JUSTICE v. EFFICIENCY: Case Management in Defamation Actions in England & Wales

DESMOND BROWNE QC
5, Raymond Buildings, Gray's Inn, London, WC1R 5BP

1. It did not require the Woolf reforms to make English judges wonder what could be done to reduce the cost and length of libel actions, particularly those likely to be tried by jury. In 1992, Neill LJ focussed on the need to reduce the "expense and complexity" of libel actions, and stated:

> *"A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other the costs which may be involved if every peripheral issue is examined and debated at the trial."* [1]

2. So what issue is to be regarded as peripheral ? In a case in 2005[2] Eady J thought that the question had to be judged objectively, on the facts of the individual case and having regard to both the considerations mentioned by Neill LJ. Even if they ever did, it has become clear that the pleadings no longer govern the Court's task of defining the "real issue" at the heart of the case. Eady J thought that it was "*necessary to stand back from the formulation of the case by the parties' counsel and take a broad and non-technical approach"*.

3. In adopting that non-technical approach, the Court has been given the very widest powers of case management under ***Civil Procedure Rules Pt. 3*** in force since 1999. In addition to the power to exclude an issue from consideration[3], the Court can take any other step or make any other order for the purpose of managing the case and furthering the "overriding objective".

4. The "overriding objective" is at the heart of the Woolf reforms. Their aim is no more than to enable "the court to deal with cases justly". Subject to the test of what is practicable, that involves:

> *"(a) ensuring that the parties are on an equal footing,*
> *(b) saving expense,*
> *(c) dealing with the case in ways which are proportionate –*
> *(i) to the amount of money involved,*
> *(ii) to the importance of the case,*
> *(iii) to the complexity of the issues; and*

---

[1] Rechem International Ltd. v. Express Newspapers Ltd.: The Times: 18 June 1992

[2] McKeith v. News Group Newspapers: (2005) EMLR 780

[3] CPR 3.1(2)(k)

(iv) to the financial position of each party,

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

5. The Court is obliged to seek to give effect to the overriding objective, and the parties are "required to help the Court" to do so [4].

6. In defamation actions problems arise because very often the meaning attached to the words by the claimant is not that which the defendant seeks to justify. As is well known, in England it is open to the defendant to justify any meaning which the words are *capable of bearing,* and which is not separate and distinct[5]. This – the so-called rule in ***Polly Peck*** – was rejected in New Zealand and was a matter of debate in Australia until the introduction of the defence of contextual truth. That defence goes further than ***Polly Peck***, but only applies to the libel as a whole if the imputation complained of does not further harm the plaintiff's reputation having regard to the substantial truth of the contextual imputations.

7. In England today it is not just the meaning of the words and the substantive law which govern the ambit of a plea of justification, case management considerations have become highly relevant [6]. The trend towards tighter control over the issues in libel actions was revealed in a Court of Appeal case in May 1999, one month after the CPR came into force [7]. As it happens, the Court was presided over by Lord Woolf himself, then Master of the Rolls. May LJ in giving judgment warned that:

"As with all actions, libel actions should by proper case management be confined within manageable and economic bounds. They should not descend into uncontrolled and wide-ranging investigations akin to public enquiries, where that is not necessary to determine the real issues between the parties. The court will... strive to manage the case so as to minimise the burden on litigants of slender means. This includes excluding all peripheral material which is not essential to the just determination of the real issues between the parties, and whose examination would be disproportionate to its importance to those issues." [8]

8. Equality of arms is obviously a very important consideration, but as Lord Woolf said:

".... if a party because of his or her personal circumstances wishes the court to restrain the activities of another party with the object of achieving greater equality, then that party must behave in a way which makes it clear that he or she is

---

[4] CPR Pt. 1.2 & 1.3

[5] See Polly Peck Holdings Plc v. Trelford (1986) QB 1000 at 1032

[6] See para. 11.14(7), p328, Gatley, 11th Edition

[7] McPhilemy v. Times Newspapers Ltd. (1999) EMLR 751

[8] Ibid, p773

conducting the proceedings in a manner which demonstrates a desire to limit the expense as far as practical." [9]

[9] Ibid, p777

9. In all libel actions vindication is a most important part of the relief sought by the claimant. But as the Court of Appeal said in 1996, proper vindication must be obtained on a proper basis. Hence the action must be structured to achieve that situation and to ensure that the defendant is not prevented from deploying his full essential defence: *"it is a poor form of vindication if it is only obtained by half-muzzling the other side."* [10]

10. Cases where the Court of Appeal has cut a defence down to size include ***Cruise v. Express Newspapers*** in 1999, where the defendant's case would have entailed a wide-ranging investigation of the merits of Scientology way beyond the imputations concerning their private affairs of which Tom Cruise and Nicole Kidman complained. [11]

11. A more recent case in which the Court side-stepped a potentially prolonged scientific inquiry involved the dietician, Dr Gillian McKeith.[12] She sued, complaining that she had been portrayed as a charlatan who had misrepresented her qualifications. Eady J feared that the defence would involve an expensive and open-ended inquiry into the merits of her various nutritional theories. He said:

"I apprehend that if the Defendant's allegations in the newspaper had been addressed solely to those [theories], the Claimant would not be litigating on the subject. If such an inquiry were permitted, the wealthy Defendant with all its resources will be placed in a position of unacceptable tactical and financial advantage over an individual litigant." [13]

12. The Court applies the same principles to applications for leave to amend. Thus, in 2007 Tugendhat J refused permission to one of the wealthiest men in America to amend to introduce new particulars in support of his claim for aggravated damages. [14] The Judge's reasoning revealed how important a consideration is proportionality:

".... the time and costs that would be required to investigate at trial the new matters sought to be introduced is not proportionate to the amount of money involved in any increased award of aggravated damages, is not proportionate given the financial position of Mr Adelson, and would distract the jury from concentrating on the already complex issues which they will have to decide."

---

[10] Basham v. Gregory: Unreported: CA: 21 February 1996, cited by May LJ at ibid, p771

[11] (1999) QB 931

[12] McKeith v. News Group Newspapers Ltd. (2005) EMLR 760

[13] Ibid, para.21

[14] Adelson v. Associated Newspapers Ltd (2007) EWHC 997 (QB)

13. In other cases the English courts have effectively used case management considerations to treat as an abuse actions which were not caught by the strict rules of *res judicata*. Thus in ***Schellenberg v. BBC*** in 1999 [15] the Claimant, a Scottish landlord accused of ill-treating his tenants, settled a libel action against the *Guardian* on disadvantageous terms five weeks into an 8-week action. Eady J then struck out as an abuse a further action against the BBC which raised similar factual issues. He ruled:

"The pursuit of the [BBC] action in the hope of salvaging something from the disastrous outcome of the previous action can only, in my view, be characterised as a desperate exercise in damage limitation. It represents one last throw of the dice. In all the circumstances I am afraid that I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantage for the parties in terms of expense, and the wider public in terms of court resources."

14. In 2005 the Court of Appeal were confronted with the argument that to dismiss a libel action as an abuse where there were only five publishees, one of whom was the claimant's solicitor and two others were business associates, infringed the Claimant's right of access to the court under ***art.6 ECHR*** [16]. Lord Phillips MR said:

"If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick." [17]

15. To see how far we have travelled in just over a decade, we need to wind the clock back to 1992 to a case called ***Joyce v. Sengupta*** [18]. The claimant was Princess Anne's maid, who had been accused of stealing her employer's confidential correspondence and handing it to a national newspaper. Because she could not obtain legal aid for libel, she cast her claim in malicious falsehood. The Judge struck it out, but in the Court of Appeal the newspaper's argument that the action was "economic lunacy" fell on stony ground. Sir Donald Nicholls V-C did not mince his words:

"Mr Browne's second submission was as bold as his first. He submitted that another reason why this action is an abuse is that only nominal damages, or at best modest damages of a few hundred pounds, will be recoverable by the plaintiff. The amount she stands to obtain is wholly out of line with the costs each side will incur....

With all respect to counsel, this is a hopeless submission..... let me assume that the defendants are correct in submitting that the plaintiff is unlikely to

---

[15] (2000) EMLR 296

[16] Jameel (Yousef) v. Dow Jones & Co Inc (2005) QB 946

[17] Ibid, para. 69

[18] (1993) 1 WLR 337

recover more than a few hundred pounds in damages..... Even so I do not see how it follows that this action should be struck out as an abuse. The plaintiff's main purpose in bringing this action is to clear her name. If she wins, she will succeed in doing so. Compared with a libel action, the amount of damages she may recover in malicious falsehood may be small, but there is no reason why she should not be entitled to pursue such a claim." [19]

[19] Ibid, p343E-H