, including mandatory costs sanctions, the benefits of the pre-action process would be lost, and it would become less costly for the claimant simply to issue proceedings, serve Particulars of Claim, and for the defendant then to serve a Defence.
105. Media members also considered that a number of other aspects of the protocol need strengthening. In relation to the provision of information in the Letter of Claim they considered that:
  - In addition to the existing provisions requiring the claimant to include information on the words complained of, in cases where there is a web publication, there should also be a requirement to provide the relevant URL and a copy of the web page. This is because large web operators can host millions of pages of content and claimants need to be clear precisely what pages are complained of.
  - Information on what remedies are being sought should include the amount of general damages which are sought and the best estimate possible of the actual financial loss.
  - The provision relating to information on factual inaccuracies should be amended to require the claimant to demonstrate, explain or set out why the words are inaccurate or unsupportable rather than just “give a sufficient explanation to enable the defendant to appreciate why the words are inaccurate or insupportable” as now.

- They expressed support for the recommendation of Lord Justice Jackson in his report *Review of Civil Litigation Costs* that paragraph 3.3 of the protocol should be strengthened to read “The Claimant should identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of”,<sup>54</sup> provided it is clear that this is mandatory and that other aspects of the protocol on meaning continue to apply.

106. Media members proposed broader changes relating to the scope and aims of the protocol and the inclusion of provisions on funding arrangements, instructing experts and limitation issues. They also took the view that a pro-active approach by members of the judiciary to ensuring that the protocol is complied with could be helpful, and that judicial training on the issue could assist.

107. The views on these issues of claimant lawyers were as follows:

- It is agreed that if and insofar as necessary, the claimants should provide the URL, copy of the relevant web page or whatever other information the defendant may need to identify the words complained of.
- It is inappropriate to require a claimant to state from the outset the amount of damages claimed. Aside from the difficulty in asking the claimant to put a value on his or her own reputation, most often the amount will depend on the defendant’s conduct, in particular whether it chooses to apologise or to maintain that what has been published is true. A requirement of this nature is likely to lead to a high figure being put on the damages sought, which may be unhelpful in managing the claimant’s expectations and achieving settlement (although it is recognised that the Civil Procedure Rules require that claims should not be exaggerated).
- It would be wrong to force a claimant to identify, demonstrate, explain or set out in the Letter of Claim why the words are inaccurate or unsupportable as (i) until the claimant knows whether the publisher intends to run a defence of justification it would be inappropriate to demand that they provide the publisher with such information; (ii) it will not always be in the claimant’s power to do so, for example in circumstances where the claimant has to prove a negative; (iii) claimants will understandably be concerned about supplying a publisher (who could be, for example, a commercial rival) with information to which they might not otherwise be entitled; (iv) often letters of claim have to be written under extreme pressure of time and requiring more than is necessary would impede this and lead to unnecessary cost; and (v) a requirement to demonstrate that the words used are false, on penalty of costs sanctions, would effectively reverse the burden of proof, which would be inappropriate.

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<sup>54</sup> See paragraph 7.1(ii), Chapter 32, Part 5 (page 329) of the Final Report.

- A requirement to set out meaning as proposed by Lord Justice Jackson would not be appropriate as it would slow preparing and sending a letter of complaint in some cases and would lead to unnecessary cost, particularly if there was a need to instruct Counsel over the formulation of the meaning.
- The current protocol has the considerable benefit of being short and clear, and the broader changes proposed by media representatives would unnecessarily add to its complexity and reduce its effectiveness.
- There are concerns in relation to a rigid enforcement of time limits in the protocol, particularly if costs sanctions for unilateral shortening of those limits were imposed. Particularly in the case of internet publication where allegations can multiply at great speed, it is sometimes necessary to foreshorten the process to secure a meaningful and effective remedy.

## **Conclusion**

- The Working Group recommends that the Pre-Action Protocol is amended so that, in cases where there is a web publication, claimants are required to provide the relevant URL and a copy of the web page in their letter of claim (or whatever other information the defendant may need in order to identify the words complained of).
- The group notes the recommendation of the Jackson Review that the Pre-Action Protocol should require meaning to be set out and the fact that there are arguments both for and against this. However, the balance is probably in favour of this recommendation.
- There is a range of views as to the extent to which further changes are necessary. The Working Group notes that the Civil Justice Council is currently reviewing all the civil procedure pre-action protocols and recommends that a copy of this report be sent to the CJC so that the issues relating to compliance with the protocol and other specific points raised by the group can be considered in the course of this review.

## **A fast track/summary procedure**

108. Currently defamation proceedings are generally allocated to the multi-track procedure under the Civil Procedure Rules. The summary procedure established under sections 8 to 10 of the Defamation Act 1996 is only available in circumstances where the court considers that either the claimant's claim or the defendant's defence has no realistic prospect of success (unless the claimant specifically asks for summary relief).
109. Members of the group indicated that the offer of amends procedure already provides a means of resolving cases where the defendant has no valid case, and that the summary procedure is seldom used and is largely superfluous, though exceptionally it does enable the court to make a

declaration of falsity. It was suggested that a revised procedure could be developed which focuses on smaller, low value claims where the nature of the defamation is limited, and with a limit on damages. However, it was noted by claimant lawyers that defamation cases cannot be judged purely by reference to the damages recovered (by contrast to, for example, personal injury claims) as they are typically chiefly about exonerating a reputation; that more straightforward cases can be brought to trial in the High Court quickly under the existing procedure; that the overwhelming majority of cases which go to trial last longer than a day and so would not be suitable for a fast track procedure; and that in the light of the Working Group's view that the right to trial with a jury should be retained, a fast track procedure to save time and costs could be rendered practically meaningless.

110. The possibility of amending the current provisions governing allocation of cases to the county court was also raised. Currently referral of a case to the county court can only occur if both parties agree. It was suggested that restoring a power to the judge to refer where appropriate, or to define types or levels of case which could be referred (for example cases of slander or cases where there was a simple dispute on the facts) could help to reduce costs.

111. However, concern was expressed that non-specialist county court judges would find it very difficult to deal with libel cases, which would only be likely to arise very infrequently, and that rather than reducing costs, any such change could considerably increase costs, because of the need for additional Counsels' fees, the increased length of both interlocutory hearings and trials, and the number of appeals which would inevitably be lodged.

## **Conclusion**

- On balance, it would not be desirable to develop a revised summary procedure because there may be difficulties in identifying more minor cases in a simple way and, given the relative complexity of libel proceedings, these may not be suitable for a fast-track procedure.

## **Declarations of falsity**

112. A declaration of falsity is one of the categories of summary relief that is available under the summary procedure in sections 8 to 10 of the Defamation Act 1996. In some cases the question of whether the allegedly defamatory statement was true or not remains unresolved, as under *Reynolds* the focus of the trial is on whether the publication has been in the public interest and whether the guidelines on responsible journalism have been followed. The group therefore considered whether there was any need to make this form of remedy available more widely.

113. There was some enthusiasm for such a change. Those in favour argued that a declaration of falsity could replace the vindicatory element of damages and hence lower the level. They accepted that the burden of

proof should be upon the claimant, and argued that the public should not be deprived of knowing the truth in relation to an allegation concerning a matter of public interest. It was suggested that if evidence of falsity existed this should be put forward by the claimant in the letter of claim. Concern was expressed that under the current system, declarations of falsity were usually obtained in cases which were not defended, and that this meant that the declaration could then be used around the world as an indication of the claimant's probity when evidence on the issue had not been tested.

### **Conclusion**

- There is no consensus in the group on the need to extend the circumstances in which the courts can make declarations of falsity, and further consideration should be given to whether this would be appropriate.

### **Specialist judges**

114. Differing views were expressed by the group on the appropriateness of libel cases being heard by specialist judges. From one perspective, the view was taken that a move to non-specialists could be desirable, but others considered that specialist judges were essential, and that a return to a non-specialist approach would be damaging. Two members of the group drew attention to recent cases where non-specialist judges had granted injunctions in ignorance of section 12 of the Human Rights Act 1998. Some members took the view that a wider spread of specialist judges would be helpful, and an extension in the number of judges (whether specialist or not) was suggested by one member to counter difficulties arising from the concentration of decisions by one or two judges. One member also suggested a time limit on the period for which a judge should sit as a specialist in a particular area.
115. The group recognised that under the terms of the Constitutional Reform Act 2005, this issue is a matter relating to the deployment of the judiciary for which the Lord Chief Justice is responsible.

### **Conclusion**

- The Justice Secretary should write to the Lord Chief Justice drawing this particular area of the Working Group's report to his attention.

## **Annex A: Terms of reference, list of members and course of discussions of the Working Group**

### **Terms of reference**

To consider whether the law of libel, including the law relating to “libel tourism”, in England and Wales needs reform, and if so to make recommendations as to solutions

### **List of members**

David Banks (Media Law Consultant)

Sir Leszek Borysiewicz (Chief Executive of the Medical Research Council)

Tracey Brown (Managing Director, Sense about Science)

Desmond Browne QC (Barrister, 5 Raymond Buildings)

Rod Christie-Miller (Partner and Chief Executive at Schillings, Solicitors)

Robin Esser (Executive Managing Editor, Daily Mail)

Jo Glanville (Editor, Index on Censorship)

Jonathan Heawood (Director, English PEN)

Tony Jaffa (Head of the media team at Foot Anstey, Solicitors)

Sarah Jones (Head of Litigation and Intellectual Property, BBC)

Marcus Partington (Chair of Media Lawyers Association, and Deputy Secretary/Group Legal Director, Trinity Mirror Plc)

Gillian Phillips (Director of Editorial Legal Services, The Guardian)

Gavin Phillipson (Professor at Durham Law School)

Mark Stephens (Partner at Stephens Finer Innocent, Solicitors)

Andrew Stephenson (Solicitor at Carter Ruck, Solicitors)

Paul Tweed (Senior partner at Johnsons, Solicitors)

John Witherow (Editor, Sunday Times)

### **Observer**

John Sorabji (Legal Secretary to the Master of the Rolls)

### **Course of discussions of the group**

The Working Group met four times: on 28 January, 11 February, 25 February and 12 March 2010.

The first meeting focused on deciding which issues the group should prioritise for discussion, bearing in mind the very tight timescale. It was agreed to focus on libel tourism, whether there should be a new statutory public interest defence, the multiple publication rule and a range of procedural issues.

The second meeting was allocated to discussion of public interest and procedural issues. The third meeting looked at libel tourism, the multiple publication rule and also involved a brief discussion of the report of the Select Committee on Culture Media and Sport which had been published that week.

In the final meeting the group discussed a draft of this report and its recommendations.

During the course of the group's discussions, other issues were raised which were also recognised to be of significant interest, in particular the burden of proof, the defence of fair comment, whether there should be a "public figure" exception and whether corporations should be able to sue for libel, but given the limited time available these were not focused on as priorities.



## Annex B: Cases with a foreign connection issued in the High Court in 2009

1. In total there were 219 defamation cases issued in the High Court in 2009. Of those, 34 were identified as having a “foreign connection” i.e. the address of one or more of the parties is outside the jurisdiction. **Table 1** below sets out a breakdown of those cases using information about the locations of the parties which is obtainable from the register of claims issued and claim forms.
2. The cases have been categorised according to the location of the claimant and defendants. In order to assess the “location” of parties, the address given on the claim form has been used as the reference point. This is a standard piece of information which is normally available so provides a quick means of assessment. However, as noted below it has its limitations.
3. In a further 7 cases, address details for one or more of the parties were lacking. **Table 2** below sets out available information on those. These cases have not been included in the statistics.
4. **Table 3** below shows the locations of defendants and claimants in terms of whether their addresses are inside or outside the EU (or Lugano Convention territory). In summary, of the 34 cases with a foreign connection:
  - (1) 54.4% (21 individual cases) involved defendants and claimants located in the EU
  - (2) 35.3% (13 individual cases) involved a defendant(s) located in the EU and a claimant(s) located outside
  - (3) 10.3% (5 individual cases) involved a defendant(s) located outside the EU and a claimant(s) located within it
  - (4) No cases were identified in which both the defendant and claimant were located outside the EU.
5. More specifically, in relation to this jurisdiction:
  - (1) Of the 21 individual cases in which at least one of the defendants and at least one of the claimants were located in the EU (category (1) above), in only two (cases B and T) none of the parties were located in England. 12 of the cases involved claimants located within the jurisdiction and 14 involved defendants located within the jurisdiction.
  - (2) Of the 13 cases brought by foreign-based claimants against defendants located in the EU (category 2 above), one (case H) involved a defendant located outside of this jurisdiction. In all the others, the defendant was located in England.

- (3) Of the 5 cases brought by claimants in the EU against defendants located outside (category 3 above), there were two cases (N and S) in which the claimant was located outside of the jurisdiction and 3 involved England-based claimants.
6. This data needs to be treated with caution. It should be borne in mind that:
- This does not attempt to give a conclusive picture of the place of domicile of the parties.
  - Even if a conclusive picture of domicile was given, this may not be the end of the story. It is possible that a person who is not domiciled in this country will have a substantial reputation to protect in this jurisdiction.
  - It is acknowledged that cases which some might argue are “libel tourism” cases may have been left out of the statistics due to the limitations of the method of assessment. For example, where no address is given, it is not possible to tell where parties are based.
  - This is a snapshot of cases from one year only. Therefore any conclusions which may be drawn need to be treated with caution.

**Table 1 – cases with a foreign connection**

<b>Case</b>	<b>Claimant location – EU / Lugano state</b>	<b>Claimant location – non-EU</b>	<b>Defendant location – EU / Lugano state</b>	<b>Defendant location – non-EU</b>
A		Individual (Russia)	Company (England)	
B	(1) Individual (Switzerland) (2) Company (Switzerland)		Individual (Switzerland)	
C	Individual (England)		(1) Company (Austria) (2) Company (England)	
D		(1) & (2) Companies (India); (3) & (4) Individuals (India?)	Company (England)	
E		Company (US)	Company (England)	
F	(1) Company (England)	(2) Individual (US)	Individual (England)	
G	Company (Ireland)		Individual (England)	
H	Individual (England)		Company (Italy)	
I	(1) Company (Ireland) (2) Individual (Spain)		Individual (England)	
J	Individual (England)		(1) Company (England)	(2) – (4) Companies (USA)
K	Individual (England)			(1) Individual (USA); (2) Company (USA)
L	Individual (England)		Company (Iceland)	
M	Company (England)		Company (Germany)	
N	(1) Company (Isle of Man) (2) & (3) Individuals (Isle of Man)			Individual (South Africa)
O	Individual (England)		(1) & (2) Companies (Germany)	
P	Individual (Germany)		Company (England)	
Q		Individual (USA)	Company (England)	
R	Individual (Spain)		Company (England)	

Case	Claimant location – EU / Lugano state	Claimant location – non-EU	Defendant location – EU / Lugano state	Defendant location – non-EU
S	(1) & (2) Companies (Switzerland) (3) & (4) Individuals (Switzerland)		(2) Individual (Ireland) (3) Individual (England) (4) Individual (France)	(1) Company (USA)
T	Company (Portugal)		Individual (France)	
U		Individual (Monaco)	Company (England)	
V		Individual (South Africa)	Company (England)	
W	Individual (Spain)		Company (England)	
X		Individual (Bahrain)	Company (England)	
Y		(1) Individual (Bahrain) (2) Individual (Bahrain)	Company (England)	
Z		Individual (Bahrain)	Company (England)	
AA	Individual (England)		(1) Company (England) (2) Individual (Germany)	
BB	(1) Individual (Switzerland?) (2) Company (Netherlands)		Company (England)	
CC	(1)-(3) Companies (unknown); (4) Company (England); (5) Individual (England)		(2) & (3) Companies (unknown) (3) Company (Czech)	(1) Individual (Canada); (4) Company (USA)
DD		Company (USA)	Individual (England)	
EE	Individual (England)		(1) Company (England) (2) Company (France)	
FF		Individual (USA)	Individual (England)	
GG	(3) Company (England) (4) Company (Gibraltar)	(1) Individual (Iran) (2) Individual (Iran)	Individual (England)	
HH	Individual (England)		(1) Individual (England) (2) Educational institution (England) (3) Individual (Lithuania) (4) Educational institution (Lithuania)	

**Table 2 – cases lacking address details for parties**

These cases are not included in the statistics due to lack of sufficient information. This may be due to lack particulars including address, or law firm details only for a significant proportion of the parties.

Case	Claimant(s) location unknown	Claimant in EU	Claimant outside EU	Defendant(s) location unknown	Defendant in EU	Defendant outside EU
1	X				X	
2	X (Multiple claimants)			X (1 <sup>st</sup> defendant)		X (2 <sup>nd</sup> defendant based in US)
3	X			X		
4	X			X		
5	X (2 <sup>nd</sup> claimant)	X (1 <sup>st</sup> claimant)		X		
6	X			X		
7			X (US)	X		

**Table 3 – categorisation of cases with a foreign connection**

<b>Both D &amp; C located in EU / Lugano state</b>	<b>D located in EU / Lugano state (C located outside)</b>	<b>D located outside EU / Lugano state (C located in)</b>	<b>Both D &amp; C located outside EU/Lugano state</b>
B C F (multiple claimants – 1 <sup>st</sup> claimant in EU) G H I J (multiple defendants – 1 <sup>st</sup> defendant in EU) L M O P R S (multiple defendants – 2 <sup>nd</sup> - 4 <sup>th</sup> defendants in EU) T W AA BB CC (multiple defendants – 3 <sup>rd</sup> defendant in EU) EE GG (multiple claimants – 3 <sup>rd</sup> & 4 <sup>th</sup> inside) HH	A D E F (multiple claimants – 2 <sup>nd</sup> claimant outside EU) Q U V X Y Z DD FF GG (multiple claimants – 1 <sup>st</sup> & 2 <sup>nd</sup> claimants outside EU)	J (multiple defendants – 2 <sup>nd</sup> – 4 <sup>th</sup> defendants outside EU) K N S (multiple defendants – 1 <sup>st</sup> defendant outside EU) CC (multiple defendants – 1 <sup>st</sup> & 4 <sup>th</sup> defendants outside EU)	
18.5* / 34 = <b>54.4%</b> (21 individual cases)	12 = <b>35.3%</b> (13 individual cases)	3.5 = <b>10.3%</b> (5 individual cases)	0 = <b>0%</b>
<b>8% of all cases in 2009</b>	<b>5% of all cases in 2009</b>	<b>1.5% of all cases in 2009</b>	<b>0% of all cases in 2009</b>

\* NB Where a case appears in two columns due to multiple parties with differing locations, these count for .5 in each column for the purposes of calculating percentages of total cases. The number of individual cases given in brackets indicates the total number of cases in the category disregarding double-counting due to multiple parties from differing locations.

## Numbers for 2009

Total number of defamation cases issued in High Court in 2009: **219**

Total number of cases identified as having foreign connection: **34**

Number of cases lacking addresses: **7**

## Annex C: “Libel tourism” – list of cases raised by members of the Working Group<sup>55</sup>

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
A	Boris Berezovsky v Russian Television & Radio Broadcasting Co & Vladimir Terluk (ongoing)	[2009] EWHC 1733 QB [2008] EWHC 1918 (QB)	Berezovsky: famous Russian politician. Living in UK since 2001 & granted refugee status.	(1) Russian TV broadcaster (2) Terluk: Russian contributor to the programme.	Comments made, in Russian, on Russian news programme on RTR Planeta – Russian satellite TV station. Can be viewed in UK without subscription. Significant audience in Russian expat community in England.
B	GE Healthcare v Thomsen (2009)	Claim withdrawn. Details taken from a guardian.co.uk report (20.12.09)	3 claimant companies: US, UK, Norwegian.  GE Healthcare – part of General Electric conglomerate.	Thomsen – a Danish radiologist	1. Conference in Oxford –15 min presentation to 30–40 people 2. Article in specialist magazine (Belgian publisher) – 1,000 copies in circulation within jurisdiction of English court.
C	NMT Medical v Wilmshurst	Ongoing	NMT – American manufacturer	Peter Wilmshurst – British cardiologist	Statement made by claimant at an academic conference in the US and report on Canadian cardiology website
D	(A Saudi Business Group) v Associated Press	Not yet issued?	A Saudi Arabian business group	AP	AP coverage of group’s dispute with another Saudi corporation.

<sup>55</sup> Note we have not attempted to filter cases raised. If a case has been suggested by a Working Group member as a potential “libel tourism” case, it has been included. We recognise that “libel tourism” is a controversial concept.



	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
E	(A Saudi company) v Forbes, Bloomberg, AP	Not yet issued?	A Saudi Arabian company	Forbes, Bloomberg, AP	Concerns coverage of legal proceedings in America against another Saudi entity.
F	Uri Geller v CNN, Virgin, Sky	Ongoing	British citizen	CNN – a US TV company, Virgin, Sky	Comment made by a contributor on Larry King Live in the US. Broadcast facilitated in the UK by Virgin and Sky.
G	SRM v Wall Street Journal, Bloomberg & others		Off shore hedge fund	American based newspaper	
H	Mardas v New York Times Co & International Herald Tribune SAS	[2009] EWCA Civ 633	Domiciled in Greece but lived in England 1963-1996	(1) NYT – USA (2) IHT published in Paris.	Hard copy circulation in UK: NYT - less than 200; IHT - 0. Internet access “no particular concentration” in UK (para 2) – at first instance it was found 27 hits of IHT article online & only 4 for NYT.
I	Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd	[2009] EWHC 781 (QB) [2009] EWHC 1717 (QB)	European subsidiary of Japanese multinational corporation manufacturing food additives	ASDA – British supermarket	
J	Metropolitan International Schools Ltd v Design Technica Corp & Ors	[2009] EWHC 1765 (QB)	European based vocational training provider	(1) Company (US) (2) Google UK – UK subsidiary of 3 <sup>rd</sup> defendant (3) Google Inc	Information appearing on a web bulletin hosted by 1 <sup>st</sup> defendant. 2 <sup>nd</sup> & 3 <sup>rd</sup> defendants joined because when an internet user used its search engine to search for the claimant’s courses the results included links to the defamatory material.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
K	Kahangi & Ors v Nourizadeh	[2009] EWHC 2451 (QB)	(1) Individual (2) Individual (3) Company – dormant (4) Company – Gibraltar	USA – Iranian exile, dissident & journalist	Allegations in six articles published in a journal & various websites.
L	Lonzim Plc & Ors v Sprague	[2009] EWHC 2838 (QB)	(1) Lonzim – company (Isle of Man); (2) Chairman (3) Executive director	South Africa	Dispute between shareholders & managers. Action struck out. See case details at footnote 19.
M	Nicholas Cage (2008)	HQ08X00359  The case was concluded by way of a settlement entailing an undertaking by the defendants not to republish the allegation, an apology published in the Daily Mail, payment of the Claimant's legal costs and a donation made by the defendants to a charity of the Claimant's choice.	American actor Nicholas Cage	Kathleen Turner, Associated Newspapers Limited, Headline Publishing Group Limited	Book published in UK. Daily Mail had published extracts of book.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
N	Rinat Akhmetov v Kyiv Post (2007–8)	No judgment located. Proceedings not issued, matter settled out of court.	RA – Ukrainian businessman and politician.	Kyiv Post newspaper – Ukrainian (English language newspaper)	Article in Kyiv Post in English concerning allegedly unlawful land deals and corruption in Kiev. Paper only has 100 subscribers in UK; 9.8% of visitors to Kyivpost.co, are from the UK (according to <a href="http://www.alexa.com/siteinfo/kyivpost">www.alexa.com/siteinfo/kyivpost</a> )
	Rinat Akhmetov v Obozrevatel (2008)	Default judgment given against Obozrevatel. Proceeded to compensation hearing at which £50,000 damages awarded. A member commented the defendant had ample notice of the application for default judgement and the compensation hearing.		Obozrevatel Ukraine-based internet news site	Obozrevatel is a Ukraine-based news site which publishes in Russian and Ukrainian. 4 articles. Research carried out by the claimant's solicitors shows that on four days taken at random (17, 18, 21 and 22 May 2007) the number of hits in England (not Wales) on the website were 108, 214, 161 and 203 respectively. (Data from Bigmir.net, which is owned by the same group that owns Kyiv Post). It was suggested by the claimant's solicitors that it would be reasonable to infer that there would be a similar number of people (100 – 200) who would have read the words complained of when they were first published.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
O	Kaupthing Bank HF & Others v JP /Politikens Hus & Others (2008)  Claim no: HQ07X00300	No judgment – settled before trial.  The case was concluded by way of a settlement reached in February 2008 which included an agreed Statement in Open Court; an apology and payment of damages of £100,000 plus costs.	Icelandic Bank  Chairman resident in London.  At the time of the publication of the defamatory articles, Kaupthing Bank and its subsidiaries operated in thirteen countries, held assets in the region of €60 billion and, in 2007, recorded a profit of €812 million, 31% of which originated in the United Kingdom.	Danish newspaper	Some articles posted on paper's website and translated into English.
P	Rath v Guardian News Media Ltd & Anor	[2008] EWHC 398 (QB)	USA – nutritionist, founder of research institute in California.	UK newspaper	Articles in UK print & online edition.
Q	Atlantis v World Group of Companies NV & Anor v Gruppo Editoriale L'Espresso SPA	[2008] All ER (D) 227 (May)	(1) Company incorporated in Netherlands Antilles (part of a large business group – Atlantis World Group) operating casino.	Italian publishing group	Article in Italian magazine.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
R	Al Koronky v Little/Brown (2005–08)		Al Koronky: former Sudanese diplomat & his wife, Sudan. Resident in Sudan (PEN)	Little, Brown: UK publishers	
S	Al Koronky & Anor v Time Life Entertainment Group Ltd & Anor	[2006] EWCA Civ 1123	Al Koronky: former Sudanese diplomat & his wife, Sudan. Resident in Sudan but had lived in London for 8 years.	(1) US Publisher (2) Author	Libel in a book entitled “Slave”. Published in the US and then in London.
T	Ghannouchi v Al Arabiya (2007)		Sheikh Rashid Ghannouchi, leader of exiled An Nahda party  18 years resident in UK, granted asylum, permanent residence	Al Arabiya – Saudi-owned Arabic language satellite TV network based in Dubai	Estimated 100,000 UK viewers of programme. Broadcast at issue available in UK in Arabic via satellite receivers
U	Cameron Diaz v National Enquirer (2007)	HQ05X01423	American actress	National Enquirer – US magazine	Story appeared in US version & on US magazine's website. Story viewed 279 times from UK internet addresses (Index).
V	<i>Kaupthing Bank HF &amp; Others v JP /Politikens Hus &amp; Others</i> (2008) Claim no: HQ07X00300	See case O above			

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
W	Jameel v Dow Jones & Co Inc  Jameel v Wall Street Journal Europe Sprl (the Mohamed Jameel Action)	[2005] EWCA Civ 75  [2006] UKHL 44	C Saudi Arabian (brother of claimant in the Mohamed Jameel action below)  (1) Jameel – Saudi Arabian businessman. (2) Trading company incorporated in Saudi Arabia that had a commercial reputation in England and Wales but did not own property or conduct any trade or business there.	Publisher of Wall Street Journal and Wall Street Journal On-line.  Wall St Journal – American newspaper edited, published and printed in Brussels for distribution in Europe and the Middle East.	Complaint concerned article on internet servers of Wall St Journal On-Line in New Jersey. Website available to subscribers in England
X	Al Amoudi v Brisard & anor	[2006] EWHC 1062 (QB)  [2006] All ER (D) 21 Jun	International businessman - born in Ethiopia, now settled in Saudi Arabia, with an established reputation in London. 2.5 months a year (approx) spent in England for business / personal reasons. Had home in London.	(1) Brisard: French national resident in Switzerland; (2) Swiss company.	Two reports on defendant's website.  Claimant applied to strike out. The Court held that a claimant in a libel action on an internet publication was not entitled to rely on any presumption of law that there had been substantial publication within the jurisdiction. The claimant must prove the material had been accessed and downloaded. Application dismissed.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
Y	Berezovsky v Fridman, Alfabank (2006)		Resident in UK since October 2001, granted asylum in 2003	Russian businessman and his bank	Allegations on Russian TV (available in UK on subscription)
Z	Veliu v Mazrekaj & anor -	[2006] 1710 (QB)	Lived in UK for 8 years & had indefinite leave to remain  Journalist living and working in UK for past 8 years (Albanian)	(1) Owner and publisher of Kosovan paper (Bota Sot) published from Zurich (2) editor	Article published in Albanian in Bota Sot, a Kosovan Daily newspaper sold in UK (& other countries) and widely read in Albanian community in England and Wales.
Z A	Prince Radu of Hohenzollern v Houston & Anor	[2008] EWCA Civ 921	Professional actor & husband of Princess of Romania	(1) Editor/owner of magazine resident in England (2) English Publisher of magazine	Article in 'Royalty Monthly'.
Z B	Mahfouz & Anor v Brisard & Anor	[2006] EWHC 1191 (QB)	Two Saudi Arabians	Two Europeans – authors of book	Book "Forbidden Truth" making numerous references to the claimants.
Z C	High Tech International AG & Ors v Deripaska	[2006] EWHC 3276 (QB)	Two companies & an individual involved in energy trading (all USA?)	Russian citizen with properties in UK. Evidence showed D had homes all over the world. There was a pattern of visits to the UK.	
Z D	Human Rights Watch (2005)		A man named in the report who was applying for permanent residence in UK (Index)	International NGO	Only a handful of reports in circulation in UK at the time & "extremely small" number had accessed it from online in UK (PEN) HRW investigative report on Rwandan genocide.

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
Z E	Polanski v Conde Nast	[2005] UKHL 10	French national, living in France. Famous film director with reputation in England.	Conde Nast – US-based publisher but operating in the UK	Article published in Vanity Fair magazine which is in circulation in the UK.
Z F	Mahfouz & others v Ehrenfeld and another	[2005] All ER (D) 361 (Jul)	Khalid bin Mahfouz-Saudi businessmen. Two claimants had, until just before the start of proceedings, been owners of a business with its HQ in England.	(1) Rachel Ehrenfeld: American author (consultant on international terrorism); (2) Bonus Books: US publisher.	Book published in England and Wales via on-line bookshops. 23 copies sold on web in UK e.g. via Amazon.
Z G	Creative resins International Ltd v Glasslam Europe Ltd			European	Article published on website of US Glass Magazine
Z H	Turcu (Maris) v News Group Newspapers Ltd	[2005] EWHC 799 (QB)	Romanian	UK newsgroup – publishers	Articles in UK newspapers e.g. News of the World.
Z I	Grovit v De Nederlandsche Bank & Ors	[2005] EWHC 2944 (QB)	Claimant lived and worked in London – worked for a Panamanian company registered at Companies House.	(1) Netherlands Central Bank (2) head of transactions (3) supervisor (based in Netherlands)	Libel contained in a letter in the form of a fax sent to a machine in London office. Fax in Dutch. Translated into English and read by Dutch interpreter & 5 co-workers.



	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
Z J	Lewis & others v King	[2004] EWCA Civ 1329	King -US citizen, living in Florida. A boxing promoter well known in UK.	(1) Lewis – British citizen resident or principally resident in New York. World champion heavyweight boxer. (2) Lewis' US production company; (3) Lewis' attorney based in US.	Articles on fightnews.com & boxingtalk.com (a "trans-national libel"). Evidence of text being downloaded in England. Texts contained remarks made by Lewis' attorney.
Z K	Harrods v Dow Jones (2003)				10 copies & a few on internet. Total number 1.8million.
Z L	Berezovsky v Forbes (1996–2003)	[2000] All ER (D) 643	(1) Berezovsky: Russian businessman & politician. HL confirmed B had a substantial connection with England & Wales & an important business reputation to protect here. B's ex-wife & children here, frequent visits. (2) Glouchkov: deputy manager of Russian international airline. Connection with the UK of a lesser order but still significant.	Forbes Magazine – American magazine published in England and Russia (& also available on the internet in England)	2,000+ copies in UK via print or internet, 780,000 copies in US, 13 in Russia, unknown number on internet (Index, PEN)

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
Z M	Chadha v Barrons (1998)		US citizen, some business interests in England	US publisher	"something under 2,000" copies in UK, total circulation 300,000
Z N	Wyatt v Forbes (1997)		US citizen with business connections in UK		
Z O	Schapira v Ha'artez (1996-7)	21 March 1997 [1997] EMLR 735	Israeli origin, British citizen for 10 years	Israeli newspaper in UK	121 copies in UK out of a total of 60,000
Z P	Shevill & Ors v Presse Alliance (1992-1995)		(1) English national domiciled in England (2)–(4) companies in three contracting states	French newspaper	237,000 copies in France & 15,500 in other European countries of which only 230 sold in England and Wales. Article in French daily newspaper.
Z Q	Schapira v Ma'ariv (1993-4)		Israeli origin, British citizen for 10 years	Israeli newspaper in UK	170 copies out of a total of 60,000.
Z R	Orara v Observer (1992)		Kenyan national	English newspaper	Article on front page of English newspaper, no publication in Kenya
Z S	Robert Maxwell (1991)		Robert Maxwell – British	New Republic - American political magazine (Index)	135 subscribers to magazine in UK. Profile written about RM by British journalist (Index).
Z T	Bachchan v Dagens Nyheter (1990)		Indian politician resident in England for 18 months & brother of a filmstar	Swedish Newspaper	200 copies in UK out of total of 400,000. India Abroad newswire, US-based service reported allegation – 1,000 copies in UK.
Z U	Fiennes v Fotheringham (1989)		English explorer	Canadian magazine	400 copies in England, 636,000 in Canada.
Z V	Papandreou v Time (1989)		Ex-PM of Greece		66,000 copies in England, 13,000 in Greece, total circulation 3 million.
Z W	Packard v Eleftherotypia (1987)		Ex-British naval officer	Greek newspaper	40 copies of newspaper in circulation in London

	Case name	Reference	Claimant details	Defendant details	Extent & nature of publication in England (& elsewhere, if known)
Z X	Britney Spears v National Enquirer (2006)		American singer	UK version of magazine	

## Annex D: Libel tourism legal background

### The procedure for applying for permission to serve a claim out of the jurisdiction

Rule 6.36 states that, in any proceedings to which rule 6.32<sup>56</sup> or 6.33<sup>57</sup> does not apply the claimant may serve a claim form out of the jurisdiction *with the permission of the court* if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply. In cases where a defendant is not domiciled in a Member State, it is necessary for claimants to apply for permission to serve a claim form out of the jurisdiction.

Rule 6.37 makes further provision about this application for permission. The application for permission must set out which of the grounds in paragraph 3.1 of Practice Direction 6B is relied on. One of those grounds is that a claim is made in tort where:

- a) damage was sustained within the jurisdiction; or
- b) the damage sustained resulted from an act committed within the jurisdiction.<sup>58</sup>

The matters that a court will take into account in determining whether permission to serve out should be granted go beyond a mere consideration of the question whether the claimant's grounds fall within one of those stated in para 3.1 of 6BPD. One of the factors is whether England is the *forum conveniens* (i.e. the appropriate place for the claim to be brought).<sup>59</sup> Paragraph (3) of rule 6.37 provides that the court will not give permission to serve out unless satisfied that England and Wales is the **proper place** in which to bring the claim.

Applications for permission to serve a claim form out of the jurisdiction are made without notice (which means that the defendant will not be asked to make *forum non conveniens*<sup>60</sup> arguments at this stage to demonstrate that this is not the appropriate forum for the claim) to a Master. The burden is on the claimant to show that the court in England is the appropriate forum.

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<sup>56</sup> Service of the claim form where the permission of the court is not required – Scotland and Northern Ireland

<sup>57</sup> Service of the claim form where permission of the court is not required – out of the United Kingdom. This rule makes provision dispensing with the need for permission to be sought including where there are no proceedings between the parties concerning the same claim pending in the courts of any other part of the UK or any other Convention territory; and the defendant is domiciled in the UK or in any Convention territory.

<sup>58</sup> Paragraph 3.1(9)

<sup>59</sup> See CPR 6.37.1

<sup>60</sup> About which, see below.

## Key cases on abuse of process

*Jameel (Yousef) v Dow Jones Co Inc*<sup>61</sup>

The Court of Appeal held that, if the court were considering an application to set aside permission to serve the proceedings out of the jurisdiction, it was necessary for the claimant to demonstrate that a “real and substantial” tort had been committed within the jurisdiction.

## Discretion to decline jurisdiction – *forum non conveniens*

In cases where the defendant is not domiciled in a Member State, English courts have at common law (see the *Spiliada* case<sup>62</sup>), a broad inherent discretion to decline to assume jurisdiction on the basis of *forum non conveniens*, namely that another jurisdiction is available for the trial of the claims and that the other jurisdiction is clearly the more appropriate forum. An English court which decides to decline jurisdiction under the doctrine of *forum non conveniens* stays proceedings so that there is a provisional suspension and the proceedings may be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or the claimant has no effective access to justice in that forum.

In *Owusu v NB Jackson (trading as Villa Holidays Bal-Inn Villas) and others*<sup>63</sup> the ECJ held that the Brussels Convention precluded a court of a contracting state from declining jurisdiction conferred on it by article 2 (which is identical to article 2 of the Brussels I Regulation) on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action even if the jurisdiction of no other contracting state was in issue or the proceedings had no connecting factors to any other state i.e. *forum non conveniens* is curtailed in this context. The ECJ reached its decision on the basis that the requirement imposed by article 2 is a mandatory rule and there could be no derogation from the principle of bringing proceedings in the court of the defendant’s domicile except in the cases provided for by the Brussels Convention. There was a need for legal certainty as to forum and the application of the *forum non conveniens* doctrine in this context would undermine the predictability of the rules of jurisdiction.

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<sup>61</sup> [2005] EWCA Civ 75

<sup>62</sup> See footnote 12.

<sup>63</sup> Case C-281/02; [2005] All ER (D) 47 (Mar) (ECJ, Grand Chamber). Mr Owusu was a British national domiciled in the UK who suffered an accident while on holiday in Jamaica. He brought an action for breach of contract against Mr Jackson, who was also domiciled in the UK, and an action in tort against several Jamaican companies. The claim was served on Mr Jackson in the UK and leave was granted for proceedings to be served on the other defendants in Jamaica. The defendants applied to the court for a declaration that the English court should not exercise its jurisdiction in relation to the claim because the case had closer links to Jamaica and that the Jamaican courts were the forum with jurisdiction in which the case might be tried more suitably.

## Challenging jurisdiction

Under Part 11 of the CPR, a defendant who wishes either to dispute the court's jurisdiction to try the claim, or argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any which it may have (r.11(1)). This must be done within 14 days of an Acknowledgement of Service (AOS) being filed (r.11(4)).

The court may declare that it has no jurisdiction or will not exercise its jurisdiction and may make further order e.g. setting aside the claim form or service of it, or staying the proceedings (r.11(6)).<sup>64</sup> However, not every issue of jurisdiction has to be disposed of at this stage. The court may postpone the issue of jurisdiction to a later stage where it is convenient to do so.

Applications disputing jurisdiction are governed by the general provisions about applications in Part 23 of the CPR. They will normally be decided on written evidence of the parties, although further information, disclosure or examination of a signatory of written evidence may be required. Where the challenge is against service out of the jurisdiction, the burden of proof is on the claimant to establish the necessary elements of his or her case.

## Jurisdiction

### *The Brussels I Regulation*

Council Regulation (EC) No. 44/2001 of December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the "Brussels I Regulation") determines the jurisdiction of a UK court in civil matters. The Regulation is directly applicable between all member states of the European Union.

Where the Regulation does not apply, the earlier Brussels Convention or Lugano Convention may apply between contracting states. Where the Regulation (or Conventions) give jurisdiction to a UK court, there are internal rules determining which part of the UK has jurisdiction in a particular case.

The basic principle of the Brussels I Regulation is that jurisdiction is to be exercised by the Member State in which the defendant is domiciled, regardless of his or her nationality. There is an absence of common rules of jurisdiction against third state defendants, with this being a matter for national rules.

Key provisions:

- Persons domiciled in a Member State must, whatever their nationality, be sued in the courts of that Member State (subject to certain provisions) (Article 2(1))

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<sup>64</sup> If the court does not accept the defendant's application and make a declaration of the type described in r.11(6), the AOS ceases to have effect and the defendant has 14 days in which to file another one. If such an AOS is filed, the defendant is treated as having accepted that the court has jurisdiction.

- Persons who are not nationals of the Member State in which they are domiciled are governed by the rules of jurisdiction applicable to nationals of the State (Article 2(2)).
- Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Chapter II, sections 2-7 of the Brussels I Regulation (Article 3)
- If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State are determined by the law of that Member State (subject to articles 22 and 23) (Article 4(1))
- Claimants domiciled in a Member State may use national rules of jurisdiction against defendants not domiciled in a Member State (Article 4(2)).
- If a defendant is not domiciled in a Member State, the Brussels I Regulation is still relevant. A court may not assert jurisdiction if the same cause of action was first brought before the courts of another contracting state.
- A person domiciled in a Member State may be sued in another Member State “in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred” (Article 5(3)). A matter “relating to tort” has been held to cover any action which seeks to establish the liability of the defendant, but which does not relate to contract.
- Where a person domiciled in a Member State is one of several defendants, he or she may be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear them together (Article 6(1))

If damage occurs in a number of contracting states each state may exercise special jurisdiction over so much of the damage as occurred within its territorial jurisdiction (see *Shevill v Presse Alliance*<sup>65</sup> in which it was held because under English law, each publication of a libel is a separate tort, separate actions in each relevant jurisdiction are permitted as a matter of principle, notwithstanding that the libellous material was published abroad).

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<sup>65</sup> [1996] AC 959 & [1995] ECR I-415, ECJ

## **Annex E: Extract from the Admiralty and Commercial Courts Guide (8<sup>th</sup> Edition)**

### ***Appendix 15***

#### **Service Out of the Jurisdiction: Related Practice**

##### **Service out of the jurisdiction without permission**

1. (a) Before issuing a claim form or seeking permission to serve out of the jurisdiction, it is necessary to consider whether the jurisdiction of the English courts is affected by the Civil Jurisdiction and Judgments Act 1982. Where each claim in the claim form is a claim which the Court has by virtue of the Civil Jurisdiction and Judgments Act 1982 power to hear and determine, service of the claim form out of the jurisdiction may be effected without permission provided that, in the case of service in Scotland or Northern Ireland, the relevant requirements of rules 6.32 and 6.34 are satisfied; and, in the case of service out of the United Kingdom, the relevant requirements of rules 6.33 and 6.34 are satisfied.

These requirements include the requirement to file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction and to serve a copy of that notice with the claim form. In the case of service out of the jurisdiction of the United Kingdom, paragraph 2.1 of PD6B requires the notice to be in the form of practice form N510 in order to comply with rule 6.34. Rule 6.34(2) provides that, if the claimant fails to file such a notice, the consequence is that the claim form may only be served once the claimant has filed the requisite notice or if the court gives permission.

- (b) Because of the significance of (amongst other things) the concept of “first seizure” in the context of Council Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Judgment Regulation”), it is very important that the statement as to the grounds upon which the claimant is entitled to serve the claim form out of the jurisdiction is accurate and made with care. If entitlement to serve out of the jurisdiction without leave is wrongly asserted, a claimant may be ordered to pay the costs of a defendant’s application to strike out the claim or set aside serve of the claim form on an indemnity basis.
- (c) Rule 6.35 sets out the time periods during which a defendant must respond to a claim form where permission was not required for service, depending on whether the defendant is:



- (i) in Scotland or Northern Ireland;
- (ii) in a Member State or a Convention Territory; or
- (iii) elsewhere.

Paragraph 6 of PDB sets out the periods for responding in the case of defendants served elsewhere.

These provisions are subject to the modifications set out in rule 58 in relation to Commercial Court Cases, including, but not limited to:

- (i) that a defendant must file an acknowledgement of service in every case; and
- (ii) that the time periods provided by rule 6.35 apply after service of the claim form.

**Application for permission: statement in support**

2. (a) The grounds upon which a claimant may apply for the court's permission to serve a claim form out of the jurisdiction pursuant to rule 6.36 (in circumstances where neither rule 6.32 nor rule 6.33 applies) are set out in paragraph 3.1 of PDB.
- (b) An application for permission under rule 6.36 must set out:
  - (i) the ground in PD6B relied on as giving the court jurisdiction to order service out, together with a summary of the facts relied on as bringing the case within each such paragraph;
  - (ii) where the application is made in respect of a claim referred to in paragraph 3.1(3) of PD6B, the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try;
  - (iii) the belief of the claimant that the claim has a reasonable prospect of success; and
  - (iv) the defendant's address or, if not known, in what place or country the defendant is or is likely to be found.
- (c) The claimant should also present evidence of the considerations relied upon as showing that the case is a proper one in which to subject a party outside the jurisdiction to proceedings within it (stating the grounds of belief and sources of information); exhibit copies of the documents referred to and any other significant documents; and draw attention to any features which might reasonably be thought to weigh against the making of the order sought. Where convenient the written evidence should be included in the form of application notice, rather than in a separate witness statement. The form of application notice may be extended for this purpose.

**Application for permission: copies of draft order**

3. The documents submitted with the application must
  - (a) specify the periods within which the defendant must:
    - (i) file an acknowledgement of service;
    - (ii) serve or file an admission;
    - (iii) file a defence; and
  - (b) set out any other directions sought by the claimant as to:
    - (i) the method of service;
    - (ii) the terms of any order sought giving permission to serve other documents out of the jurisdiction;

The relevant periods referred to in sub-paragraphs (a)(i) – (iii) above are specified in paragraphs 6.1 – 6.6 of PDB, and in the Table at the end of that Practice Direction.

**Application for permission: copy or draft of claim form**

4. A copy or draft of the claim form which the applicant intends to issue and serve must be provided to the judge who will usually initial it. If the endorsement to the claim form includes causes of action or claims not covered by the grounds on which permission to serve out of the jurisdiction can properly be granted, permission will be refused unless the draft is amended to restrict it to proper claims. Where the application is for the issue of a concurrent claim form, the documents submitted must also include a copy of the original claim form.

**Arbitration matters**

5. Service out of the jurisdiction in arbitration matters is governed by Part 62. As to the 1968 Convention on Jurisdiction in the context of arbitration, see Article 1(4), which applies rules 6.40 – 6.46. The Judgment Regulation does not apply to “arbitration” (see Article 1.(2)(d), but what proceedings fall within the category of arbitration and what do not, may be a difficult question: see *The Front Comor*, 10 February 2009, Case C-185/07.

**Practice under rules 6.32 and 6.33**

6.
  - (a) Although a Part 7 claim form may contain or be accompanied by particulars of claim, there is no need for it to do so and in many cases particulars of claim will be served after the claim form: **rule 58.5.**
  - (b) A defendant should acknowledge service in every case: **rule 58.6(1).**
  - (c) The period for filing an acknowledgment of service will be calculated from the service of the claim form, whether or not particulars of claim are to follow: **rule 58.6.**
  - (d) The periods for filing an acknowledgement of service and a defence are set out respectively in **rule 6.35(2)** (in relation to claim

forms served in Scotland and Northern Ireland); in **rule 6.35(3)** (in relation to claim forms served pursuant to rule 6.33 on a defendant in a Convention Territory within Europe or a Member State); in **rule 6.35(4)** (in relation to claim forms served pursuant to rule 6.33 on a defendant in a Convention Territory outside Europe); and in paragraphs 6.1, 6.3, 6.4 and the Table in PDB in relation to claim forms served pursuant to rule 6.33 on a defendant in a country elsewhere: **rule 6.35(5)**.

**Practice under rule 6.36**

7. (a) Although a Part 7 claim form may contain or be accompanied by particulars of claim, there is no need for it to do so and in many cases particulars of claim will be served after the claim form: **rule 58.5**. If the claim form states that particulars of claim are to follow, there is no need to obtain further permission to serve out of the jurisdiction: **rule 6.38(2)**.

However, permission must be obtained to serve any other document out of the jurisdiction: **rule 6.38(2)**; other than in cases where the defendant has given an address for service in Scotland and Northern Ireland: **rule 6.38(3)**.

- (b) A defendant should acknowledge service in every case: **rule 58.6(1)**.
  - (c) The periods for filing an acknowledgment of service will be calculated from the service of the claim form, whether or not particulars of claim are to follow: **rule 58.6**.
  - (d) The period for serving, and filing, particulars of claim (where they were not contained in the claim form and did not accompany the claim form) will be calculated from acknowledgment of service: **rule 58.5(1)(c)**.
  - (e) The period for serving and filing the defence will be calculated from service of the particulars of claim: **rule 58.10(2)**.
8. Time for serving and filing a defence is calculated:
  - (a) by reference to the number of days listed in the Table in PDB after service of the particulars of claim; or
  - (b) where the defendant has filed an acknowledgement of service, the number of days listed in the Table plus an additional 14 days after service of the particulars of claim: **paragraph 6.4 of PDB**.
9. There is some uncertainty whether the court's powers under rule 6.37 and rule 6.40 to give directions about the "method" of service include a specific power to make an order for service of documents to which Section IV of Part 6 applies by an alternative method (e.g. service on solicitors within the jurisdiction or service on a party by email); see the

Notes in the 2009 Edition of Civil Procedure Rules Part 6 at paras 6.15.1 and 6.15.7. To date, the Commercial and Admiralty Court judges have taken the view that they do have such power and, in appropriate cases, have made orders providing for alternative methods of service, in cases where the criteria for serving the claim form out of the jurisdiction are satisfied. However, in circumstances where such alternative service is not permitted by the law of the country in which the defendant is to be served, rule 6.40(3) and (4) would appear to prevent such orders being made.

**Practice under rule 6.41 – service in accordance with the Service Regulation**

10. If a party wishes to effect service of the claim form or other document in accordance with the Service Regulation, then the procedure to be adopted differs depending upon whether service is being made pursuant to rule 6.33 (service of the claim form, and other documents, out of the jurisdiction where the permission of the court is not required), or whether it is being made pursuant to rules 6.36 and 6.37 (service of the claim form, and other documents, out of the jurisdiction where the permission of the court is required).
11. In the former case (service without permission), the claimant must file the relevant documents referred to in rule 6.41(2) with the Registry. If the documents are in order, the relevant court officer will seal the claim form and forward the documents to the Senior Master of the Queen's Bench Division in accordance with rule 6.41(3).
12. In the latter case (service with permission), the claimant must first obtain permission from a judge to serve the relevant documents out of the jurisdiction, together with a direction pursuant to rule 6.37 that one, or the, method of service is to be in accordance with the Service Regulation. Once such an order has been made, the relevant court officer will seal the claim form and forward the documents to the Senior Master in accordance with rule 6.41(3).
13. In either case, once the documents have been forwarded by the Registry to the Senior Master, any queries thereafter about the progress of such service should be directed to the Senior Master.

## **Annex F: The view of NGOs on the efficacy of the *Reynolds* defence**

NGO A:

'In practice, smaller organisations with limited resources will find it very difficult to work out whether their publications fall within the concept of responsible journalism and testing the defence could prove ruinously expensive if they are unsuccessful... we have a reputation for robust research led publications and campaigning positions and so our methods fit quite well with the concept of "responsible journalism" but the uncertainty of the defence means that we have to be circumspect about the issues we cover.'

NGO B:

'One problem for us is that it is much harder for a campaigning organisation to obtain the view of a subject than it is for a media organisation. There may be practical difficulties with doing so. One particular problem is the risk of being injunctioned in advance of publication were we to make contact. Whilst this has never happened we are alive to that risk and to the fact that it could result in a long term research and publication project being stymied at very short notice with wider detrimental campaign effects. Whilst such an injunction may, of course, have a beneficial campaign effect the increasing availability of 'super injunctions' reduces the possible benefit of that effect.' (This should be read in the context of injunctions for privacy and of guidance concerning any moves to allow injunctions in defamation).

Index and PEN say that NGO B also told them that they have dropped elements of reports because of libel risk. NGO A told them that they recently received libel claim threats following an article they published about a web marketing company and that they would not report further on that subject in the immediate future as a result.

### **Evidence from Global Witness – in response to questions from Index and PEN on impact of libel and *Reynolds***

1. How aware is your organisation of the libel laws in this country?

Global Witness is very familiar with UK libel law and has been increasingly concerned about the highly obstructive effect it has on investigative work which seeks to expose the truth in the public interest. For example, we have submitted proposals on libel law reform to the Culture, Media and Sports Department and the Ministry of Justice, and have recently been given permission together with other organisations to challenge Max Mosley's application on libel law before the European Court of Human Rights.

2. Do you have your final reports, press releases, letters or other public documents reviewed by a lawyer or with libel laws in mind?

Yes. Global Witness has all its reports, briefing papers, press releases and other publications checked for libel risks by pro bono or paid lawyers. We also engage legal advice at the initial planning and research stage of some reports for a range of reasons including where there may be particular issues about keeping individual sources who are at risk protected; or for seeking advice about whether documents are privileged or not. In some cases we may additionally seek advice for the same report from lawyers specialising in different national jurisdictions or areas of expertise.

3. Do you have a legal budget? If so, how much approximately is it?

We use both pro bono and paid legal advice.

In the past two years we have requested and received 90 pieces of advice from our pro bono lawyers, each of which would have had very high cost implications, had they not been pro bono. As an NGO working on matters of public interest, we find it very worrying and inappropriate that we need to rely on the goodwill of our lawyers to be able to carry out our work.

An example of legal costs for due diligence on a report: £4,900 for a recent report on the role of international banks in facilitating state looting. But see Point 9 below in which the costs for a different report, including legal advice for a large number of due diligence letters plus translation and delivery but not legal advice for the actual report, were approximately £17,000.

On top of these, being brought to court for alleged libel - a constant and very realistic threat thanks to the current UK libel law - would impose further and possibly devastating costs on us. It needs to be borne in mind that campaigning organisations face the extra risk that companies and governments may seek to stop the campaign, or financially ruin the NGO to prevent it from further campaigning on public interest matters. These hostile approaches go beyond the challenge of a defamation case over an article or someone using the UK courts to launder their reputation. Even if the case never makes it to court, the financial and resources involved are daunting and can act as a deterrent to publishing information based on the public interest. For example some years ago a number of individuals all brought claims on the same subject matter against GW at the same time. We obtained pro bono support initially but it stopped in a matter of weeks when the law firm had carried out approx. £70,000 of work. After that we were lucky to find a good firm who heavily discounted their rates (another form of partial pro bono) and spread the invoices. One of the individuals was attempting to claim hundreds of millions of dollars of lost business. After approximately one year of intensive work all the individuals decided not to pursue the matter further.

Libel insurance is not reliably useful because decisions are taken by the insurers who obviously have different priorities to a campaigning NGO that might be working for years on a campaign issue. The campaigning NGO cannot rely on the insurance firm putting public interest issues ahead of cost based decisions on whether to contest or settle a claim.

4. Can you provide any examples of lines of enquiry, stories or reports that you have not pursued specifically because you have been concerned that you may be sued for libel?

We endeavour not to be chilled because we believe that matters that are in the public interest need to be aired, and that long term campaigning over a number of years must not be prevented from happening. However this means that there is a constant bearing of risk as a result. This is an example of how 'media' law needs to take account of publishers other than daily or weekly press.

5. What dissuaded you from pursuing that line?

See point 4.

6. Are you aware that a defence of "responsible journalism" is available to a publisher or writer of a public interest story if sued for libel?

Yes.

7. Please explain what you understand that defence means.

The defence - also known as Reynolds defence - is successful if the defendant proves that it was in public interest to publish, and they published responsibly. We are aware of the 10 point test of responsibility that courts use as a guideline when deciding on cases relying on Reynolds defence, and we keep its requirements in mind when publishing.

8. What steps do you take to make sure that you might be able to use that defence?

Global Witness always makes sure its publications are in line with the requirements of responsible journalism. In particular, if and when it is appropriate and possible, we make significant effort to contact the persons we intend to publish on prior to publication, to fact check and seek their comment. We also have in place internal procedures and guidelines to ensure that all our publications are accurate and in the public interest.

9. What difficulties have you encountered in doing that?

The meticulous system of ensuring accurate and public interest publication has very high costs in terms of legal fees, staff time and resources. It may also result in significant delays in publication. For example: a recent report on the looting of state assets in Cambodia by the Prime Minister and cronies around him involved writing detailed letters (which required legal input) to 87 individuals as part of the Reynolds defence. Virtually all the letters had to be translated into Khmer, Vietnamese and Chinese and then couriered, which cost approximately £12,700: the letters actually had more text (requiring translation) than the report itself. In addition, follow up letters and calls were, of course, also required. It took two staff working for two weeks. Of the 87 letters sent there were five responses which were predominantly from major companies based in America and Australia. The total cost including translation of the letters, legal advice for the letters and couriering was over £17,000, with staff time on top of that. The legal advice for the report was a separate amount.

## **Annex G: Extending statutory qualified privilege to address particular issues raised by the regional media**

### **Background**

1. Section 15 of the Defamation Act 1996 provides that fair and accurate reports of specified reports or statements, published in the public interest without malice, have the protection of qualified privilege. The categories of reports or statements so protected are listed in Part I, paragraphs 1 to 8, of Schedule 1 to the Act. For example, fair and accurate reports of proceedings in public of a legislature (which includes a local legislature) anywhere in the world.
2. Section 15 further provides that certain other fair and accurate reports of specified reports or statements, published in the public interest without malice, have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or contradiction. The categories of reports or statements so protected are listed in Part II, paragraphs 9 to 14, of Schedule 1 to the Act. For example, a fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of an international organisation or international conference.
3. Paragraph 15 of Schedule 1 to the Defamation Act 1996 enables the Lord Chancellor by order to designate for the purposes of that paragraph a fair and accurate report of, or copy of or extract from, any adjudication, report, statement, or notice issued by a body, officer or other person designated for the purposes of that paragraph.<sup>66</sup> Paragraph 15 is in Part II of the Schedule so it is considered that the scope of this power is limited to adding additional items to Part II.<sup>67</sup>

### **The problems encountered**

4. The view expressed from the regional media perspective was that in the 15 years or so since the Defamation Act 1996 was drafted and enacted, the world in which publishers operate has changed completely. Globalisation is now an integral part of our way of life. The internet was only in its infancy in the 1990s. No-one can seriously argue that the

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<sup>66</sup> The Lord Chancellor has this power for England and Wales or Northern Ireland. For Scotland, this must be by order of the Secretary of State.

<sup>67</sup> The supplementary provisions in Part III of Schedule 1 (paragraph 17) also enable the Lord Chancellor (for England, Wales and Northern Ireland) to ensure there is corresponding provision in respect of paragraphs 11 and 13 of the Schedule in respect of the Channel Islands or the Isle of Man, or in another member State. For Scotland, this must be by order of the Secretary of State.



media landscape of the 1990s still exists in 2010. The internet has changed fundamentally the way the press operates.

5. Specific examples of problems experienced by the English regional press in recent years, include the following:
  - A UK citizen was arrested in Bangkok on suspicion of committing sex offences against children. The local chief of police made a public call for witnesses to come forward, including witnesses based in England. The call for witnesses was not published in the arrested man's home area because the police chief's call for assistance was not protected by statutory qualified privilege because it did not meet the definitions contained in paragraphs 7 or 9 of Schedule 1.
  - At a general meeting of a Hong Kong registered public company with substantial interests in the UK, certain institutional shareholders were very critical of named British executives. Though in the public interest to report them, the criticisms were not publicised by the relevant local newspapers in this country because the meeting was not of a UK public company, and thus fell outside the ambit of paragraph 13 of Schedule 1.
  - It is a staple of local journalism to report important local trials and inquests. It is frequently the case that after a conviction or verdict in a Coroner's Court, an authorised police officer will make an official comment. Such comments have the protection of qualified privilege, as they fall within paragraph 9 of Schedule 1. It is frequently the case, however, that relatives of the victim/deceased (and increasingly, their lawyers) wish to make a public statement, so that certain relevant facts can be brought to the attention of the public. Because such statements are not made within any of the circumstances listed in Schedule 1, the statements are invariably edited so as to make them 'safe', and thus, they do not accurately reflect the commentators' true feelings or intentions
  - Similarly, although reports of local authority meetings fall within the ambit of paragraph 11 of Schedule 1, comments made by councillors after a meeting, on the steps of a Town Hall, carry no such privilege. Although often more revealing for local people, only the anodyne and non-contentious remarks are ever published. Local people are rarely told the full story in such circumstances.
  - It is common in local politics for one Councillor to complain about the behaviour of another Councillor, or sometimes, of an official. The complaints are made either to the Council's own Standards Board, or to the national Standards Board. Sometimes, the local press will be provided with a copy of the complaint; sometimes, they are given a verbal briefing by the complainant. Either way, this type of detailed information is cannot be reported without risk of legal challenge, as it does not fall within any of the categories listed in Schedule 1.
  - A religious newspaper wished to report a strong rebuttal made by one of the leaders of its Church, to a fierce attack on the faith by a

secularist. However, the report of the rebuttal was spiked because it would not have had the protection of statutory qualified privilege.

## The proposal

6. It has been proposed that the following things be added to Part II of Schedule 1:
  - a) Reports of meetings, documents etc of public companies worldwide<sup>68</sup>
  - b) Statements or matter issued for the information of the public by an elected representative or an official of any of the following governmental institutions:
    - i) the UK Parliament
    - ii) the Welsh Assembly
    - iii) the Scottish Parliament
    - iv) the Northern Ireland Assembly
    - v) any parish, district, county or unitary council in the UK.
  - c) Statements or matter issued for the information of the public by or on behalf of any qualified solicitor of barrister in the course of their representation of a client.
  - d) Matter that has been referred for the purpose of investigation to any authority performing governmental functions, including police functions.
  - e) Statements issued for the information of the public by or on behalf of any religious organisation (as defined for the purposes of s.13 HRA 1998).
  - f) Statements or matter issued for the information of the public by or on behalf of authorised representatives of any NGO.
7. It has also been suggested that paragraph 7 in Part I of Schedule 1 which covers fair and accurate copies or extracts of matter published by or on the authority of a government, a legislature, or any authority performing governmental functions, anywhere in the world, be extended to encompass police functions. However, it is considered this could not be done by designation under paragraph 15.

## Views of other members

8. A member from the national media expressed support for elements of this proposal. In particular:
  - This provides an opportunity to give proper protection to all reports that are officially issued thus reducing the need for anonymisation.
  - There is a strong argument for including a new protected category for fair and accurate reports published anywhere in the world by

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<sup>68</sup> Thus going beyond only UK public companies as currently covered by paragraph 13 of the Schedule.

charitable organisations, including NGOs (and copies of, extracts from, or summaries of such reports).

- Schedule 1 to the Defamation Act 1996 is in need of review and updating e.g. why should a fair and accurate report of proceedings in a legislature outside Europe be accorded a higher privilege than a fair and accurate report of proceedings in a legislature in the UK/Europe?
9. On the other hand, while claimant lawyers had no objection in principle to an extension of the scope of Part II of Schedule 1, difficulties with the particular amendments proposed were foreseen. Key issues raised include the following:
- There is a need for caution because interference with Article 8 rights should only be tolerated to the extent this is necessary in a democratic society. In addition, it is arguable that the current defence of statutory qualified privilege contravenes the principle that neither Article 10 nor Article 8 rights should have presumptive priority over the other.
  - In relation to reports of meetings, documents etc of public companies worldwide, the proposal as it stands is likely to be too broad. It would be necessary to consider the standards applying to what can be said in public company statements in other countries. It would be damaging to UK interests if UK publishers could disseminate untrue information about UK companies on the basis of a statement in a report from a foreign public company.<sup>69</sup>
  - To the extent that the change proposed to cover statements or matters issued for the information of the public “by or on behalf of” elected representatives of the UK Parliament, parish councils etc (paragraph (b) of the proposal), is unnecessary because those scenarios are already covered by or paragraph 9 of Part II of the Schedule.
  - In relation to the statements or matters issued by or on behalf of a solicitor or barrister in the course of their representation of their client (paragraph (c) of the proposal), the risk would be that a person could make any allegations they wanted against another by simply instructing a lawyer.<sup>70</sup> There is no justification for extending protection beyond the existing protection for fair and accurate reports of court proceedings.
  - In relation to matters referred to authorities for investigations (paragraph (d) of the proposal), vexatious or malicious complaints might be referred for the purposes of investigation in order to allow protected reports of the allegation. It was suggested that what matters

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<sup>69</sup> An alternative perspective was that, in the internet age, it is illogical for the rest of the world to know about, and be able to comment on, such a matter, while this cannot be safely reported in the UK.

<sup>70</sup> However, professional codes for solicitors and barristers may prevent this being a problem.

is whether the police, when matters are referred to them, decide themselves to issue a statement to the public on the basis of the evidence and, if they do, reports of such statements will be covered by Part II of Schedule 1.

- Reports of findings or decisions of associations formed in the UK, or other Member States, for the purpose of promoting or encouraging the exercise or interest in any religion (or of any committee or governing body of such an association) will be covered by paragraph 14(a) of Part II of Schedule 1.<sup>71</sup> Therefore it was queried to what extent the proposal at paragraph (e) was necessary. A broader issue of principle was also raised concerning why statements issued by religious organisations should be granted greater protection than other types of organisation at a time when there is considerable disharmony among religious groups and the definition of “religious organisation” is controversial (although it is noted that a range of “associations” involved in art, science, trade etc are listed in paragraph 14).
  - The proposed extension to cover statements or matters issued for the information of the public by NGOs (paragraph (f)) may not be necessary because reports of the findings and decisions of certain associations (which might include many NGOs) are covered by paragraph 14 of the Schedule.<sup>72</sup> However, to the extent that the proposal goes beyond this, there is a risk of abuse because any group of persons could form an NGO and thereby obtain the ability to feed the media with defamatory statements.<sup>73</sup> It is not clear how it would be proposed to define an NGO.
  - There is no need to extend paragraph 7 of Schedule 1 to encompass police functions because it is believed there is sufficient protection, in relation to police of a European member state, under paragraph 9 of Part II of the Schedule. Extending this to police forces anywhere in the world would be dangerous as there are some states whose police forces do not operate to appropriate standards or are recognised to be involved in human rights abuses.
10. However, in general there was no objection in principle to the idea of extending the scope of Part II of Schedule 1. A claimant lawyer view was that there may perhaps be a case for consideration that the Schedule, which currently covers reports etc made by UK and EU companies, be extended to companies listed on major specified Stock Exchanges (where listed companies may be expected to be subject to effective regulation).

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<sup>71</sup> An alternative perspective was that paragraph 14 has its limitations because it is confined to “findings or decisions” and not any other sort of pronouncement.

<sup>72</sup> As above in footnote 71, the point was made that the restriction of paragraph 14 to “findings or decisions” of the relevant body is too narrow and not conducive to the reporting of matters of public interest.

<sup>73</sup> Although, it was suggested that statutory qualified privilege under section 15 of the Defamation Act 1996 is not available if the publication was motivated by malice and this may apply here.

## **Annex H: Pre-Action Protocol for Defamation**

### **1 Introduction**

#### **1.1**

Lord Irvine of Lairg, in his foreword to the Pre-Action Protocol for Personal Injury Claims identified the value of creating Pre-Action Protocols as a key part of the Civil Justice Reforms. He hoped that Pre-Action Protocols would set effective and enforceable standards for the efficient conduct of pre-action litigation.

#### **1.2**

Lord Irvine went on to state that:

The protocol aims to improve pre-action communication between the parties by establishing a timetable for the exchange of information relevant to the dispute and by setting standards for the content of correspondence. Compliance with the protocol will enable parties to make an informed judgement on the merits of their cases earlier than tends to happen today, because they will have earlier access to the information they need. This will provide every opportunity for improved communications between the parties designed to lead to an increase in the number of pre-action settlements.

#### **1.3**

It is against this background that a Pre-Action Protocol for Claims in Defamation is submitted. This Protocol is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a claim in defamation, acting in good faith, can explore the early and appropriate resolution of that claim.

#### **1.4**

There are important features which distinguish defamation claims from other areas of civil litigation, and these must be borne in mind when both applying, and reviewing the application of, the Pre-Action Protocol. In particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only 1 year, and almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.

#### **1.5**

This Pre-Action Protocol embraces the spirit of the reforms to the Civil Justice system envisaged by Lord Woolf, and now enacted in the Civil Procedure Rules. It aims to incorporate the concept of the overriding objective, as provided by the Rules at Part 1, before the commencement of any Court proceedings, namely:

- dealing with a case justly includes, so far as is practicable:
- ensuring that the parties are on an equal footing;
  - saving expense;

dealing with the case in ways which are proportionate:

- to the amount of money involved;
- to the importance of the case;
- to the complexity of the issues; and
- to the financial position of each party;
- ensuring that it is dealt with expeditiously and fairly; and
- allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

## **2 Aims of the Protocol**

### **2.**

- This protocol aims to set out a code of good practice which parties should follow when litigation is being considered.
- It encourages early communication of a claim.
- It aims to encourage both parties to disclose sufficient information to enable each to understand the other's case and to promote the prospect of early resolution.
- It sets a timetable for the exchange of information relevant to the dispute.
- It sets standards for the content of correspondence.
- It identifies options which either party might adopt to encourage settlement of the claim.
- Should a claim proceed to litigation, the extent to which the protocol has been followed both in practice and in spirit by the parties will assist the Court in dealing with liability for costs and making other Orders.
- Letters of claim and responses sent pursuant to this Protocol are not intended to have the same status as a Statement of Case in proceedings.
- It aims to keep the costs of resolving disputes subject to this protocol proportionate.

## **3 Pre-action protocol Letter of Claim**

### **3.1**

The Claimant should notify the Defendant of his/her claim in writing at the earliest reasonable opportunity.

### **3.2**

The Letter of Claim should include the following information:

- name of Claimant;
- sufficient details to identify the publication or broadcast which contained the words complained of;

- the words complained of and, if known, the date of publication; where possible, a copy or transcript of the words complained of should be enclosed;
- factual inaccuracies or unsupportable comment within the words complained of; the Claimant should give a sufficient explanation to enable the Defendant to appreciate why the words are inaccurate or unsupportable;
- the nature of the remedies sought by the Claimant.

Where relevant, the Letter of Claim should also include:

- any facts or matters which make the Claimant identifiable from the words complained of;
- details of any special facts relevant to the interpretation of the words complained of and/or any particular damage caused by the words complained of.

### **3.3**

It is desirable for the Claimant to identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of.

## **Defendant's Response to Letter of Claim**

### **3.4**

The Defendant should provide a full response to the Letter of Claim as soon as reasonably possible. If the Defendant believes that he/she will be unable to respond within 14 days (or such shorter time limit as specified in the Letter of Claim), then he/she should specify the date by which he/she intends to respond.

### **3.5**

The Response should include the following:

- whether or to what extent the Claimant's claim is accepted, whether more information is required or whether it is rejected;
- if the claim is accepted in whole or in part, the Defendant should indicate which remedies it is willing to offer;
- if more information is required, then the Defendant should specify precisely what information is needed to enable the claim to be dealt with and why;
- if the claim is rejected, then the Defendant should explain the reasons why it is rejected, including a sufficient indication of any facts on which the Defendant is likely to rely in support of any substantive defence;
- It is desirable for the Defendant to include in the Response to the Letter of Claim the meaning(s) he/she attributes to the words complained of.

## **Proportionality of Costs**

### **3.6**

In formulating both the Letter of Claim and Response and in taking any subsequent steps, the parties should act reasonably to keep costs proportionate to the nature and gravity of the case and the stage the complaint has reached.

## **Alternative Dispute Resolution**

### **3.7**

The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

### **3.8**

It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

- Discussion and negotiation.
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in the field of defamation or an individual experienced in the subject matter of the claim).
- Mediation – a form of facilitated negotiation assisted by an independent neutral party.
- Reference to the Press Complaints Commission (an independent body which deals with complaints from members of the public about the editorial content of newspapers and magazines)

The Legal Services Commission has published a booklet on 'Alternatives to Court', CLS Direct Information Leaflet 23 ([www.clsdirect.org.uk/legalhelp/leaflet23.jsp](http://www.clsdirect.org.uk/legalhelp/leaflet23.jsp)), which lists a number of organisations that provide alternative dispute resolution services.

### **3.9**

*It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.*



## Annex I: Role of juries

At present section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 give a right to trial with a jury in claims for libel, slander, malicious prosecution, false imprisonment or (in certain circumstances) fraud. In other cases trial is generally by judge alone. The High Court has a general discretion to order trial with a jury, although this is very rarely exercised. Sir Rupert Jackson's report indicates that fewer libel cases are now being heard with a jury rather than by a judge alone (he indicates that in 2008 there were 4 of each at the Royal Courts of Justice, and that up to November 2009 there had been 4 jury trials and 9 by judge alone).

- As noted above, the determination as to whether words are defamatory normally involves the judge to ruling whether the words are capable of bearing a defamatory meaning; and, where there is one, the jury then deciding whether the words do in fact bear a defamatory meaning.
- In relation to defences, it is for the judge to determine questions of law relating to whether a statement is justified, but what meaning the publication in fact bears and whether or not the defendant has successfully proved it to be true or substantially true is a question of fact for the jury.
- In relation to fair comment, the question whether all or some of the words complained of are capable of being statements of fact or comments is a question of construction for the judge. Otherwise, contested issues are treated as questions of fact for the jury, apart from whether the subject matter is capable of being a matter of public interest, which is treated as a question of law for the judge.
- It is also for the judge to determine whether the publication attracts either absolute or qualified privilege, but disputed facts relevant to the existence of privilege are for the jury, in particular whether a report is fair and accurate.
- If there is evidence of malice, to displace a defence of fair comment or qualified privilege, the issue of malice must be determined by the jury.
- The assessment of damages is currently a matter for the jury, having been directed by the judge on relevant background circumstances, including guidelines on reasonable amounts of damages.





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