Costs protection in defamation and privacy claims Farrer & Co response

8 November 2013

Farrer & Co LLP

Farrer & Co LLP acts for a wide range of clients, advising private individuals, institutions and corporate clients on libel and privacy in both claimant and defendant capacities. We also have extensive experience of defending libel and privacy claims on behalf of the media, including acting for national newspaper and magazine publishers, business to business titles, regional newspaper groups, broadcasters and other media clients.

We have, therefore, considerable experience built up over the past 20 years in advising claimants and defendants and their insurers in libel and privacy litigation in England and Wales.

The views expressed in this paper are general observations based on our experience in this area of the law. We are not instructed by any particular client to submit views and the following response is provided so as to assist the Government by way of observation only.

Overview

We have substantial reservations about the likely impact of the proposals contained in the document, Costs Protection in Defamation and Privacy Claims. We have tried to respond as helpfully as we can, by answering each question in the questionnaire. However, all our answers are subject to the more extensive general comments (and caveats) at the end of this response document.

Question 1: Do you agree with the scope of the protection? If not, what should it cover?

Yes, we agree with the scope of the protection so far as it goes. However, as drafted the definition would appear to exclude claims relating to user generated content, a growing area of claims. Given the focus in the Defamation Act 2013 towards author liability, the scope should be widened as follows (our amendments underlined):

> *"publication and privacy proceedings" means proceedings for—*
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> *(a) defamation; (b) malicious falsehood; (c) breach of confidence involving publication to the general public; (d) misuse of private information; or (e) harassment, where the defendant is a news publisher <u>or an author publishing statements via a platform operated by a news publisher</u>.*
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> *"news publisher" means a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs".*

Question 2: Do you agree with this process? If not, how should it be improved?

Yes, we agree with the process for assessing eligibility for costs protection. However if, as proposed, a defendant may apply, it may be that in a particular case both the claimant and defendant have the benefit of nil or capped liability. This outcome could result in a waste of court time; if acting in person neither would seem to have much incentive for bringing the litigation to an end.

Question 3: Do you agree with the approach of allowing full costs protection for those of modest means, partial (capped) protection for those in the 'mid' group, and no costs protection for those with substantial means? If not, what alternative regime should be adopted?

Yes, we agree the threefold division of eligibility. But we consider that in relation to the mid group/capped liability segment there are potential practical problems. It is envisaged in para 31 of the consultation document that the capped amount would be assessed by the judge on the basis of a statement of assets *"and the costs budget*". As further illustrated below, we doubt that this will be feasible in many cases because costs protection applications will likely be made at a very early stage of the case, before the issues have crystallized sufficiently for the parties to be able to say what an appropriate costs budget should be. This follows from our reading of the Government's proposals, namely that a claimant will be able to insist on applying for costs protection before his action gets under way in earnest – "*at the first judicial hearing*" to quote para 31 - and before e.g. the defendant is in a position to apply to strike out the action (on the basis that the claimant would naturally, it seems to us, want to be protected in terms of liability for costs in that application to strike out). We note that para 32 expressly says that a party who will be liable to pay something "*should know as early as possible what their likely liability would be so that they can make properly informed choices in the litigation*". Again, we doubt that this will be feasible in many cases. It is much more likely that at the first judicial hearing the parties will be unable to offer more than an educated guess as to the overall costs of action (which in turn will depend on a great number of variables) and that there will be no option but to proceed in stages, reviewing the appropriate cost cap as the case progresses.

Question 4: Should there be any further clarification of the level of means for each group? If so, what levels of means would be appropriate?

We do not have any further suggestions regarding clarifying the level of means for each group. On our reading of the proposals the judge will consider the applicant's assets ("*what that party could afford to pay*") and may also consider the opponent's assets (in order, so far as we understand it, to review the likely impact on the opponent of being deprived of his full entitlement to costs recovery) before exercising his discretion to allow the applicant to cap his liability.

It would be helpful to have some clarity on the relevance of the liquidity of assets. For example, how would a claimant with limited income but an unmortgaged and valuable property be assessed?

A realistic assessment must be made when calculating the means of each group. For example, an individual earning over £100,000 per annum would be seen by most standards to be wealthy. However with living expenses, this would not provide sufficient income to either fund a libel claim or defend a claim brought against them, both of which can easily exceed £500,000.

Question 5: Do you agree that the test of 'severe financial hardship' is the right test to exclude the very wealthy – whether individuals or bodies (including, for example, national newspapers that report a loss)? If not, what is the appropriate test?

Yes we agree that the test should be 'severe financial hardship' and as above we envisage that this should be a matter for judicial discretion in each case.

Question 6: Do you agree that a party in the 'mid' group should pay a 'reasonable amount'? If not, what is the appropriate test?

Yes, we agree that a party in the mid group should pay a reasonable amount.

Question 7: What factors should be taken into account in determining what is a 'reasonable amount' for a party in the 'mid' group to be liable for?

The factors to be taken into account in determining what is a reasonable sum to pay should include: the applicant's income and assets (and the liquidity of those assets); the opponent's income and assets; the likely course and cost of the action; and the merits of the claim.

Question 8: What evidence do you have on the legal costs for claimants and defendants in defamation cases? We would be particularly interested in information on the average level of costs for each party and how this varies across cases.

We have considerable experience of defamation and privacy cases and in our experience it is impossible to state an average level of costs, since every case differs. We would note that the increasing prevalence of litigants in person has increased the costs payable by defendants, even where the claimant's case has little merit.

Question 9: What evidence do you have on the financial means of claimants and defendants in defamation cases?

Likewise, the financial means of claimants and defendants differ widely, from impecunious claimants in person to large corporations backed by insurance. It is notable that litigants with something to lose tend to be less keen to litigate.

Question 10: What impact do you think the proposals will have on businesses? We would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses, as both claimants and defendants.

It is our opinion that it will be predominantly claimants who apply for costs protection orders and that the financial effects will be felt most often and more severely by defendant media organisations, for which such orders will be an unwelcome additional financial burden in already difficult times. Some smaller publishers if not backed by insurance will fare especially badly.

Small and Medium sized businesses who cannot currently afford to either make or defend a claim may benefit from the protection.

Question 11: Do you agree with the proposed additional provisions? If not, how should they be improved?

There are a number of additional provisions suggested in the draft document. We disagree with the proposal in para 35 that the applicant's statements of assets should be confidential as this will not allow his opponent to test the statement. Nor is it easy to see how an opponent could adequately oppose an application (as envisaged in para 36) unless he had access to the grounds for it.

The suggestion in para 39 that a party unsuccessfully opposing a costs application pay costs on an indemnity basis risks an abuse and lack of transparency in the process, particularly given that the opposing party is already hampered by not being able to have sight of the applicant's statement of assets. Whether indemnity costs should be awarded should be a matter left to the judge in exercise of his/her usual discretion and should not be prescribed.

Question 12: Should there be any specific provision in the rules concerning which party should pay the costs of an application for costs protection? If so, what should the provision be?

As above, in our opinion a party opposing such an application should not be penalised by having to pay indemnity costs as a matter of course: rather the presumption should be that costs are in the cause, with discretion to order costs in any event in an egregious case. This is the normal standard in litigation.

Question 13: Should the Pre-Action Protocol for Defamation be amended to take account of these new provisions? If so, how?

Yes, we consider that appropriate amendments should be made to the Protocol, in order to establish at what stage applications should be made and the procedure which the parties should adopt to try to agree an order, before applying to the court if they cannot agree.

It should be a requirement of a costs capping order that the claimant has complied with the Protocol, or that there is good reason why they have not.

Question 14: Do you have any comments on how the drafting of the rules might be improved?

We have the following suggestions for how the rules might be improved, in accordance with the longer note below. For the reasons set out in that note we consider that, before a regime is put in place to grant one party to litigation a very substantial advantage, such that considerable pressure will in our view be placed on the disadvantaged party to settle even unmeritorious litigation, the court should first review the merits of the claim and secondly, in any case where it will be asked to make a capped liability order, await crystallisation of the issues so that it can form a view as to the likely course and cost of the claim. Costs protection orders should be automatically reviewed before any appeal, without penalty to the opposing party.

As presently drafted Rule 44.19(1) simply refers to 'proceedings' and would be presumed to include appeals to the higher courts. This should be clarified. We do not consider that the beneficiary of a costs capping order should be permitted to pursue unsuccessful appeals at the other party's cost.

To obtain ATE insurance, a party was generally required to obtain a legal opinion on the merits of the case, sufficient to convince the insurer that the case was meritorious. Whilst it can be difficult to assess the merits of a defamation case until at least the filing of the defence, some procedure ought to be in place to prevent unmeritorious claims from going forward. Without such a procedure, it is inevitable that the changes will lead to a significant volume of additional claims, some of them vexatious, from claimants who would otherwise think more carefully before engaging in a claim. A claimant knowing that he/she risks no adverse costs consequences simply has no incentive to act reasonably and pursue proportionate claims. It should be borne in mind that the threshold a claimant is required to overcome to avoid being struck out is in reality a low one The proposals could therefore lead not only to unfair burdens on the defendants but to a substantive waste of already overburdened court time.

Question 15: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

It should be clarified how a minor acting through a litigation friend would be categorised.

General comments

It is a fundamental point of principle that no one should be unfairly penalised for publishing lawful, true information or honest comment in the public interest. Free speech, as well as being a basic human right (Article 10), protects and enhances our democratic system.

Another fundamental principle is that the cost of access to justice should be proportionate, in part so as not to violate Article 6 of the ECHR ('everyone is entitled to a fair and public hearing'). Jackson LJ found (as noted in the consultation document at Annex C para 49) that CFA arrangements which then existed were *"the major contributor to disproportionate costs in civil litigation in England and Wales*". The same document says at para 49 that the Government "*has been concerned about the disproportionate costs of civil litigation, and the* ***relatively risk free*** *nature of bringing claims funded by 'no win, no fee' CFAs*" (our emphasis).

It would be a mistake to bring in changes which perpetuated the vices of the current system, leaving parties to continue to face disproportionate costs and encouraging risk free litigation. These current defects in the system create

disincentives to publication of contentious or controversial material, inhibit free speech and may constitute an unwarranted additional financial burden for both the media and individuals, particularly those involved in public life.

The current situation is that if a claimant wishes to challenge published information, as being e.g. libellous or a breach of privacy, he takes the risk of himself being penalised as to costs, leaving the defendant perhaps slightly out of pocket (because usually unable to recover 100% of costs incurred, on assessment) but basically vindicating the defendant.

The current availability of CFAs and ATE insurance qualifies that situation, because it may be unlikely that a defendant can actually recover anything from a CFA-assisted claimant and risks enhanced costs if he loses. That chilling effect of CFAs is a major reason why it is right essentially to stop them in defamations cases.

We consider that before changes are made to the rules it is important to consider how they might work in practice and to that end we offer the following actual (but anonymised) case histories and imaginary/fictional case studies.

Examples*

Case study 1

C, is accused by his employers of negligence and is sanctioned. He leaves the company, finds himself virtually unemployable in the UK and finds temporary work abroad, outside the EU, leaving behind a family in straitened circumstances. He complains of a report of the affair in an online publication.

C insists on removal of the whole article and issues a claim form, (adding the company as a party) but makes clear he has no funds and his solicitors are acting in an advisory capacity only.

This claim is settled prior to trial, the website realising that win or lose it would not recover all costs. The article complained of is taken offline and a contribution to C's costs paid. No retraction or apology is published nor damages paid, it appearing that C's main concern is to get damaging publicity about him taken offline in order to enhance his employment opportunities.

Consider the current position. D knows that C's solicitors may act on a CFA basis and that D therefore risks enhanced costs if the case is lost and that recovery from an impecunious C is unlikely. If D successfully defends or strikes out the action in which C is represented on a CFA with ATE insurance, it obtains an order for costs and, if C has no money, his insurance kicks in and C recovers something. An additional disincentive for C's lawyers is that they get nothing if the claim fails (in practice they will ask if it has a better than evens chance of success), so they may decline to act where a claim is better than hopeless but not good enough.

So, the current position encourages settlement regardless of the merits. Do the new proposals make that worse or better?

Assume implementation of the latest proposals. C would probably satisfy a court that he had no realisable funds, faced serious financial hardship if he sued, and would probably then get a nil liability order. Unless it were found that his claim was an abuse of process, i.e. provided he satisfied a court that he had reasonable grounds for the claim, he could sue with zero liability.

In more detail a likely scenario would be this. C sues after being rebuffed by D in protocol pre-action correspondence and the parties do not agree what costs protection order should apply. C pushes for maximum protection (see para 44.20 of Annex B, consultation document). D threatens to apply to strike out the claim but C insists that first he must be heard on the costs issue, as he cannot otherwise get to the next stage of the claim. Court hears C's application and grants C 'nil net liability'. D may consider an early strike out application. It might then argue that the costs order should be set aside retrospectively under 44.27 (b) "*no reasonable grounds for bringing the proceedings*". If successful, D may then seek to recover the costs probably amounting to a 5 figure sum (difficult when the C has no substantial assets). But there must be a risk that at this early stage the court declines to say that there are no reasonable grounds

and D must continue to defend the case until better grounds appear. It is meanwhile liable for its own costs. Issues such as meaning, qualified privilege (possibly a Reynolds defence or its replacement) and breach of privacy would have to be resolved entirely at the D's cost, win or lose. The costs will also be inflated by the costs application hearing, above.

So, these proposals would magnify pressure on D to settle an unmeritorious claim.

This is unjust because C's straitened financial position results from his own conduct and D has published what it considers to be a true report. The proposals may allow costs recovery at the conclusion of proceedings, when there might be argument about e.g. speculative litigation: in practice D could not easily contemplate going that far. By that stage C has been encouraged to pursue his claim and D discouraged from defending it.

Case study 2 (fictional)

A legally ignorant C is aggrieved by a publication and decides to issue a claim form after sending a protocol letter and being rebuffed. He applies for a nil liability costs order. The court is persuaded that it cannot review the merits at this stage. The D challenges the costs order, on grounds of e.g. the inadequacy of the statement of assets provided or suitability of an order, loses and is penalised by being ordered to pay costs on an indemnity basis (in accordance with the proposals in the draft at para 39). Subsequently the action is struck out as an abuse of process. D struggles to recover costs, since the C is impecunious, and has therefore wasted the costs protection hearing costs in any event and probably the other costs it incurred in an action which should never have been brought.

Case study 3 (fictional)

A newspaper publishes an investigation into a company which it suggests has been ripping off customers, the company folds and goes into liquidation. The liquidator makes a claim on the company's behalf and applies for a protected costs order. No consideration of the merits. Win or lose the D must pay all its costs of the action.

Case study 4

A claimant claims that a court report is defamatory and issues proceedings. The Master finds the report is fair and accurate and strikes out the claim (after a 3 day hearing – extended by the C acting as a litigant in person, unfamiliar with court procedure and the introduction of several late additional points and applications). C appeals to a Judge and then unsuccessfully attempts to appeal to the CA. The Ds' costs are assessed and C is ordered to pay a substantial proportion. He opposes the attempt to enforce judgment, forcing Ds to incur further costs. Ds are heavily out of pocket as a result of being unable to recover only 'assessed' costs. Had C been represented costs would likely have been lower, because hopeless points would not have been pursued.

Throughout, C says that he cannot afford legal representation and cannot afford to pay Ds' costs, despite owning substantial assets. He says this ignores his obligations, commitments, outgoings etc.

In the event Ds avoided further argument by allowing C to pay the limited costs ordered by instalments and waived some of their costs as well.

This case study illustrates how costs protection applications will be likely to involve detailed considerations of ownership of assets and liabilities. It is also a reminder that first instance decisions in an action may be appealed, with costs consequences.

There may be argument about what assets are (sufficiently) liquid, especially those located abroad, to say nothing of beneficial ownership (e.g. a C might say 'I live in a grand property but it belongs to my wife/ a blind trust/ a BVI company'). Even if there is a solution to these problems, having these early arguments will increase satellite litigation and costs.

Assume this scenario under the new proposals. Cs sue and then apply for costs protection: the court grants a capped liability order (e.g. – having regard to residence needs, encumbrances, essential outgoings on maintenance, subsistence costs etc, the properties are illiquid and liability should be capped at £50k.)

Ds successfully strike out the action before a Master. Costs on both sides, totalled together, now approach or exceed £50k. Cs wish to appeal (at D's cost win or lose). Ds apply to court to vary costs protection order. Court essentially has to decide whether to shut Cs out of court (assuming they genuinely cannot afford more than £50k) or allow their appeal to proceed with Ds bearing its costs including cost of its being represented. A refusal would likely be appealed and is unlikely. We know that in the actual case, above, the Master's decision did go to the Judge on appeal. Cs lose again and wish to appeal to the CA.

There is a risk in the new proposals of repeated applications on costs, of D failing to get sufficient cover for costs and then being forced to fund appeals. This would magnify pressure on Ds to settle an unmeritorious claim.

Case study 5 (fictional)

C sues and applies for a 'capped liability' costs protection order. The case is at the earliest stage before pleadings have closed. The C's statement of case is imperfectly pleaded and D says it requires further and better particulars before Defence. No documents have been listed or exchanged nor witnesses identified. D is asked to estimate the likely cost of the action including any possible appeals and produces a rough estimate of £25k-500k. C protests that this is too vague and/or too much. The court is unable to decide. It will either have to cap the C's liability at a maximum of C's free assets and income or deal with the matter on a staged basis, entailing several costs protection hearings and orders if the parties cannot agree.

Case study 6 (fictional)

An unmeritorious and impecunious claimant brings proceedings for libel. The threshold for strike out and/or summary judgment is not reached, meaning that D cannot easily dispose of the claim at an early stage. C is entirely unwilling to accept reason and see the weakness of his claim. Under the current rules, D has the ability to build up costs orders against C at interim hearings (for instance if C's Particulars of Claim are poorly pleaded). Where such costs orders are granted, they can act as a deterrent for C whose case is unlikely to be successful at trial but D would be forced to incur substantial costs, which it has no prospect of recovering, in successfully defending the claim.

Conversely, if C (who is impecunious) obtained a nil liability costs protection order, D would not be able to obtain interim costs orders as under the current regime. As such, C could contest an unmeritorious case on the highly unlikely chance he might succeed at trial, whilst D would either be forced to incur the significant fees associated in this process (with no prospect of recovery) or settle the claim on disadvantageous terms despite the lack of merit.

** Please note that although these case studies are based on our experiences, facts have been changed to protect client confidentiality and the other parties involved.*

Conclusions

What is missing in the proposals is any requirement for the court to evaluate the claim before making a costs order. Even a board considering an application for legal aid would require to be satisfied that there was at least an arguable case. But under the draft rules there is no such requirement.

So the above examples suggest that there should be some consideration of the merits, before costs protection orders are made and that it is inappropriate to make any capped liability order before the issues have crystallised sufficiently for the court to gauge the likely overall costs of the action. There should be an automatic review of any cost protection order prior to appeal at no cost to D if he wins at first instance; arguably in this instance a court should be entitled not to make an order if it considers the merits are overwhelmingly in D's favour albeit the claim is not bound to fail. The draft rules appear to envisage that this can happen only when a reasonable offer is made such that there is no real

merit in the case proceeding (para 36) or when the claim is an abuse of process (para 37). But if D has a strong case it may not have made any offer.

The examples also suggest that a system in which the party daiming has no substantial financial stake in the action will lead to an unfair burden on the paying party.

The reality is that under the present proposals, the unfairness and cost implications of the CFA system are very likely to be replaced by a system which provides similar unfairness and costs consequences. Replacing one unfair system with another is not to be endorsed.

Farrer & Co LLP
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