

## **Costs protection in defamation and privacy claims.**

### **Questionnaire**

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

We consider that television, radio and online broadcasts, websites, blogs and tweets containing news or information about or comment on current affairs should be covered in relation to harassment proceedings.

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

It is critical that parties considering suing should have as much certainty as possible about the financial consequences to them of suing, and before adverse costs risks arise. The proposals envisage the application (in the absence of agreement) being after the issue and service of proceedings. However, by then the parties are on adverse costs risk, without knowing what, if any, costs protection they might receive.

A better system (in the absence of agreement) would be for the parties to be able to apply to the Judge before any proceedings are issued and served. This would achieve certainty at least at the outset before any adverse costs liability arises.

Also in practice under the proposals, there is a disincentive for a defendant to agree any costs protection, without first making the claimant commence and serve proceedings.

It is also important that as early as possible in the proceedings, all parties to an action should know what, if any, costs protection is to apply to the case. The CMC is far too late in relation to this. It needs to be as early as possible in a case, even before the proceedings have been issued.

An option, at whatever stage costs protection is considered, might be to permit a claimant to withdraw from the legal proceedings without any costs liability, should that claimant reasonably consider that any costs protection that he receives places him at unacceptable risk.

#### **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?**

No. This is a recipe for uncertainty and in practice, therefore, denial of access to justice. It is suggested that costs protection be available for all but the "conspicuously wealthy" as proposed by LJ Jackson and those with insurance available to the extent of that insurance.

The test of "severe financial hardship" is very vague and, although an objective test, it is open to huge variance in interpretation. This can be seen from the Judgment of Lord Ackner in *Kelly v London Transport Executive* [1982] 1 WLR 1055: "*The matter must, in my judgment, be a question of fact and degree in each case*" and also is apparent from the Judgment of The

Honourable Mrs Justice Sharp in *The Legal Services Commission and F, A & V* [2011] EWC 899 (QB).

The proposal of a "mid" group makes matters even more uncertain and open to argument with each case being dependent on "fact and degree".

It may also result in age discrimination. For example, older parties might not be able to raise funds on equity in their homes because of their age and, as a result, obtain a costs protection order due to the court considering that they should not be required to sell their home to pay a costs order. On the other hand younger parties might be able to raise funds on equity in their homes and, as a result not obtain a costs protection order due to the court considering that as they would not need to sell their home to pay a costs order, they would not suffer "severe financial hardship".

It is contended that parties that would, in the normal course of their business, be expected to carry insurance in relation to their publications (such as broadcasters, newspaper and magazine publishers) should not be eligible for costs protection, unless they can establish a compelling reason for not carrying insurance. If they do not carry insurance, it will have been a deliberate decision not to do so. An alternative approach might be to exclude costs protection from those for whom publishing for profit is in the ordinary course of their business.

**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?**

Yes, plainly if the current proposals are to be adopted. This would be vital.

We cannot say what level of means would be appropriate for the test of "severe financial hardship" or the "mid" group because it is dependent on outgoings, responsibilities (to a spouse/partner, children, care of others such as elderly family members), stage in life and other factors such as health. In addition, we would have thought that the means of a spouse/partner and/or future inheritance should not be taken into consideration, although these may impact on the relevant financial responsibilities.

**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?**

No. We propose "conspicuously wealthy", as stated above, which should result in greater certainty and reduce argument.

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

"Reasonable amount" is again extremely vague and uncertain and would raise the question of

"reasonable" compared to what - the net assets of the relevant party, the income (less outgoings) and/or the costs of the litigation involved?

**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?**

Assets (and nature of those assets), income, liabilities, responsibilities and the estimated costs of the relevant litigation.

**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.**

The costs are rarely less than a few thousand pounds (if the case settles quickly) and if the case goes to trial they are usually in excess of £100,000 and sometimes over £1 million. We hold information, but not in a form that is easily retrievable and, in each case, the stage the case reached would need to be ascertained.

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

We hold some general information but not in a form that is easily retrievable. Our clients extend from multinational companies and billionaires to people on benefits.

**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.**

In their current form, in our view, the proposals render the potential exposure to adverse costs too uncertain and, therefore, will amount to a denial of access to justice for many claimants, SMEs and Micro businesses.

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

The additional provisions give rise to further enormous uncertainty and potential for argument and costs. For example:

- a) The variation of costs protection provisions results in yet more uncertainty for the parties to litigation. What constitutes a "reasonable offer" and whether it should result in the removal of costs protection gives rise to yet another area of potential argument;

- b) The provisions in relation to costs protection being lost (which could result in serious hardship to a relevant party) also give rise to uncertainty. The fact that a defamation action may be struck out does not mean it should never have been brought in the first place. An example of this can be found in the *Jameel (Yousef) v Dow Jones & Co. Inc* Judgment [2005] EWCA Civ 75. The case was conducted by both claimant and defendant under the misapprehension that the material online would have been read by several thousand subscribers in England, but late in the day the defendant produced evidence that the relevant webpage had only been visited by five people from England (three of whom were associated with the claimant). The defendant was awarded its costs only from the time when it disclosed the new evidence and in this regard, over recent years the law has developed very quickly. Further examples can also be found in the Judgments concerning internet publication and, in the future, more examples may occur in cases in which the “substantial harm” test has not quite been satisfied, where the position may be dependent on its particular facts. We would recommend that the Judge’s discretion to remove costs protection be limited to cases of fundamental dishonesty and to obstructing or attempting to obstruct the just disposal of proceedings. It would, for example, be wrong for a claimant to be deprived of costs protection retrospectively when the claim was brought in good faith on the understanding (not disputed by the defendant in the defence) that there had been substantial publication in England.

We agree that confidentiality is very important given commercial sensitivity and privacy issues, particularly bearing in mind that the defendant will often be a member of the media.

The draft rules at para 44.27 state that a costs order may be set aside with retrospective effect where the party has “*disclosed no reasonable grounds for bringing the proceedings*”. If this is to be retained, it should be amended to read “*disclosed no reasonable grounds for bringing or defending the proceedings.*”

**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?**

We would have thought that the default position should be costs in the case, with the Judge having discretion to make an alternative order if one or other party has behaved unreasonably.

For example, a party may not wish for reasons of confidentiality (particularly where the other party is a publisher) to reveal details of their financial position to the party on the other side and the party on the other side might then, without this information, not be prepared to agree a costs protection order. In this eventuality, the only course would be for the Judge to decide matters based on the confidential statement of the party seeking costs protection. In this example, a costs in the case order might be the most appropriate order.

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

Yes. The parties should each be required to state whether or not they seek a costs protection order and, if so, to specify what order they seek and the general basis for seeking such an order and also whether they have available to them insurance against the costs risks of the threatened action.

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

We consider that as much guidance as possible needs to be included in the rules or practice directions on the factors to be taken into account when the court (a) considers whether to grant complete or partial costs protection to a party; and (b) when and in what circumstances that costs protection order might be varied – whether on the court’s own motion or on the application of another party.

**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?**

We believe that the majority of people and companies, except those with essentially no material assets or income, the super-rich (whether individuals or companies) and those with insurance or support from a wealthy supporter, will in practical terms be denied access to justice because of the uncertainty the proposals in their current form will cause. This is unless those individuals and companies are prepared essentially to gamble with whatever money they may have, that a Judge will grant some reasonable costs protection and that costs protection will remain in place without amendment at any stage for any reason.

With regard to defendants, should they be granted complete costs protection, they may be encouraged to defend cases that otherwise they might be prepared to settle and/or should be resolved.

Claimants, particularly with full costs protection may be encouraged to make and pursue unmeritorious claims and/or to refuse settlement offers that should be accepted. Further, defendants facing this may be placed in an invidious position having no means of recovering the costs of defending the case (which could be considerable). This may impact on freedom of speech.

The abolition of recoverable success fees will make it more difficult for parties (both claimant and defendant) to find lawyers willing to represent them under a CFA. This is likely to be more acute for defendants where there will be no damages award from which to take any success fee.. Having costs protection will assist defendant individuals with limited resources when sued for libel by conspicuously wealthy claimants (e.g. the defendants in *Mengi v Hermitage* and *GE v Thomsen* cases). However, this does not assist them in finding a lawyer prepared to take on the

risks of defending them on a CFA when the most the lawyer can realistically hope to get paid, if the case is successfully defended, is the costs on a standard basis which, under the new rules, may not even include costs which were necessarily incurred.

**Carter-Ruck**

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