

Controlling Costs in Defamation Proceedings – Reducing Conditional Fee Agreement Success Fees

This is a response to the “Controlling Costs in Defamation Proceedings – Reducing Conditional Fee Agreement Success Fees” Consultation Paper (CP1/2010) (“the Consultation Paper”). It is submitted on behalf of the Media Lawyers Association (“the MLA”) which is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of the MLA's members is set out in Annex 1.

Summary

The MLA refers to, and relies upon, the response it submitted to the Ministry of Justice's February 2009 consultation paper “Controlling Costs in Defamation Proceedings” (CP4/09). It does not propose to repeat those arguments at length here. A copy of that response is attached as Annex 2 for ease of reference.

The MLA remains concerned about the high legal costs involved in defamation and some other publication cases brought under conditional fee agreements (CFAs). The MLA agrees with the view expressed by the Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice in the Foreword to the Consultation Paper that the balance has now swung too far against publishers.

In brief, the MLA continues to believe that the most simple, effective and efficient way to curb most of the abuses that are complained about in the costs sphere in publication proceedings, while maintaining access to justice, is to;

- remove the recoverability of success fees and ATE premiums; combined with
- more proactive early costs management (capping and budgeting)
- introducing a proper requirement of proportionality into the Costs Practice Direction (supplementing CPR parts 43 to 48)
- introduce some simple procedural changes such as more use of early arbitration / and/or hearings on paper on preliminary matters such as determining the actual (as opposed to the capable) meaning.

A number of these matters have been discussed in detail in the Jackson Review of Civil Litigation Costs. The MLA endorses and adopts the recommendations of Lord Justice Jackson's Final Report. The MLA notes that the proposals set out in the Consultation Paper to reduce the CFA success fee that may be charged in defamation and some other publication-related cases are proposed ONLY as an “interim measure for dealing with disproportionate costs while the Government considers Sir Rupert's wider proposals which seek to radically change the existing arrangements for all cases where CFAs are used”. It is on that premise that this response is based.

As previously pointed out, access to justice is provided by the existence of CFAs, not by permitting success fees. It is not necessary to have recoverable success fees to give access to justice. When CFAs were initially introduced (without a success fee), practical experience of them demonstrated their effectiveness in promoting access to justice. Moreover, access to justice is not a one-sided process. It is not just about enabling impecunious claimants to litigate their cases, it is also about ensuring that defendants are not prevented from properly defending meritorious cases. Given that there appears to be no justification for retaining the recoverability of success fees in publication proceedings (see below) the MLA supports the MoJ's proposal that they should, as an urgent interim measure, be restricted to 10%.

1. Justification for 100% success fees

The justification that has been advanced for 100% success fees was to allow lawyers to recover costs that would accrue from a privately paying client on basis of taking on two cases each with a 50:50 prospect of success, and winning one and losing the other. The MLA believes that this is a fundamentally misconceived justification. The Claimant solicitors have never released any statistics to support this justification.

The MLA points to the statistical analysis carried out by Lord Justice Jackson on the impact of CFAs on Claimants' costs generally and on Claimants' costs in defamation proceedings in particular: see Jackson Preliminary Report Appendix 17, Final Report Chapter 2 para 7, Overall conclusion (Appendix 1 Tables 34/35). These statistics showed that, on an analysis of data provided by the MLA to the Jackson inquiry, (based on a sample of 154 libel and privacy cases against the media which were resolved by settlement or judgment in 2008 involving nine national newspaper groups, broadcasters and news agencies as well as local newspaper publishers), 27 of these (17.5%) were brought under CFAs, and that in 11 out of 16 cases (almost 70%) overall costs (sought by the claimant and the defence) exceeded £100,000. Almost all of the 154 cases settled before trial; none of the claims failed. Only three went to trial, all of which were won by the claimant, two were funded under a CFA.

Jackson LJ then carried out a further analysis of the data, consisting of 20 CFA cases, and concluded that in these cases C's costs on average were 230% of damages, and D's costs on average were 107% of damages. In the sample of 47 non-CFA cases, C's costs on average were 184% of damages and D's costs on average were 124% of damages. These figures reflect the general pattern of disparity found by Jackson LJ across the board in CFA cases, but, notably, these figures are considerably higher in defamation cases than in other civil litigation cases (see e.g. Final Report Chapter 2 Para 2.8 (District Judges) C's costs on average 158% of damages; and Para 2.14 (Circuit Judges) C's costs on average 203% of damages).

The MLA endorses the statement in the Consultation Paper (para 19) that "it is known that, in defamation cases, claimants are winning a much higher proportion of

cases suggesting they have a much higher than 50% chance of success. Indeed the figures for relative proportions of successful and unsuccessful claims (provided by MLA to LJ Jackson see Appendix 17 to Preliminary Report) indicate not a justification for 100% success fees but rather the abolition of success fees in defamation proceedings altogether”.

2. The Consultation Paper’s Proposals

The MLA has some concerns about the current definition which the Consultation Paper proposes with regard to which proceedings should be covered by the proposal (paragraph 5). The Consultation Paper proposes to use the following definition of defamation proceedings, as used in the amendments to the Civil Procedure Rules which introduced the 42 day ‘cooling off’ period with effect from 1 October 2009, namely:

- “defamation proceedings” means proceedings for—
- (a) defamation;
 - (b) malicious falsehood; or
 - (c) breach of confidence involving publication to the public at large.

We prefer the definition of publication proceedings suggested by the Ministry of Justice in its consultation paper, Controlling Costs in Defamation Proceedings, namely:

- "Proceedings which:
- a) include a claim for defamation or malicious falsehood; or
 - b) are brought in connection with any journalistic, literary or artistic material and include a claim
 - (I) for breach of confidence;
 - (II) for misuse or unlawful disclosure of personal or private information; or
 - (III) under the Data Protection Act 1998.

This definition covers all those cases where claimants might act under a CFA and where Article 10 issues are in play.

List of questions for response

Question 1. Do you agree that the Conditional Fee Agreements Order 2000 should be amended to reduce the maximum success fee to 10% in defamation proceedings? If you disagree please give your reasons.

Yes.

Comment

There is no genuine or actual risk of lots of cases being lost such as to justify a need to “compensate” for this risk by the use of large percentage success fees. Atkins Thomson, a firm of libel specialists say on their web site¹ that “it is a testament to our ability to judge these cases that, to date, we have never lost a claim undertaken on this basis” . Russell Jones & Walker gave evidence to the Select Committee on Culture, Media and Sport in February 2009. Partner Jeremy Clarke Williams said: "I think it should be pointed out as well that, of course, when the Conditional Fee Agreement is entered into by a firm of solicitors it can represent a very considerable investment by that firm because you are agreeing to act on a "no win, no fee". In my firm we have a very rigorous risk assessment procedure at the outset to decide whether or not we are prepared to take on a case on a CFA. So it is not surprising that the cases we do take on CFAs are ones we expect to win".

Charging large percentage success fees enables CFA lawyers to make excess profits. There is no statistical evidence to justify this practice, it is not economically efficient, nor does it assist access to justice (see Summary above and the MLA’s response to CP4/09); it is the availability of CFAs that assists access to justice not the existence of the success fee. It is not just about enabling impecunious claimants to litigate their cases, it is also about ensuring that defendants are not prevented from properly defending meritorious cases. At present the (double) burden of the recoverability of success fees (and ATE insurance premiums) is having a serious adverse effect on the ability of media defendants to challenge meritorious cases.

Keith Ashby and Professor Cyril Glasser, in an article in the Civil Justice Quarterly (The Legality of Conditional Fee Uplifts (2005) 24 CJQ 130, 134) say that the success fee—

"is added as a percentage bonus to the cost of work actually done, based not on any conduct or attribute of paying parties, but as a penalty for having lost in litigation against opponents who have entered into a particular type of contract with their own lawyers."

There is no justification, theoretical or practical, for maintaining success fees at anything other than a very low level, and then only as an emergency measure. They take no account of proportionately or reasonableness. The CFA regime contains no reference to proportionality of total costs (including additional liability) (see paragraph 11.9 of the Costs practice Direction).

Sir Anthony May, President of the Queen’s Bench Division, in his recent speech to the Law Society Costs Conference in Cardiff on 19 June 2009, who expressed (in a personal capacity) serious concerns about the use of recoverable “success fees”

¹ www.atkinsthomson.com/information-guides/Atkins%20Conditional%20Fee%20Agreements.indd.pdf

"I question whether this basic structure constitutes a principled approach to the assessment of costs which a losing party to litigation should be ordered to pay. Is it right in principle that a losing party should have to pay an additional amount, in excess of the proper and reasonable costs of the litigation, to cover the winning party's lawyer's costs of losing other cases on behalf of other clients? Is it in principle right that an eventual losing party to litigation should be at risk of paying a greater uplift if he has a strongly arguable case which he nevertheless loses, whereas, if he has a rotten case, the justifiable uplift will be less?"

The Privy Council in *Seaga v Harper (Jamaica)* UKPC 26, expressed similar concerns - Sir Henry Brooke noted the considerable disparity between the costs and the amounts at stake (a liability to pay J\$1.5 million was just over one eighth of the basic costs allowed by Master Hurst) and continued "The addition of a success fee to a fee that is reasonable and proportionate is almost certain to render the resultant fee unreasonable and disproportionate".

The current situation takes no account of proportionately or reasonableness of the total costs incurred (see paragraph 11.9 of the Costs Practice Direction). The Courts have acknowledged the inequity of the existing CFA regime – reducing recoverability of success fees to a maximum of 10% would allow those utilizing success fees to recover a small additional profit in regard to additional risk would go some way towards addressing this imbalance.

Question 2. What evidence would you offer in support of a maximum success fee in excess of 10%?

Not applicable.

Question 3. If you do not agree with the proposal on reducing success fees to 10%, what evidence would you offer in support of maintaining the status quo?

Not applicable. The MLA agrees with the proposal on reducing success fees to 10% on an emergency, interim basis, pending the introduction of the Jackson proposals.

Question 4. Do you think our proposal will affect competition in this area? If so please provide details.

No.

Comment

Please see comment on Q5 below

Question 5. Do you think our proposal to reduce success fee would have any particular impact on small firms? If so please give details of the likely costs

and effects you believe they will have and what action might be taken to reduce this impact.

No

Comment

The MLA does not believe these proposals would have any adverse impact on small firms. There is no empirical evidence that limiting the recoverable costs under CFAs would deter solicitors from taking on defamation cases. The MLA do not believe that this would impair competition or reduce consumer choice. It also needs to be borne in mind that this arena is not exclusively the prerogative of celebrities suing large publishers - increasingly it is members of the public who are suing [often each other] for defamation and curbing excessive costs will have a real impact on enabling those cases to be properly fought, which in turn is likely to involve increasing use of small firms. The more pertinent action if smaller firms are to be encouraged to practice in this area is to take steps to reduce its complexity procedurally and as a matter of substantive law. Those are not matters that are affected by the changes proposed in this paper.

Question 6. Do you agree with your initial assessment that the proposal will have no equality impact? If not, please detail what the net impacts are and who they affect.

Yes.

Question 7. Do you agree with our assessment of the Human Rights impact of the proposal? If not, please detail what other impact you think they will have.

No.

Comment

Currently, the excessive costs charged under CFAs in publication proceedings are having a severe chilling impact on the media and other publishers' freedom to publish. Incidentally, given the present intended definition of defamation proceedings" (see Para 5 of the Consultation Paper), it is not clear that the current proposal would in any event apply to cases of the sort envisaged by this question. In any event, the evidence of the Claimant lawyers (for example to the Select Committee) is that in reality they are not taking on high risk cases anyway.

**Media Lawyers Association
February 2010**

ANNEX 1:

List of MLA members:

1. **Associated Newspapers Limited**, publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.
2. **The British Broadcasting Corporation**, a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.
3. **British Sky Broadcasting Limited**, a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.
4. **Channel 5 Broadcasting Limited (Five)**, a public service broadcaster of the Five service and 2 digital channels, interactive services and related websites.
5. **Channel Four Television Corporation**, a public service broadcaster of the Channel 4 service and 3 digital channels plus new media/interactive services, including websites, video on demand and pod casts.
6. **The Economist Newspaper Limited**, publisher of the Economist magazine and related services.
7. **Express Newspapers**, publisher of the Daily Express, the Sunday Express, the Daily Star, the Daily Star Sunday and related websites.
8. **The Financial Times Limited**, publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.
9. **Guardian News & Media Limited**, publisher of the Guardian, the Observer and Guardian Unlimited website.
10. **Independent News and Media Limited**, publisher of the Independent, the Independent on Sunday and related websites.
11. **Independent Television News Limited (ITN)**, producer of ITV News and Channel 4 News, internet sites and mobile phones.
12. **ITV PLC**, a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.

13. **Macmillan Publishers Limited**, a global publishing group operating in more than 80 countries, including the book imprint Pan Macmillan.
14. **The National Magazine Company Limited**, publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.
15. **News Group Newspapers Limited**, publisher of The Sun and the News of the World, and related magazines and websites, and part of News International.
16. **The Newspaper Society**, which represents the publishers of over 1300 regional and local newspapers, 1500 websites, 600 ultra local and niche titles, together with 43 radio stations and 2 TV channels.
17. **PPA (The Periodical Publishers Association)**, which is the trade body for the UK magazine and business media industry. Its 250 members operate in print, online, and face to face, producing more than 2,500 titles and their related brands.
18. **The Press Association**, the national news agency for the UK and the Republic of Ireland.
19. **Telegraph Media Group Limited**, publisher of the Daily Telegraph, Sunday Telegraph and related websites.
20. **Thomson Reuters PLC**, international news agency and information provider.
21. **Times Newspapers Limited**, publisher of The Times and The Sunday Times and related websites, and part of News International.
22. **Trinity Mirror PLC (including MGN Limited)**, publisher of over 140 local and regional newspapers, 5 national newspapers including the Daily Mirror, Sunday Mirror and The People and over 400 websites.

ANNEX 2:

MLA Submission to Ministry of Justice consultation "Controlling Costs in Defamation Proceedings": April 2009

Controlling Costs in Defamation Proceedings

This response is submitted on behalf of the Media Lawyers Association ("the MLA") which is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of the MLA's members is set out in Annex 1. This response is also supported by the organisations listed in Annex 4.

Executive Summary

The MLA welcomes the Government's proposals. Reform of costs in Article 10 (freedom of expression) cases is long overdue. The current rules allow claimants to recover costs at levels that far exceed what is necessary to ensure access to justice. Punitive and disproportionate levels of costs are affecting freedom of expression, preventing the media from covering difficult stories and forcing it to settle claims where it is in the right.

The MLA's position on the issues raised by the consultation is as follows:

1. We agree that a maximum recoverable hourly rate should be fixed.
2. We seek mandatory capping of recoverable costs in all Article 10 cases.
3. We disagree with the proposals for notification of after the event (ATE) insurance policies. We think that defendants should be notified *before* these policies are taken out and they should not be taken out prior to proceedings being commenced.
4. We agree that defendants should be provided with proper details of ATE insurance policies, including of any staged premiums, the level of cover and relevant exclusion clauses. A copy of the policy should also be provided.
5. ATE insurance premiums should not be recoverable where claims are resolved without the need for court proceedings, or where the pre-action protocol has not been complied with by the claimant.
6. We agree that the proportionality test should be applied to total costs and not just base costs.

7. The rules above in 1 to 6 should apply to all cases falling within the test in paragraph 48 of the consultation, particularly as the trend is towards more 'misuse of private information' cases.

In addition, the MLA seeks the abolition of success fees in all Article 10 cases. Success fees are not necessary to provide access to justice and operate as an unjustified financial penalty on media defendants.

Introduction

Costs in cases which engage Article 10 are out of control.

The Human Rights Act 1998 incorporated into UK law a right to freedom of expression, as provided for in Article 10 of the European Convention on Human Rights. Despite a clear legal requirement that any interference with Article 10 rights must be no more than that which is necessary and proportionate², UK law imposes unfair financial sanctions on publishers – punishing free speech and giving a financial windfall to claimant lawyers.

A recent study by the University of Oxford found that England and Wales was up to four times more expensive for defamation actions than the next most costly jurisdiction (Ireland) and 140 times more costly than the other jurisdictions examined (when excluding England and Wales from the average).³

The issue of excessive *damages* in defamation proceedings was addressed by section 8 of the Courts and Legal Services Act 1990⁴, the Offer of Amends procedure under the Defamation Act 1996 (and its subsequent operation), and the decisions by the courts on damages in breach of confidence/privacy cases since the introduction of the Human Rights Act 1998.

The issue of excessive costs remains, and shows no signs of improvement. It is a real and significant problem affecting large and small media organisations alike:

- Small publishers (regional newspapers, websites, magazines) cannot now afford to fight legal actions, and face the prospect of closure if an action is brought.
- The potential cost of defending claims (even with a strong defence) is inhibiting the media from publishing stories in the public interest. This is sometimes known as the "chilling effect" that excessive costs have on freedom of expression. This

² The test of proportionality in respect of Convention rights was firmly established by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 A.C. 69. The three stages of the test are: (1) the legislative objective must be sufficiently important to justify limiting a fundamental right (often simply equated to the notion of "legitimate aim"), (2) the measure designed to meet the objective must be rationally connected to it, and (3) the means used to impair the right must go no further than is necessary to accomplish the objective.

³ University of Oxford, "A comparative study of costs in defamation proceedings across Europe" (2008).

⁴ Which allows the Court of Appeal to adjust libel awards which are excessive or inadequate.

problem has recently been highlighted by Eady J in *Peacock v MGN Limited*⁵ where he stated:

"As is obvious, the considerations that arise in defamation are rather special – not least because of the rights to freedom of expression protected under Article 10 of the ECHR . There is no doubt that the costs of libel litigation generally, and the implications of CFAs in particular, are capable of exerting a significant chilling effect on freedom of expression. As has been pointed out, on more than one occasion, there is a huge incentive in some cases to settle for purely commercial reasons without reference to the merits of any defences that may be available".

- Cases are being settled, and stories retracted, when there is no editorial reason to do so. Claimants worthy of censure are succeeding with claims simply because the media cannot afford to defend them.

These problems are exacerbated in cases where the claimant is represented under a Conditional Fee Agreement ("CFA") with a success fee. The CFA system was designed to provide access to justice to those unable to afford to instruct lawyers. However, the system has permitted some lawyers to:

- Charge double fees for acting for wealthy claimants who are more than able to afford to pay lawyers themselves, eg Sharon Stone, Marco Materazzi, Ashley Cole, Cherie Blair, Frank Warren and Naomi Campbell.
- Run cases in a wasteful and extravagant manner, with the client totally disinterested in keeping an eye on what they are doing. Costs are nearly always out of all proportion to the level of damages.
- Charge the highest rates that they can, because their clients have no interest in the rates being charged since they will never have to pay them.
- Refuse to settle claims unless their costs are met, because they are entitled to payment under their client retainer. This means that litigation can be continued even though damages and other terms have been agreed, because defendants will not pay all of the claimant's (inflated) legal costs.

Some examples are set out in Annex 2.

These problems could (and should) have been addressed by the Courts, but judges have been reluctant to do anything:

- First instance judges have been unenthusiastic about costs capping, notwithstanding strong guidance from the Court of Appeal.
- Costs judges have been allowing partner rates of £400 & VAT per hour, which becomes £800 & VAT per hour with a 100% success fee. This is despite clear guidance, as long ago as 2005, that defamation is not 'City work'.

⁵ [2009] EWHC 769 (QB)

- Costs judges rarely have experience in libel litigation and, in assessing the costs, often do not consider whether certain steps in litigation were necessary or not.
- Claimants have been allowed to recover ATE premiums of £68,250 for each £100,000 of cover.

In October 2005, Lord Hoffmann in *Campbell v MGN Limited*⁶ noted that the level of costs in media cases were such that “it may be that a legislative solution will be needed to comply with article 10”.

Claimant lawyers sometimes say that reform is not necessary, because media organisations are wealthy and able to afford the damages and costs that are awarded, whereas their clients cannot. Not only does this position ignore the provisions of Article 10, it is also mistaken. Very few media organisations can afford to fight cases regularly. Most publishers are small businesses, with low profit margins and few cash reserves. All media groups – large and small – are also suffering from significant financial pressures, brought about by a sharp fall in revenue, and more fragmented readers, listeners and viewers. Money is simply not available to fight most cases, leading to the danger of self-imposed restrained journalism and large corporations and high net worth individuals effectively being able to stop some (true) stories being published about them.

The Solutions

Urgent reform is now needed to ensure that UK law is compatible with Article 10 and to bring an end to disproportionate and unreasonable levels of costs being recoverable in media cases.

The MLA welcomes the Ministry of Justice's proposals as a good first step towards resolving some of the excesses in the costs system. If introduced, the proposals should help claimants and defendants alike to resolve disputes, allowing them to focus on constructive dialogue and the substantive issues, rather than on costs.

None of the proposals will jeopardise access to justice in any way, nor will they affect the level of compensation that claimants will receive. The only group likely to be affected by the proposals is claimant lawyers, but there is no reason why they will not continue to have viable and profitable businesses.

Hourly Rates

Question 1: Do you agree that a maximum recoverable hourly rate should be fixed?

Yes, as part of a package of reforms aimed at solving the problem of punitive costs in Article 10 cases.

⁶ [2005] 1 W.L.R. 3394

The MLA agrees with the analysis set out in the consultation paper on the current problems with high hourly rates. Hourly rates are a significant problem in both CFA and non-CFA cases. The level of base costs is an important factor in understanding the current problems faced by media organisations. High base costs impact on costs estimates, costs caps and the amount of any additional liability payable under a CFA.

Current Problems

Most claimant firms do not compete for business on price. Their clients rarely have to pay costs themselves, so they choose lawyers for other reasons, such as market reputation. Where claimants do pay bills themselves, they are usually corporates or high net worth individuals prepared to pay premium rates for market-leading firms.

The MLA has no difficulty with a claimant choosing to pay a premium rate for their lawyer. The problem it has is with premium rates being *recoverable*.

Claimant firms are now seeking to *recover* hourly rates as high as £650 + VAT per hour. Further information on claimant rates is set out in Annex 3. Rates paid by media defendants to their external lawyers are usually considerably lower than those charged by claimant firms.

This is not something that can be left to detailed assessment. For a start, most cases do not reach assessment, either because the defendant pays the rates claimed (to avoid the cost of further proceedings) or because a global deal is done.

When cases do reach detailed assessment, Masters typically allow £400 & VAT per hour for a Grade A fee earner. These figures are too high, and the MLA cannot see any justification for them. Whilst libel is a distinct legal specialism, cases are no more complicated than other types of routine civil litigation. Indeed, cases are often simpler, and result in significantly lower financial awards, than most High Court cases. Juries make libel time-consuming and unpredictable – they do not make it more complicated or specialist.

Solutions

The MLA seeks the introduction of maximum, rather than fixed recoverable hourly rates for each of the four grades of Solicitor fee earner, with separate rates for London-based firms and those outside of London. There should also be rates set for Counsel.

There should be a policy-led determination of the maximum recoverable hourly rates. We do not think that the Advisory Committee on Civil Costs is the appropriate body to set the rates. Few on the Committee appear to have experience of Article 10 cases, and the Committee is used to setting guideline rates based on actual market

data. The MLA suggests that rates are set by the Secretary of State in a practice direction to the Civil Procedure Rules.

For the reforms to make any meaningful difference, the maximum recoverable hourly rates need to be set at a level considerably lower than those currently allowed on assessment. The MLA thinks that rates should be set at the minimum level necessary to ensure that there are sufficient lawyers available to provide access to justice, eg a scale of recoverable costs similar to those found in criminal cases.

This will not affect the availability of suitable lawyers prepared to undertake media work, including both specialised and non-specialised solicitors from outside London who can (as Eady J envisaged in *Gazley v Wade*⁷) take advantage of the services of the specialist bar. Defendants use lawyers all the time that charge considerably lower rates, and there is no shortage of competition for this work. The current claimant firms will continue to act in such cases, as will the non-specialist firms that currently undertake libel work.

Costs Capping

Question 2: Do you agree that costs capping is likely to be appropriate in all or most defamation proceedings? If so, (a) do you think costs capping should be made mandatory or (b) should its consideration be made mandatory?

Yes. Mandatory costs capping in all Article 10 cases is essential in order to solve the problem of punitive costs in Article 10 cases, but will only work if judges are provided with a framework in which to set proper limits and are obliged to adhere to it.

Current Problems

In 2004, *Musa King v Telegraph Group*⁸ established that the then Civil Procedure Rules allowed for the making of costs capping orders in defamation cases. Brooke LJ stated:

"What is in issue in this case, however, is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs (estimated in this case to be about £400,000) if he wins. The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression of which Mr Beabey spoke in his witness statement, and to lead to the danger of self-imposed restraints on publication which he so much feared...

(...)

In my judgment the only way to square the circle is to say that when making any costs-capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will

⁷ [2004] EWHC 2675

⁸ [2005] 1 W.L.R. 2282

have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win."

Costs capping orders were subsequently made in a couple of cases, for example *Tierney v News Group Newspapers*⁹ and *Alberta Matadeen v Associated Newspapers (unreported)*. One was also agreed in the case of *Sharma v Associated Newspapers Limited (2008)* (unreported).

On 6 April 2009, and despite representations from the MLA as to the unsuitability of them, new costs capping rules were introduced which mean that costs capping orders can now only be made in very narrow and 'exceptional' cases, effectively overturning the decision in *Musa King* and removing judge's powers to actively manage costs.

The recent case of *Peacock v MGN Limited*, where judgment was given on 8 April 2009, demonstrates the problem that the new rules have already caused. This was a defamation case involving allegations of domestic violence; a case Eady J characterised as "just the kind of... dispute... which is tried regularly up and down the country at a fraction of the cost contemplated here". The claimant is funded by a CFA (100% success fee) with ATE insurance. The defendant sought a costs capping order to avoid having to potentially pay £800,000 if it lost after a ten day trial. Eady J was minded to grant a costs cap, following *Musa King* principles, but was unable to do so because of the new costs capping rules.

"However understandable the present concerns of the media or parliamentarians may be, it is obvious that I must apply the law and practice as it currently stands. ... submits on behalf of the Defendant that the court needs to "get a grip" in the present case, which he argues is admirably suited for a costs capping order. I have considerable sympathy for that view.

(...)

...it does seem to me that there is a substantial risk that costs will be disproportionately incurred and that, accordingly, it might well be in the interests of justice at this stage to make a costs capping order. My conclusion as to the risk of disproportionality is reached by reference purely to the matter of hourly rates and the proposal to instruct leading counsel...

(...)

If I had a free hand, and were to follow the guidance offered in *Musa King*, I should be strongly inclined to impose a costs cap and to refer the matter to a costs judge to address hourly rates..."

Judicial Support for Costs Capping

There is now significant judicial authority in support of prospective budget control in libel cases, rather than retrospective assessment at the end of a case.

Musa King v Telegraph Group, Brooke LJ:

"I have equally no doubt, for the reasons given by Sir Christopher Staughton in *Solutia*, that it would be very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed..."

⁹ [2006] EWHC 3275 (QB)

Master O'Hare's response to the DCA's 2004 consultation, in response to a question about defamation claims:

"In my opinion, in all high costs cases, the proportionality control on costs should be applied prospectively (ie, by setting budgets) rather than retrospectively (which happens in many cases at present). The CPRC should implement new rules on budgets for all high cost cases, not just defamation cases. In smaller cases the costs of budgeting may itself be disproportionate, but so may be the costs of assessments. The CJC and CPRC should continue to consider new rules on fixed costs wherever appropriate"

*Henry v BBC*¹⁰, Gray J:

"Mr Caldecott has... accepted that any cap would have to be prospective. He is right in my view to adopt that stance. There is ample authority that costs capping orders should invariably operate prospectively and not retrospectively.... The purpose of a capping order is to enable the capped party to plan ahead the appropriate level of expenditure to bring the case to trial at a cost which is in line with the amount of the cap".

Solutions

The MLA seeks mandatory costs capping in all Article 10 cases. Caps should be set at the allocation stage by the Master assigned to the case. In time, it is hoped that costs caps will be agreed between parties, in the same way that other directions are. Masters will also become adept at setting limits that are appropriate. Where hearings are necessary, we suggest that they are limited to one hour and a costs cap will simply become part of standard directions given at a case management hearing.

To ensure that costs caps are set at an appropriate level, there should be an express requirement in the rules that the Court takes into account Article 10, and proportionality, when setting a cap.

To have any teeth, the rules must also make clear that caps will not be increased retrospectively. Otherwise, this will become the norm, with satellite litigation each time it happens. If parties are going to exceed a cap, and seek to recover the increased costs if they win, they should be required to apply in advance, and also to show good reason for the change.

We do not think a requirement to consider costs capping is workable. This is likely to lead to satellite litigation over whether caps should be imposed, which will cost more than if a cost cap is simply imposed, and in practice is going to provide judges with an easy way to avoid dealing with costs issues.

The MLA does not agree that mandatory costs capping will add to the costs of each case. In fact, costs capping should reduce costs. Not only will it control, and reduce recoverable costs, it will help parties to save the often considerable costs of detailed assessment.

¹⁰ [2005] EWHC 2503 (QB)

ATE Insurance

Question 3: Do you agree that there should be a requirement to notify the other party that ATE insurance has been entered into in the letter before claim or at the earliest opportunity thereafter?

Question 4: Would it also be helpful to require early notice of (a) whether the premiums are staged and, if so, the points at which increased premiums become payable (b) the amount of insurance cover and (c) any exclusion clauses?

Question 5: Do you agree that the ATE insurance premium should not be recoverable where an offer or amends or admission of liability is made that leads to settlement of the substantive claim without court proceedings? If so (a) should a time period be specified during which the defendant must make the admission or offer of amends in order to avoid liability for an ATE insurance premium; (b) what should the period be?

The MLA agrees with the proposals in question 4, but they need to be bolstered by a requirement to provide a copy of the policy. In relation to questions 3 and 5, the MLA's position is that claimants should inform defendants before taking out ATE insurance policies, and they should not be taken out prior to proceedings being commenced. In addition, premiums should not be recoverable until proceedings are issued, and then only if the claimant has complied with the relevant pre-action protocol.

Current problems

There is no real 'market' for ATE insurance in defamation cases, with only two main insurers. Significant market distortion exists because the claimant purchasers of ATE policies have no interest in the cost of the insurance product since they never have to pay for it.

The main ATE insurance provider is called Temple Legal Protection Limited. It charges £68,250 (including tax) for £100,000 of cover. It has little competition. In its response to the DCA's consultation in September 2004, it confirmed "There is insufficient competition in the ATE market for... defamation. This is not a sign of a healthy ATE market". That remains the position in 2009.

The main problems with ATE insurance in Article 10 cases are:

1. Premiums: These are excessive and in a completely different league to those sought in cases such as personal injury. Indeed, they are so high that Temple describes ATE in libel cases on its website as "a useful negotiating tool once the opponent knows insurance is in place". Libel ATE policies generally have deferred premiums which only become due if the claimant is successful, in which case they are recovered from the defendant. The claimant never has to pay the premium. Without any constraints on the price that they can charge,

ATE insurers have been setting premiums for their policies which no rational person would agree to pay if they were spending their own money.

2. Inadequate cover: Libel ATE insurance policies usually only provide £100,000 of cover. Insurers say that additional cover is available up to £250,000 but the reality is that this is rarely taken out. £100,000 of cover provides little real protection to either party. The amount of cover will nearly always be inadequate to cover a defendant's costs. This means that where a defendant is successful at trial against an impecunious claimant, the reality is that the defendant will still be out of pocket for hundreds of thousands of pounds. Similarly, the policies can be of little benefit to a claimant. An unsuccessful claimant faced with a bill of £600,000 would get little comfort from a £100,000 ATE policy. It would meet only a fraction of his liability, leaving £500,000 to be met from his own funds.

An example of the problem of inadequate ATE cover is the case of *Henry v BBC*. On an application for a costs capping order (which was refused), Gray J summarised what he called "the predicament of the BBC":

"As will already be apparent, the predicament of the BBC at the time when this application was argued was an unenviable one. If the case goes to trial, the BBC's own costs will be £515K. If the BBC wins at trial, there is reason to doubt it will recover under the Temple policy. In any case, the BBC will not be entitled to recover more than 20% of its costs. The combined assets of the Claimant and her husband come to about £235K, most of which consists in the equity in the matrimonial home. The Claimant's share is therefore only £117k. Conversely if the claimant wins at trial the BBC will be faced with a bill of the claimant's costs which, inclusive of uplift, will total in the region of £1.6m. That figure is of course subject to assessment. On the other hand the BBC will also have to pay its own costs".

3. Exclusions: Carter-Ruck has confirmed that the ATE insurance policies that it uses from Temple will not always pay out in cases where a claimant's evidence is not accepted at trial in relation to a plea of justification. This problem was highlighted by Gray J, again in *Henry v BBC*:

"On 18 June 2004 the Claimant entered into an insurance agreement with Temple Legal Protection Limited. The limit of indemnity was £100k. Mr Andrew Caldecott QC for the BBC draws attention to what he submits are the highly significant exclusion clauses 2, 10 and 11 in the policy. Clause 2 provides that the insurer shall not be liable for disbursements or opponent's (i.e. defendant's) costs if the legal action is lost, discontinued or abandoned "as a result of the dishonesty of the insured". Clause 10 exempts the insurer from liability for such disbursements and costs if the insured or the appointed legal adviser has given "any fraudulent, false or misleading information in connection with the legal action". Clause 11 provides a similar exemption if the insured or the appointed legal adviser has "failed to provide any material information in connection with the legal action".

"The significance of provisions such as these is obvious in a case where one of the defences relied on is justification: if the defence of justification, involving as it does allegations of deception and cover-up on the part of the Claimant, were to succeed, it is, to put it no higher, very likely that the insurer would be able to disclaim liability for the costs incurred by the "opponent", i.e. the BBC."

In *Al-Koronky v Time-Life*¹¹, where an ATE policy had been taken out, Eady J said:

¹¹ [2005] EWHC 1688

“Here it has, after a considerable lapse of time, finally been acknowledged on the Claimants’ behalf by their solicitor that there is no ATE insurance that is likely to be of any value whatsoever to the Defendants should they succeed.”

The fact that costs may not be recoverable where a justification defence succeeds at trial (and the claimant is without resources) puts defendant publishers in a difficult position when deciding how to conduct the litigation. The prospect of successfully proving that the claimant has lied brings the possible consequence that the ATE insurance is invalid. This may influence the way a defence is put and undermine the defendant publisher's right to a fair trial.

4. Often unnecessary: Contrary to the widespread view that libel cases are difficult and uncertain for claimants, the reality is that the vast majority of libel cases are won (through settlement) by claimants, with the claimants having their legal costs paid by defendants. The fact that “the law of defamation was weighted in favour of claimants” was acknowledged by Lord Hoffmann in *Jameel & others v Wall Street Journal Europe Sprl*¹². Often, there is simply no need for ATE cover, yet some firms now take it out as a matter of course, irrespective of the merits of a particular case. Indeed, Carter-Ruck and Simons Muirhead and Burton obtain ATE cover from Temple before a defendant has even been told about the complaint, meaning that the defendant has to pay the premium even if it apologises straightaway. Typically this can be over £6,500 per claim. For small magazines and newspapers this is a significant expense. With larger media groups, the cumulative cost of these premiums is also burdensome.
5. Multiple premiums: There has been an increasing problem with defendants being asked to pay multiple premiums, for example where two individuals have complained about the same newspaper article, or a claimant sues multiple defendants over the same issues.
6. Individual ATE policies: Temple also appear to have introduced a new practice of individual ATE policies (with the normal excessive premiums) being taken out against individual newspaper titles, even though the titles are published by the same company, a decision which has just been upheld by Master Howarth in a detailed assessment on 30 April 2009.

Solutions - Timing

ATE insurance should not be obtained without giving the defendant notice and a reasonable opportunity to agree or object to such cover being taken out.

This is necessary in order to prevent ATE insurance being taken out in cases where

¹² [2006] UKHL 44. Lord Hoffmann said “until very recently, the law of defamation was weighted in favour of claimants”. The only change he referred to, in the area of defamation, were in his words “the House [of Lords] attempted to redress the balance in favour of greater freedom of the press to publish stories of genuine public interest” was in the area of qualified privilege. The implication is, therefore, that in all other areas [than those stories which are genuinely in the public interest and could be defended on the grounds of qualified privilege] the law remains “weighted in favour of claimants”.

the defendant has made a mistake and wishes to resolve matters quickly. It will also allow the defendant to assess the adequacy and value of any policy. Given the problems identified earlier in this note, it is only fair that defendants should be given an opportunity to raise objections before ATE insurance is taken out so that they do not have to pay for policies that are of little or no value.

In addition, ATE insurance premiums should not be recoverable from a defendant in any case that is resolved without the need for proceedings to be issued and served or where proceedings have only been issued in order to obtain a statement in open court. In publication proceedings, there is no financial risk to a claimant until the defendant has indicated that it intends to dispute liability, or proceedings are issued after compliance with the relevant pre-action protocol. It follows that there is no need for claimants to have ATE insurance at this stage, since there is no possibility of an adverse costs award being made against them.

There are other reasons why there should be a 'premium free' period at the beginning of cases.

Firstly, it will encourage parties to settle claims promptly, which is in the interests of both claimants and defendants. Parties are encouraged under the pre-action protocols and overriding objective to seek to avoid litigation by settlement before the commencement of a claim – proceedings are meant to be the last resort. A premium free period will encourage a defendant to settle cases quickly which it cannot defend.

Secondly, to be fair to defendants, they should be allowed a proper period of time in which to assess the merits of a claim before being made to pay a penalty ATE insurance premium. The principle of giving defendants time to investigate was acknowledged in *Nail v Jones & others*¹³ where Eady J said:

"I should add that it will normally *not* be regarded as an aggravating factor that a defendant takes time [in which to respond to a letter of claim], provided the delay involved is no more than is reasonable in the circumstances, in order to investigate the complaint and make a properly informed decision as to what steps to take. It may be said, in general terms, that the older the allegations are the greater the time needed to investigate."

"Following the recommendation of the Neill Committee, Parliament provided a longer breathing space for deciding whether to make an offer of amends than that which had been permitted under the previous scheme set out in s.4 of the Defamation Act 1952. One of the reasons why that had hardly ever been used was that it proved, in practical terms, very difficult to comply with the strict time limits imposed".

The MLA suggests the service of proceedings as the relevant trigger to allow defendants time to investigate. This is consistent with the pre-action protocols, which allow a reasonable time for a defendant to respond. It is not always possible for a defendant to respond straightaway (for example within 14 days) because:

1. In most defamation/Article 10 actions where a substantive defence is raised, the burden of proof is on the defendant, meaning that a defendant must advance a positive case in support of its defended position.

¹³ [2004] EWHC 647 (QB)

2. The journalist may have a substantial amount of material supporting the allegations, which would need to be collated, evaluated and assessed.
3. Media publishers use material from a range of sources. For example, user generated content submitted by the public, sometimes anonymously, content prepared by freelance journalists and news agencies and, for broadcasters, programming made by independent third-party companies. In some cases there is an international element, with relevant people, or sources of information, based overseas.
4. Complaints are not always received immediately after initial publication, meaning that materials are not always to hand, or people have moved to different projects or, indeed, employers. This is a particular problem where complaints are received about material first published more than a year ago - publications that should be outside of the limitation period - which have been republished or repeated. For example, content that is accessible from an online news archive, on DVD, or (in the case of television and radio/audio) is repeated, either by the same broadcaster or a different one.

In a defamation action where the defendant makes an offer of amends before proceedings are issued, there should not be any ATE premium payable since the claimant has not been subjected to any risk. As Eady J noted in *Campbell James v Guardian Media Group PLC*¹⁴:

“The Claimant knows he has, in effect, “won” and that he will receive compensation and vindication in due course. The Defendant has from that moment laid down its arms”.

In *Nail v News Group Newspapers Limited*¹⁵, May LJ said

“The claimant knows that his reputation has been repaired to the full extent that is possible. He is vindicated. He is relieved from the anxiety and costs risk of contested proceedings”.

The MLA cannot see any reason for offer of amends cases to be treated differently depending on whether Part 8 proceedings need to be issued. As a matter of principle, the position should be the same because the claimant will still know as soon as the offer of amends is made that s/he has won. When Part 8 proceedings result in a contested hearing, a claimant is already able to obtain protection on costs by making a reasonable Part 36 offer.

Alternatively, the MLA is content for a 30 day period, which we suggest is expressed as one month.

Solutions - Information

The defendant should be provided with details of the premium, the extent of the cover to be provided, the terms on which it is to be provided (including any exclusion clauses) and the stage or stages to be covered. This information should be provided

¹⁴ [2005] EWHC 893

¹⁵ [2005] E.M.L.R. 12

to the defendant together with a copy of the policy. In *Henry v BBC*, Gray J was critical of Carter-Ruck when it refused to provide proper details of an ATE policy:

“Both the amount of cover and the existence of material exclusions in the policy are of obvious relevance to the opposite party, who must be in a position to make informed choices as to the conduct of the litigation. If the discrepancy between the amount of cover and the updated estimate of costs up to and including trial had been made known promptly to the BBC (as they could and should have been), the present application could have been mounted far sooner. It is said on behalf of the Claimant that exclusions such as those contained in the Temple policy are commonplace in this field. If so, that is a further reason for candour on the part of the insured's solicitors about the possible limits on the ability of the opposite party to recover under the policy. It is also said on behalf of the Claimant that insurers such as Temple would be unlikely to seek to avoid liability by reference to the exclusion clauses summarised above. I see no reason why this or any other defendant should proceed on any such assumption particularly in a high cost case.

(...)

...the BBC was kept in the dark about the terms of the ATE insurance cover. That should not have happened: the BBC had a legitimate interest in knowing the extent of the protection provided under the policy. Whether or not the exclusion clauses in the Temple policy are commonplace, the BBC had a right to know what they were.”

There are two main reasons why this is important:

Firstly, defendants need to be able to calculate what cover is available if they are successful at trial, so they can take an informed decision on how to respond to a claim. This is because there is usually a gap between the level of insurance cover (typically £100k) and a defendant's costs. Claimants rarely have the resources to meet this gap, meaning that defendants must bear their own defence costs even if they win.

Secondly, if premiums are staged, defendants need to understand when their potential liability might increase.

In practice, information is provided already by some claimant solicitors, but this practice is not universal, and is also undertaken on a voluntary basis. The MLA cannot think of any practical, or commercial, reason why provision of this information and a copy of the policy should not be mandatory in all Article 10 cases.

Other reform needed

With extortionate base premiums, ATE insurance costs will remain disproportionate and unreasonable even after the introduction of the Government's proposals. The MLA suggests the following changes are also made:

1. The rules should provide that when assessing whether an ATE insurance premium is proportionate and reasonable, the Court should not take into account usual premium rates on the ATE libel 'market'. This is because there is not a competitive market, as such, for ATE insurance in Article 10 cases.
2. There should be a cap limiting the recoverability of any base premium (before discount) to 30% of the level of cover.

3. ATE insurance premiums need to be reduced depending on the stage at which a case is resolved, with a period at the start of the claim where no ATE premium is payable, and the full premium only becoming due when a case reaches trial.
4. Any rule change also needs to deal with cases where a membership organisation has self-insured the claimant's costs. These premiums can be extremely high. In the case of *Miller v Associated Newspapers*¹⁶, the membership organisation informed the defendant that, if successful at trial, it would seek payment of a £616,646 premium for cover of £1 million. This was not, of course, a real premium. As the membership organisation was self-insured, the premium was really just a payment to the organisation for having promised to indemnify one of its members if they lost in the proceedings. The proposals set out above on ATE need to be applied in the same way to membership organisations.

Proportionality

Question 6: Do you agree that the courts should apply the proportionality test to total costs and not just base costs?

Yes, in all Article 10 cases.

Paragraph 11.9 of the Costs Practice Direction, which expressly allows costs to be recovered at a level which is considered by the Court to be disproportionate, is incompatible with Article 10 to the extent that it is applied to publication proceedings.

In CFA cases, the addition of a success fee and ATE premium results in a defendant having to pay costs at a level that is accepted to be disproportionate. As Eady stated in *Tierney v News Group Newspapers Limited* "it is inherent in the new regime that such litigants [CFA litigants] may well recover what would traditionally have been seen as unreasonable and disproportionate costs". This position cannot be compatible with Article 10, where any interference must be proportionate and necessary.

To remedy this problem, CPD 11.9 should either be deleted, or amended to make clear that it does not apply in Article 10 cases.

Definition of Article 10 cases

Question 7: Should the proposals apply to (a) defamation disputes only (b) a broader definition based on context (c) disputes defined by way of a wider list of causes of action? Please say which option you prefer and why. If option (b) please suggest how you would define the scope and give reasons. If option

¹⁶ [2005] EWHC 557 (QB)

(c) please say whether you agree with the definition suggested at paragraph 48 or propose an alternative definition.

Option (c) – using the wording in paragraph 48.

All defamation and malicious falsehood claims – whether against the media, companies or individuals – raise issues of freedom of expression, and so should be included in the costs reforms.

The same is not true in cases for breach of confidence, misuse or unlawful disclosure of personal or private information, or under the Data Protection Act 1998. Whereas all cases brought against the media are likely to raise Article 10 issues, it is quite possible that claims could be brought against others that do not. The MLA thinks the proposed definition works because it is limited to claims that relate to journalistic, literary or artistic material, making use of the same definition found already in the Data Protection Act 1998, the Freedom of Information Act 2000 and the Human Rights Act 1998.

Claims for misuse of private information are, following the decision of the Court of Appeal in *McKennit v Ash*¹⁷, increasing. In time they may exceed the number of defamation actions, which is why it is essential that the changes apply to all of the proceedings referred to in paragraph 48.

Other questions

Question 8: Do you agree with the estimated costs and savings to legal businesses, media defendants, ATE insurers and the Courts? Will any additional costs or benefits arise from these proposals?

The MLA has no comment to make.

Question 9: Do you agree with our initial view that the proposed changes will have no equality impacts? If not, please explain your reasons.

The MLA has no comment to make.

Question 10: What would be the potential costs/savings to your business of the proposals? Please explain how these costs or savings will arise, indicate the size of your business; micro (1-9), small (10-49), medium (50-250) and also which sector you operate in.

The proposals will lead to costs savings to the MLA's members. If implemented properly, costs controls will limit all litigants' potential exposure to costs liabilities. In addition, parties will know that they will not recover all their costs if they win – and so they are likely to litigate more efficiently.

¹⁷ [2006] EWCA Civ 1714

**Question 11: Are there any competition impacts arising from these proposals?
Please give details.**

The MLA has no comment to make.

Reform of Success Fees

In addition to the proposals set out in the consultation paper, the MLA invites the Government to abolish the recovery of success fees in all Article 10 cases.

Five years ago, the media started to raise concerns about the level of success fees in CFA cases. At that time, claimant lawyers were routinely charging 100% success fees in all defamation cases, even where cases were settled promptly, or it was clear that a claimant's case was strong. It had also become clear that claimants represented under CFAs had little interest in the rates that their lawyers charged, or the amount of work undertaken, because they knew that they would never have to pay them.

CFAs can encourage claimants to bring proceedings where they perhaps should not do so. In the recent case of *Noorani v Calver*¹⁸, Coulson J said:

"There is no doubt that in certain cases a CFA can be beneficial and allow a claim to be brought where otherwise the claimant may not have had the financial resources to come to court.

But, so it seems to me, the operation of a CFA agreement in practice can be fraught with difficulties, and can be a positive disadvantage for the other party. This case is a good example.

I am in no doubt that, if the claimant had not had the advantage of a CFA, and had to pay all his legal costs as they fell due, as the defendant had to do, he would have realised much earlier that his claim should not be pursued, and that he was running a wholly unjustified financial risk.

The existence of a CFA can inure a party like the claimant to the chilly winds of reality; it can make him oblivious to the significant financial risk that he is running, and the potentially ruinous costs liability that he may be incurring.

In my judgment, the conduct of libel proceedings on credit is a thoroughly bad idea, and I consider that the claimant's CFA agreement was a factor in the wrongful maintenance of these proceedings, and their thoroughly unsatisfactory conclusion".

In February 2009, the Bar Council published a discussion paper in which it observed:¹⁹

"There is a structural flaw with the present CFA regime. Clients have no real interest in the size of costs incurred on their behalf. They have no true interest in the outcome of an inter parties assessment. If inflated base costs are assessed downwards, the lawyers can usually still make good through the success fee...

(...)

¹⁸ [2009] EWHC 592 (QB)

¹⁹ The Merits of a Contingent Legal Aid Fund, discussion paper.

We have already drawn attention to the perception that costs have risen unjustifiably in much litigation. We believe the existence of CFA's may have been a hidden driver because of the lack of client interest. Conversely, if in CFA cases the success fee and ATE premium are not recoverable, the client would have real and indeed substantial interest in keeping his base cost to a sensible minimum...".

In response to Government consultations, and a Civil Justice Council mediation, some claimant lawyers have introduced voluntary staged success fees. In 2007, the Government consulted on a system of fixed success fees. The MLA remains disappointed that the Government chose not to implement reform in this area and instead left the system on a voluntary footing.

MLA members have started to see a return by some claimant lawyers to more onerous success fees. In one recent claim, claimant lawyers sought a success fee of 100% for a case in which pleadings had just closed. Without regulation in this area, there is no reason why claimant lawyers will not return to seeking 100% success fees routinely in all cases.

As Jack Straw said to the Labour Party conference in 2008: "... but the behaviour of some lawyers in ramping up their fees in these cases is nothing short of scandalous so I am going to address this and consider whether to cap more tightly the level of success fees that lawyers can charge".

Success fees were introduced to ensure access to justice; however, there is no mechanism whereby the recovery of a success fee in one Article 10 case leads to the provision of legal services to a person who requires (and has been denied) access to justice. It was thought that without success fees, solicitors would not be prepared to take many cases on a no win, no fee basis. Whilst this might be true for some areas of legal practice, defamation is very different. It is doubtful (and there is no evidence to suggest) that success fees were ever needed to ensure a ready supply of claimant lawyers prepared to act on a no win, no fee basis in meritorious cases.

There is, in fact, little risk to claimant lawyers taking claims on a no win, no fee basis. Defamation is not a particularly risky area of law for claimants. Nearly all claims settle – we estimate that costs are paid to claimants as part of a settlement in at least 90% of claims, probably more. Of those cases against the media that do not settle, a recent analysis (based on data included in a book written by David Price²⁰) showed that over a period of 13 years to 2003, newspaper defendants in jury libel trials won just 18% of trials. As one claimant lawyer has said "When a libel case gets close to trial the odds are stacked in favour of the claimant".

Moreover there are no statistics available from the main claimant firms as to how many CFA cases they have won and how many they have lost. As the Government has been told before, we suspect this is because very, very few CFA cases are lost, thereby indicating that existing success fees are excessive and also unnecessary in this area of the law.

²⁰ *Defamation: Law, Procedure and Practice*, Third Edition (Sweet & Maxwell, London, 2004) Appendix 3, Page 561.

The abolition of the recovery of a success fee in all Article 10 cases would also help remove the unattractive situation, which currently exists, whereby wealthy claimants (examples of whom are given above) – who make up a disproportionately large percentage of claimants in Article 10 cases – utilise CFAs which, as the Ministry of Justice's own website states, are supposed to "provide access to justice for those who could not afford to pursue litigation".

In Ireland, solicitors regularly act on a no win, no fee basis, without a success fee. There is a ready supply of lawyers available to undertake libel work. Even in England and Wales before the introduction of recoverable success fees, fees were often not paid by a claimant until the end of a case, and were then often confined to the amount recovered from a defendant.

The Government's submissions in *MGN Limited v United Kingdom* make clear that section 58 of the Courts and Legal Services Act 1990 permits a CFA to include a success fee but "does not require that any CFA in fact provide for the payment of a success fee".

Even once the changes which are proposed in the consultation paper have been made, as long as CFAs with success fees recoverable from the losing party are permitted in Article 10 cases, the system will arguably not be compatible with Article 10.

The reality is that there is little justification for the payment of a success fee, which merely gives a windfall to claimant lawyers. It is for this reason that the MLA asks the Government to abolish the recovery of success fees in all Article 10 cases.

**Media Lawyers Association
30 April 2009**

ANNEX 1: List of MLA members: [Not repeated]

ANNEX 2: Examples and data

The following cases include judicial criticism and concern about the level of costs in publication proceedings:

1. *Campbell v MGN Limited*, in which Lord Hoffman talked of the "blackmailing effect" arising out of the use of CFAs by impecunious claimants without ATE cover and/or the conduct of a case by claimant solicitors in a manner which forced defendants to run up "substantial costs".
2. *McKenna v MGN Limited* (unreported), in which Eady J highlighted the differences between costs in libel and clinical negligence cases and said that

the costs incurred in that case might “raise eyebrows” and require close scrutiny. In that case, the claimant recovered damages of £25,000 and the claimant’s costs were well over £800,000 plus VAT.

3. King v Telegraph Group Limited, in which, Brooke LJ identified the chilling effect on freedom of expression caused by CFAs:

“What is in issue in this case... is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs... if he wins. The obvious unfairness of such a system is bound to have a chilling effect on a newspaper exercising its right to freedom of expression... and lead to the danger of self-imposed restraints on publication which he so much feared.”

Brooke LJ confirmed the availability (and desirability) of costs capping in libel CFA cases.

4. King v Telegraph Group Limited, in the detailed assessment proceedings, Senior Costs Judge Hurst thought it “inconceivable” that an ordinary litigant would allow solicitors to incur base costs of £317,523 in order to obtain judgment for £130,000.
5. Peacock v MGN Limited, in which Eady J stated:

"As is obvious, the considerations that arise in defamation are rather special – not least because of the rights to freedom of expression protected under Article 10 of the ECHR . There is no doubt that the costs of libel litigation generally, and the implications of CFAs in particular, are capable of exerting a significant chilling effect on freedom of expression. As has been pointed out, on more than one occasion, there is a huge incentive in some cases to settle for purely commercial reasons without reference to the merits of any defences that may be available".

Examples of cases where total costs were clearly disproportionate include:

1. Jones v Associated Newspapers²¹. In this libel case which reached trial the claimant was awarded £5,000 in damages by a jury. He sought around £388,000 in costs (including VAT and a CFA with a success fee of 100% on both solicitors' and counsels' fees). The partner dealing with the case at the claimant's firm of solicitors charged an hourly rate (before 100% uplift) of £400. Costs were eventually agreed at just over £316,000. By comparison, the defence costs (using Devon-based solicitors) were £136,000.
2. Cox & another v MGN Limited & others²². The case settled on payment of damages of £50,000. The Claimants were represented on a CFA with base costs of £142,728, which with a 95% success fee meant total costs were in excess of £270,000. The costs of the first defendant, which effectively handled the entire case, were under £50,000.
3. Campbell v MGN Limited. Campbell was awarded damages of £3,500 at trial. For a hearing before the House of Lords, Campbell sought costs of £594,470.

²¹ [2007] EWHC 1489 (QB)

²² [2006] EWHC 1235 (QB)

Her Solicitor's base costs were £169,733 with a success fee of £161,256. In contrast, MGN Limited's Solicitor's costs were £43,084, meaning that Campbell's Solicitors were seeking base costs 8 times greater than MGN's.

4. *Amar v BBC* (2008). In this libel and privacy claim an offer of amends was made three weeks after receipt of the letter of claim and accepted ten days later. The claimant had the benefit of a CFA with initial success fee of 25% as well as a stepped ATE insurance policy with £100,000 of cover. The total costs claimed by the claimant were £66,824 (including disbursements), comprising over 125 hours of work carried out by five separate fee earners in the claimant's solicitors firm, including 66 hours of partner time and 33 hours of an assistant solicitor. More than 101 hours of work was carried out after the letter of claim had been sent. The BBC queried these costs, and a bill of costs was drawn seeking the reduced sum of £57,485, comprising 38 hours of partner time and 42 hours for an assistant. By contrast, the BBC's lawyers spent 40 hours in total. The BBC has recently served its points of dispute.

Data

In March 2009, data on libel and privacy claims resolved in 2008 was collected for Lord Justice Jackson from 9 national newspaper groups, broadcasters and news agencies, as well as from the Newspaper Society which represents the interests of local newspaper publishers.

The data showed that:

1. Of the 154 claims that resulted in the media having to make a financial payment, 149 involved payment by the media of the claimant's lawyer's costs. In the remaining 5 cases, only damages were paid, with each party bearing their own legal costs.
2. There was a huge disparity between the costs of claimants and those of defendants, particularly in the higher value cases. For example:
 - a. A case in which the media's costs were £38,460 compared to the claimant's costs of £286,001, in a claim that was settled for damages of £12,500.
 - b. A case in which the media's costs were £557,750 whereas the claimant was seeking costs of more than three times this, of £2.033m.
3. In the majority of cases, media defendants paid more towards the claimant's legal costs than they did in damages. In fact, excluding cases where a global sum (covering costs and damages) was agreed, the schedule shows payments of £3,091,217 in damages, compared to £9,507,049 for claimant's costs. The most expensive cases included:
 - a. A case in which the claimant spent £2,033,145 to recover £115,000 in damages (damages approx. one seventeenth of costs).

- b. A case in which the claimant spent an estimated £1,700,000 to recover £105,000 in damages (damages approx. one sixteenth of costs). This was not even a CFA case – if it had of been, costs could have been double.
4. As a direct result of the costs regime, libel trials have become rare with the media defending very few defamation or privacy claims. There were just two defamation trials and one privacy trial contained within the data.
 5. In all the other cases identified, the media settled. This was either because a claim had merit or, in an increasing number of cases, because the media organisation could not afford to defend, or take the risk of a jury trial, even though the claim was unmeritorious.
 6. In only 27 of the cases (16%) was the claimant represented under a CFA, which demonstrates that CFAs are not necessary to provide access to the courts for libel and privacy claimants.

ANNEX 3: Costs of claimant firms:

Claimant Hourly Rates

The MLA has compiled the data below from information provided to its members about base costs by claimant firms in Article 10 cases. In the time available, it has not been possible for members to undertake a comprehensive review of all their files, but we believe the data shown gives an accurate picture of base rates claimed.

We understand that Carter-Ruck has different rates for CFA and non-CFA cases. Where we know that a rate is not used for CFA cases, we have said so. We do not know with certainty whether the rates quoted for other firms are the ones charged in CFA cases, whether all of the firms listed conduct CFAs (although we are confident that the vast majority of them do), or whether all of the firms charge success fees up to the permitted maximum of 100%. For illustrative purposes, however, we have shown the effect of a CFA uplift of 100% and VAT on the rates claimed.

In most cases, claimants are not registered for VAT, which has to be paid by defendants – this becomes a real cost because defendants are unable to offset these sums against output VAT.

Firm	Band	Net Base £	Uplift (100%) £	Sub- total £	VAT 15% £	Total hourly rate £
Schillings	A	650	650	1,300	195	1,495
Teacher Stern	A	580	580	1,160	174	1,334
Carter-Ruck (Non CFA)	A	500		500	75	575
Charles	A	475	475	950	142.50	1,092.50

Firm	Band	Net Base £	Uplift (100%) £	Sub- total £	VAT 15% £	Total hourly rate £
Russell						
Schillings	A	475	475	950	142.50	1,092.50
David Price	A	450	450	900	135	1,035
Addleshaw Goddard	A	445	445	890	133.50	1,023.50
Harbottle & Lewis	A	430	430	860	129	989
Carter-Ruck	A	400	400	800	120	920
Withers	A	370	370	740	111	851
Simons Muirhead & Burton	A	350	350	700	105	805
Atkins	A	350	350	700	105	805
Addleshaw Goddard	B	330	330	660	99	759
Teacher Stern	A	325	325	650	97.50	747.50
Russell Jones & Walker	A	320	320	640	96	736
Harbottle & Lewis	A	310	310	620	93	713
Charles Russell	B	305	305	610	91.50	701.50
Addleshaw Goddard	C	290	290	580	87	667
Teacher Stern	B	285	285	570	85.50	655.50
Atkins	B	250	250	500	75	575
Carter-Ruck	C	250	250	500	75	575
Schillings	B	250	250	500	75	575
David Price	C	240	240	480	72	552
Russell Jones & Walker	B	225	225	450	67.50	517.50
David Price	C	220	220	440	66	506
Charles Russell	C	215	215	430	64.50	494.50
Schillings	C	215	215	430	64.50	494.50
Simons Muirhead & Burton	C	190	190	380	57	437
Harbottle &	D	175	175	350	52.50	402.50

Firm	Band	Net Base £	Uplift (100%) £	Sub- total £	VAT 15% £	Total hourly rate £
Lewis						
Teacher Stern	C	165	165	330	49.50	379.50
Carter Ruck	D	160	160	320	48	368
Addleshaw Goddard	D	160	160	320	48	368
Schillings	D	135	135	270	40.50	310.50
Simons Muirhead & Burton	D	130	130	260	39	299
Charles Russell	D	125	125	250	37.50	287.50
David Price	D	100	100	200	30	230

These hourly rates for the base costs can be summarised as follows. These rates exclude VAT :-

	Grade A	Grade B	Grade C	Grade D
Addleshaw Goddard	£445	£330	£290	£160
Atkins	£350	£250		
Carter-Ruck	£400 - £500		£250	£160
Charles Russell	£475	£305	£215	£125
David Price	£450		£220 - £240	£100
Harbottle & Lewis	£310 - £430			£175
Russell Jones & Walker	£320	£225		
Schillings	£475 - £650	£250	£215	£135
Simons Muirhead & Burton	£350		£190	£130
Teacher Stern	£325 - £580	£285	£165	
Withers	£370			