THE ALTERNATIVE LIBEL PROJECT

A FINAL REPORT ON THE PROBLEMS CREATED BY DEFAMATION PROCEDURE WITH RECOMMENDATIONS FOR CHANGE

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the voice of free expression

ENGLISH PEN

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EXECUTIVE SUMMARY

The Alternative Libel Project demonstrates that there are alternative methods of dispute resolution which can help parties resolve disputes in a timely, cost-effective and fair manner. Alongside strong encouragement to promote their use, there needs to be reform of the court process by which a claim for defamation can be made or defended.

Defamation cases could be resolved early and at lower cost if parties used alternative methods of dispute resolution (ADR):

- Mediation has a success rate of more than 90 per cent in libel actions. It enables parties to establish the merits of their case in an efficient and effective manner, whilst exploring practical solutions available

- Arbitration can succeed in resolving key issues early. Parties obtain a binding decision from an experienced lawyer or retired judge on key issues, resolving the most contentious issues and enabling the parties to settle the case

- Early Neutral Evaluation (ENE) has a high success rate in family law and in the Technology and Construction Court. It allows judges to give an opinion on the merits of a case on the basis of a short and straightforward hearing. It permits both parties to argue their case and gives them an early and frank assessment of their chances which may assist parties in settling the case

The government must promote the routine use of ADR as well as ensuring the court process is accessible and the court takes action to redress any inequality of arms between the parties. To do this we recommend the government:

- Amends the Pre-Action Protocol to encourage ADR

- Requires courts to make orders that parties consider using ADR and, if they think it is unsuitable, file a witness statement explaining why. The parties' approach to ADR and those witness statements must then be considered in making awards of costs: parties who refuse to use ADR unreasonably should be penalised

- Allows judges to carry out ENE

- Creates a presumption that a judge invites parties to ENE unless the parties have attempted to mediate or have narrowed the issues through arbitration, or it appears to the judge that one party is trying to use its financial weight to bully another in the course of the case

- Introduces an independent hearing on meaning

- Requires judges to be more robust in managing cases that come before them

- Makes costs rules which allow judges to redress an inequality of arms between the parties

FOREWORD

With the assistance of research funded by the Nuffield Foundation, English PEN and Index on Censorship, two organisations committed to the protection and extension of free expression, have prepared this report on alternative and better ways of resolving defamation disputes.

While, as they stress, the report is theirs alone, the two organisations have called on the advice of a panel of experts which it was my privilege to chair and which has sought in its meetings to keep in mind two particular things.

One is that a defamation lawsuit is always an emotional and financial nightmare for one party, and as often as not for both. The other is that in defamation there are no regular good guys and bad guys: the claimant may be a decent individual whose reputation has been unjustifiably wrecked, or a bully trying to suppress legitimate criticism; the defendant may be a wealthy organisation prepared to trample on reputations for profit, or a courageous writer who has offended someone powerful.

Whatever reforms are adopted, one size must fit all of these. Our advice has been given with this in mind. It has also taken into account a growing body of experience of non-litigious dispute resolution and of procedural short cuts, such as early neutral evaluation, within the litigation process.

There will continue inevitably to be cases with only one realistic outcome which will have to either settle or go to trial; but there are likely to be many more which, with help and encouragement, can reach a satisfactory conclusion without going the long and costly road to a full hearing.

PEN's and Index's proposals for achieving this are in the nature of things exploratory, but they have been very carefully researched and well thought through. I commend them to the attention of litigants, lawyers and policymakers.

The Rt Hon Sir STEPHEN SEDLEY
Chair, Advisory Committee

INTRODUCTION

Libel cases cost too much money, take too long to resolve and often result in outcomes with which neither party is happy. The cost, rather than the merits of the case, too often determines the outcome of defamation claims.

There needs to be urgent reform of the process by which a claim for defamation can be made or defended. The right procedure is critically important: it determines whether people can enjoy their rights in theory or in practice.

An effective and efficient resolution of libel and slander claims is possible where parties want such a resolution. But for this to happen routinely, the government must promote a significant change in the way that both parties and the court approach cases.

For the parties, this change would mean seeking the assistance of a neutral third person to help settle the case where initial correspondence has failed. This could be through mediation, Early Neutral Evaluation or narrowing the issues through arbitration. For the court, this would mean using its resources and powers to enable and encourage the parties to reach a resolution, and ultimately punish parties who act unreasonably by refusing to try to settle the case.

To promote a change to a culture of engaging in these ADR practices, the government must create procedural and costs rules to allow the court to influence parties' behaviour before and during litigation. It must also ensure that the court itself is accessible to anyone, regardless of their resources. This means ensuring the court uses its power to prevent wealthy bullies from abusing the court process to intimidate the other party.

With the exception of some of the rules on costs (which are the subject of a Bill before Parliament), none of our recommendations require primary legislation. They can all be implemented by rule changes and judicial action, which means they can be achieved quickly.

INTRODUCTION

Changes to procedure need to be made alongside reform to the substantive law of defamation: a perfectly fair and balanced substantive law will not result in fairness if it is prohibitively expensive to establish a person's legal rights; likewise, a perfect procedure cannot lead to justice if the law applied by the courts is itself unjust. Lord Bach recently echoed the same concern when he said 'You can have the best system in the world, but if only very few people can actually use it, it is not much good.'[1]

Our report must of course be set in the context of the Leveson Inquiry, which is examining the practices of the media, who are often litigants in libel actions. We are conscious that Lord Justice Leveson may recommend the establishment of a new body that offers adjudication or arbitration for cases involving the media. We would welcome this, as we do any form of alternative dispute resolution (ADR) which the parties choose to use because it is cheaper and faster while being as fair as litigation.

There is some support for the establishment of a dedicated tribunal for defamation and privacy issues. In 'Free Speech Is Not For Sale'[2] English PEN and Index on Censorship supported this proposal. It has become clear in the course of this project, however, that introducing such a tribunal would not cure the ills of the current defamation process. The costs and speed of a tribunal depend on the powers of its chairperson and rules of procedure, just as the costs and speed of a court depend on the powers of a judge and rules of procedure. The introduction of a tribunal would therefore risk being merely a change in style rather than substance.

We believe the issue of procedure in defamation cases is of fundamental importance for the protection of freedom of expression in the UK, and we are extremely grateful to the Nuffield Foundation for making it possible for Index on Censorship and English PEN to carry out this research.

Our thanks also go to the many lawyers, journalists, alternative dispute resolution specialists and others who have given us their time and the benefit of their expertise in the course of this project. The names of those who have so generously given us their advice appear in Appendix 1.

We would particularly like to thank the members of our advisory committee and Sir Stephen Sedley, the chair. The advice of our committee members has been invaluable. We have been guided by their many and varied expert opinions throughout the course of this project. The views expressed within this report are, however, those of English PEN and Index on Censorship and not all of these are necessarily shared by those who have advised and supported us.

1 Lords Hansard, 30 January 2012, Column 1378

2 2009, http://libelreform.org/reports/LibelDoc_LowRes.pdf

THE PROBLEM

Many people in this country would view the prospect of becoming involved in a defamation claim with dread. The uncertainty, duration and cost of proceedings mean that potential claimants may hesitate to pursue a case where they may have a legitimate grievance, while potential defendants may decide against publishing an article or a book despite believing that it would be in the public interest to do so. Cases settle because of factors such as cost rather than agreement on their merit. This undermines freedom of expression, compromises reputational rights and harms the image of the English and Welsh justice system.

CASE STUDY

Two long-standing foster parents were accused of terrorism in a national newspaper. The accusations were without foundation, but although their employer accepted the allegations were untrue, there was concern about the press attention. The couple lost their role as foster carers and with it their income. They sought initial advice from a defamation lawyer and were advised they had a very strong case. Despite this, and the knowledge that a CFA [Conditional Fee Agreement] and ATE [After The Event] insurance would be available, they were worried about the litigation process and afraid of losing their life savings and home. Still traumatised by the effect of the publication, they decided not to sue. The allegations therefore remain unchallenged.

The fear of being drawn into defamation proceedings may also deter people from publishing material without considering the possible strength of their defence. Website hosts and internet service providers (ISPs) may remove sites and content when they receive a threat of libel action, and book publishers may err on the side of caution when editing material submitted for publication.

In a recent survey by the Publishers Association[3] its members said they spent an average of £200,000 a year on pre-publication libel reading, libel insurance and defending libel threats, and that defending a libel case that reached the courts cost an average of £1.33m.

In a House of Lords debate, the historian Lord Bew gave a striking example with reference to a newspaper article he had written: 'In the past two or three weeks, the Bloody Sunday report of the noble and learned Lord, Lord Saville, put a number of contentious matters beyond all reasonable doubt. I left out several paragraphs of those articles because there was still so much space for possible libel action, even though I was confident that what I wanted to say was definitely true. It simply was not worth putting the newspaper through the struggle or argument or difficulties that it might subsequently face, even in a context in which so much has been clarified beyond doubt.'[4]

Why are people so afraid of becoming involved in a defamation claim? Firstly, it is a question of expense. Headlines such as 'BBC to pay £1m over Mohamed Taranissi libel battle'[5] in the Daily Telegraph bring the high costs of defamation

[3] Appendix I to the Publishers Association submission to both the Ministry of Justice consultation on the Draft Defamation Bill and the House of Commons and House of Lords Select Committee on the Draft Defamation Bill http://www.publishersassociation.org.uk/images/stories/Policy/pa response to draft defamation bill - final - 9 june 2011.pdf

[4] House of Lords Hansard, 9 July 2010 : Column 456

[5] 8 June 2009, http://www.telegraph.co.uk/health/healthnews/5477873/BBC-to-pay-1m-over-Mohamed-Taranissi-libel-battle.html

THE PROBLEM

claims to the attention of the public. Mohamed Taranissi is a doctor specialising in IVF treatment who made a defamation claim against the BBC. The Telegraph reported: 'Both parties have agreed to settle and not to continue forward and consider the matter now closed. A source close to the case said the BBC was not paying any damages to Mr Taranissi, but would cover his legal costs, believed to be around £900,000. The Corporation's own costs have not been revealed but they are likely to be a six-figure sum.'

The problem is exacerbated when one party has resources and the other does not. Journalist Hardeep Singh incurred costs of more than £90,000 as a defendant before the High Court ruled that it could not hear the case.[6] Despite winning his case, Singh has been unable to recover his costs. He has said, 'It seems [the claimant] hoped I would be forced to back out of the case as the costs mounted, which begs the question: should freedom of speech in this country only be available to the rich who have means to defend themselves in court?'[7]

The main reasons for the high costs of defamation cases are:

- The process takes too long, and entails too much unnecessary work, as well as avoidable and protracted interim applications
- The potential for a jury trial, which means key issues cannot be determined by a judge early in the process
- The use of conditional fee agreements (CFAs), which can more than double one party's basic costs, and on which the government is legislating
- Lawyers' base hourly charging rates for calculating their fees
- The defendant is required to prove allegations are true when pleading a defence of justification (truth), rather than the claimant being required to show they are false

should freedom of speech in this country only be available to the rich who have means to defend themselves in court?

We recognise that litigation costs money: it takes time and expertise. Defamation lawyers can charge high rates because of the specialist nature of their work, and the fact that there are few libel barristers and a small number of solicitors' firms in the field. We believe however that the courts should not routinely allow lawyers in defamation cases to recover hourly rates that exceed the guidelines laid down by the Advisory Committee on Civil Costs.

The main focus of our research is the procedure, which is a major factor in determining how much time lawyers spend on a case, and therefore their fees. Both claimants' and defendants' base costs (i.e. costs incurred as a result of the actual work done, and not including percentage uplifts for taking the case on a no-win no-fee basis) can be staggeringly high.

One of the procedural issues that leads to high costs is the current presumption in favour of a jury, even though most trials now take place before judge alone. While there is still a possibility of having a jury in a case, it can be difficult to predict the outcome, which makes it harder to reach a settlement. One of the main reasons for this is that judges will not decide the precise meaning of the words complained of if the case may go before a jury, as this is one issue that the jury should decide. This affects most areas of case preparation and may mean that the case needs to be argued on several fronts.

Even if there is not going to be a jury in a case, unless the meaning of the words complained of has been agreed or determined, parties will prepare to present different arguments for different levels of meaning.

6 See "High Court halts Indian holy man's libel case against British journalist", Murray Wardrop, 18 May 2010 http://www.telegraph.co.uk/news/
7 Ibid
8 s.2 Defamation Act 1996

The introduction of the 'Offer of Amends' procedure[8] has helped resolve some cases in a timely and cost-effective manner. This is a procedure whereby a defendant can admit liability for a defamatory statement, apologise and consequently have to pay a reduced amount in compensation to the claimant. However, the use of this procedure is hampered by the fact that the parties can often not agree the meaning of the publication and therefore cannot make an offer of amends. The determination of (capable) meaning comes after the point where this process can be utilised.

Costs can quickly mount and the issue of who should pay them becomes a bar to settling the case. Costs almost always exceed damages in reputation cases. Despite recognising this, it seems self-defeating to incur more expense in arguing over costs already incurred.

Tactics adopted by the parties are also said to drive costs. Deliberate delay on the part of defendants and claimants carrying out unnecessary work are two common complaints, and may contribute to increased costs.

Furthermore, defamation litigation often involves points of principle and highly emotive issues, both of which people may be willing to spend money on.

The duration of defamation claims is a further concern. In 2008-2010 the average time it took between issuing a claim and a judge making a decision, following a trial, was just over 17 months.[9] For people trying to restore their reputation or resolve a dispute to determine whether they will be allowed to continue to publish an article, this is a long time to wait.

Material which is online has an enduring nature and, unlike print publications, requires swift removal if it is not to remain accessible. We do not address in this report whether secondary publishers should be liable while proceedings relating to the publication are continuing: that is a matter for the substantive law. Nor do we consider the Libel Reform Campaign's proposal for a short court procedure to determine liability. However, if cases could be resolved quickly, and at a lower cost, it is much less likely that ISPs and website hosts will be intimidated into removing material.

We believe that there needs to be a change in the culture of resolving defamation disputes. Most defamation claims issued in the High Court settle before they reach trial,[10] but too often this is because the costs of fighting the case are too high. The financial fear needs to be removed from defamation proceedings, so that people can make a decision based on what they believe is right and not on their individual wealth. Proceedings need to be brought to a swift conclusion, so that reputations can be restored as quickly as possible or the freedom to publish can be confirmed.

The need to reform defamation procedure has been recognised by many of the witnesses who gave evidence to Parliament's Joint Committee on the Draft Defamation Bill. In addition, at least two proposals have been made for a fast track or simplified procedure to sit alongside a High Court procedure.[11] Furthermore, a private arbitration scheme[12] has been set up following the report of the Early Resolution Procedure Group,[13] which was formed by several senior media law practitioners and chaired by Sir Charles Gray. The purpose of this scheme is to offer potential litigants in defamation proceedings a quicker and cheaper alternative to High Court proceedings, and is particularly aimed at resolving the issue of the meaning of the words in dispute.

The state must provide an efficient and effective judicial process so that parties can be assured that their right to reputation, or right to free speech, will be fairly adjudicated upon. But alongside this, a concerted effort is needed to encourage parties to resolve their differences without the need for costly and protracted court proceedings. We have therefore considered a range of procedures and forums which may be more effective than the current process for defamation claims (see Appendices 2 & 3), and have drawn from many of these to make our recommendations.

9 From " Reframing the time it takes to get to a libel trial" Dominic Crossley, Collyer Bristow LLP, 11 November 2010

10 Mr Justice Tugendhat, p.3, Corrected transcript of oral evidence given to the House of Lords and House of Commons joint committee on the Draft Defamation Bill, 6 July 2011

11 "A proposal for a fast track procedure for defamation", Media Standards Trust http://mediastandardstrust.org/wp-content/uploads/downloads/2011/02/A-Fast-Track-Procedure-for-Defamation.pdf and "Reframing Libel: Taking (All) Rights Seriously and Where It Leads" Professor Alastair Mullis, University of East Anglia and Dr Andrew Scott, Law Department London School of Economics and Political Science http://www.lse.ac.uk/collections/law/wps/WPS2010-20_MullisandScott.pdf

12 Early Resolution CIC, http://www.earlyresolution.co.uk/

13 "Media Disputes and Civil Litigation Costs" Early Resolution Procedure Group, 2010, http://inforrm.files.wordpress. com/2010/12/early-resolution-procedure-report.pdf

THE PROPOSED SOLUTION

Our proposal requires a change in culture by both parties involved in defamation disputes and the High Court. For the parties, this change would be to seek the assistance of a neutral third party to help settle the case more frequently and quickly than happens at present; for the courts, it would demand a more pro-active approach, assisting parties to avoid full proceedings where appropriate, and managing cases more efficiently and robustly.

We believe the following could bring this culture change about:

- The introduction of a renewed Pre-Action Protocol for Defamation which strongly encourages the use of alternative dispute resolution (ADR)
- Courts making orders requiring parties to consider alternative dispute resolution and imposing subsequent costs sanctions for failing to do so
- Courts inviting parties to carry out early neutral evaluation if they have not attempted mediation or narrowed the issues through arbitration, unless it appears to the judge that one party is trying to use its financial weight to bully the other in the course of the case
- More consistent case management by judges
- A new court procedure to determine meaning independent of full defamation proceedings
- New rules governing costs

The final three recommendations focus on existing court procedures and funding arrangements rather than ADR mechanisms. However, we believe these proposals are a critical part of allowing access to justice in defamation proceedings. They are the tools that the government and in turn the courts can deploy to stop parties from using their wealth to bully opponents.

We are acutely conscious that 'those of very great wealth might be perfectly prepared to use the very expensive court route itself to effectively squash the expression that you wish to preserve, and if [ADR is] voluntary, then nothing can be done to stop that'[14]. Yet we do not believe that compelling ADR is the solution: the wealthy may go down the ADR route with no intention of settling the case, and just use the process to drive up costs further. Instead the court process should be reformed so wealthy parties do not gain advantages by pursuing a case for as long as possible, and unreasonably refusing to use ADR should result in a financial penalty.

[14] Leveson LJ, 24 January 2012 (Transcript of Leveson Inquiry, Day 30, AM - page 55, line 5)

THE PROPOSED SOLUTION

AN OVERVIEW OF THE PROPOSED APPROACH TO ADR

Parties ought to use ADR more frequently in defamation claims.

The main options available at present are mediation and arbitration. Both have been shown to work to resolve defamation claims. They give parties the opportunity to present their case: mediation does so on a personal level, allowing parties to concentrate on what matters to them and not the niceties of the law or court procedure; arbitration cuts through procedural red tape to allow the parties to obtain a binding decision on the key issues in disputes from a defamation expert. But we also believe that in those cases where mediation or arbitration may not be suitable, Early Neutral Evaluation would help parties to settle the case.

The court should ensure that parties use ADR where it is suitable to do so, and only resort to full court proceedings where absolutely necessary. It should encourage and assist parties to resolve cases early and at a lower cost, and penalise parties who do not welcome this approach without good reason. For this to happen there needs to be a change in court rules and guidance.

Firstly, there should be a change to the Pre-Action Protocol for Defamation to strongly encourage ADR and to warn parties they may be penalised in costs if they do not give this proper consideration: in addition, the courts need to enforce this. If judges make such orders regularly, parties will very quickly change their behaviour and ensure that ADR is given careful consideration in every case.

Secondly, a rule should be introduced to allow judges to carry out ENE.

Thirdly, guidance should be issued to judges which states that parties whose case has reached court without having attempted mediation or having narrowed the issues through arbitration should be invited to apply for an early neutral evaluation of the case, unless the judge believes that one party is trying to use its relative wealth to bully the other in the course of proceedings. The guidance should also say that judges should make orders requiring parties to consider ADR, and where it is not considered suitable, the parties must file a witness statement saying why this is the case. This witness statement will then be considered when the court makes costs orders. This mechanism[15] is widely used in other types of litigation.

[15] This mechanism is known as an Ungley Order, and says "The parties shall by [date] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable" Para 32, *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576

THE PROPOSED SOLUTION

PRE-ACTION PROTOCOL

We recommend that the Pre-Action Protocol for Defamation be amended to strongly encourage ADR and to allow courts to penalise parties if they do not give ADR serious consideration. Pre-Action Protocols set out the actions that should be taken prior to a case going to court: they set out the court's expectation of how cases should be dealt with and guide inexperienced practitioners. In order to persuade parties to consider using ADR as a matter of course, the Pre-Action Protocol needs to include this as a requirement.

We understand that a draft of an amended protocol, which applies to all publication proceedings, has already been produced by a working group set up by the Law Society, at the request of the Civil Justice Council. This sets out the requirement for parties to consider using ADR and states that the court may require evidence that the parties have done so. We would like to see the efforts of those who produced this draft brought to fruition, with the introduction of this protocol or, if necessary, a slightly amended version.

At the very least, the Pre-Action Protocol for Defamation must be amended to remove the words, 'It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR,' as has already happened with the Practice Direction for Pre-Action Conduct. This is unnecessary and potentially counter-productive.

MEDIATION

Mediation is being used increasingly in defamation disputes and usually results in settlement. Evidence from mediators or practitioners who have experience of a large number of mediated defamation cases suggests that the success rate for defamation claims settling as a result of mediation is more than 90 per cent.[16] The cost of mediation varies according to the mediator, but published rates show a day's mediation with an experienced libel practitioner and mediator could cost £2,500 plus VAT. Compared to the considerable costs of protracted legal proceedings, this may make mediation an attractive proposition for those looking to save costs.

Mediation has big advantages for defamation claims: it is private; it allows for any solution; it gives the personalities involved an opportunity to meet face to face; it gets parties talking; it removes guesswork by giving parties a realistic view of what the other party wants; it is focused on a solution rather than taking the procedural steps required to bring a case to court; and it can take place early, before evidence is exchanged and costs mount.

> **the success rate for defamation claims settling as a result of mediation is more than 90 per cent**

In contrast to court proceedings, mediation does not require people to stand by the strongest case possible. They may not therefore become so entrenched in their position. The process is not focused on following a formal procedure or assessing rights according to law (although this of course forms the backdrop to the case).

Mediation concentrates on the personal, with people being treated as individuals, rather than just as parties to a case. It offers parties an opportunity to deal with emotions in tandem with the legal rights and wrongs of the case. The personal nature of mediation can make it cathartic for parties, particularly for claimants.

Individual claimants are often quoted as saying they just want to put the record straight and/or an apology. By way of an example, in evidence to the Culture, Media and Sport Select Committee, Gerry McCann talked about defamation proceedings in relation to newspaper articles

16 Although statistics can be hard to come by, four different sources have confirmed this figure: one defamation practitioner and mediator has a 96 per cent success rate, out of 86 cases; another experienced mediator has handled a high number of defamation mediations and estimates at least 90 per cent have settled; one practitioner has experience of 30 defamation mediations with a 93 per cent success rate; and another practitioner has experience of 10 defamation mediations with a 100 per cent success rate.

published following the disappearance of his daughter: 'We were interested in putting a stop to it first and foremost and looking for some redress primarily with an apology.'[17] A similar sentiment was expressed, in the BBC's See You in Court[18] by Sheryl Gascoigne, who had been the subject of a series of defamatory allegations in various tabloid newspapers. Yet, while the court has the power to prevent re-publication of defamatory allegations, it cannot order a defendant to apologise. In contrast, mediation offers an opportunity for early agreement on the issue of whether allegations should be taken down from the internet, or not republished, and for apologies to be made.

CASE STUDY

A story about fraud ran on pages 1 and 3 of a national newspaper: the alleged fraudster's girlfriend, a hotel receptionist who had no involvement in the fraud, was libelled in the story. The case was mediated. The claimant, her lawyer, the legal manager of the newspaper involved and a well-known libel lawyer attended the mediation. The claimant found the mediation process empowering. The defendant's representatives were visibly moved when she described the effect the report had on her life. The case settled for a substantial five-figure sum.

Mediation can work even in cases where it seems that, on the face of it, settlement is not within reach. This was recognised by the court almost a decade ago when Brooke LJ said: '[The defendant's barrister] when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. The court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.'[19]

The mediators whom we have interviewed for this report have also said they have successfully mediated cases involving serious allegations of criminality, which the defendant maintained was true.

We recognise that there are different approaches to mediation: some mediators have specialist knowledge of the law and use this to guide the parties, and others focus on achieving a mutually acceptable settlement rather than legal rights and wrongs. Our view is that different approaches are useful in different cases, and so the form of mediation which should be attempted should be left to practitioners to agree on, and not be prescribed.

The appropriate mediator should be carefully selected to ensure that parties' expectations of the mediator's role are met. As lawyers experience an increasing number of defamation mediations, they will be able to help select the most effective mediator to resolve their client's dispute. If one or both parties are unrepresented, then a third-party provider may be helpful in selecting an appropriate mediator.

Despite the many advantages of mediation, we recognise that there may be some cases for which it is unsuitable and that unsuccessful mediation will add to the cost of proceedings.

17 12 Q 213, EV 76, "Press standards, privacy and libel: Second Report of Session 2009-2010", House of Commons Culture, Media and Sport Committee, 9 February 2010 http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362ii.pdf
18 13 "See You in Court" Episode 1, Broadcast on BBC on 29 March 2011
19 14 Brooke LJ at para 14, *Dunnett* v *Railtrack PLC* [2002] EWCA Civ 303

That expense can be minimal compared to the cost of a full trial, but to force a party to incur extra costs in cases where neither party believes mediation will work seems to be contrary to the aim of reducing costs.

In cases where it seems that mediation would inevitably fail, it seems futile to force both parties to incur the costs of attending mediation. This is one of the reasons we do not recommend that mediation be made compulsory in defamation proceedings.

Given the advantages of mediation in defamation cases, however, we welcome the Court of Appeal's recent reiteration that there is 'a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs.'[20]

Much of the benefit of mediation may well be lost if the parties do not personally attend (or, in the case of a corporate body, if a person with authority to settle the case does not attend). Though we do not believe the veil should be lifted on the confidentiality of mediation, when considering costs the court ought to be able to take in to account where parties choose to attend mediation in person or send their legal representatives.

ARBITRATION

Arbitration is also being used more frequently to help resolve defamation disputes by giving parties a quick and relatively cheap decision on key issues. Parties isolate the issues which are the biggest barriers to settling the case, and engage a retired judge or experienced lawyer to decide these issues. Once a decision has been made on these critical issues, parties usually go on to settle the case.

Costs of arbitration vary, but parties may pay approximately £2,500 plus VAT for a decision on a limited number of issues. Again, once compared to the costs of a court action, this may seem an attractive option.

Parties can agree to arbitrate all or part of their dispute. Once the issues for the arbitrator have been decided, and the identity of the arbitrator agreed, the parties enter into an arbitration agreement. This is a contract which states that the parties accept the arbitrator's decision as binding. Such agreements are governed by the Arbitration Act 1996, which sets out that 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'.

The details of the arbitration process depend on the arbitrator or nominating body used. But both parties are usually given the opportunity to make submissions and the process is usually characterised by speed, with decisions made within a few weeks of the referral being made.

parties may pay approximately £2,500 plus VAT for a decision on a limited number of issues

One national newspaper, The Times, has often used arbitration to resolve defamation disputes. This worked well to resolve key issues in libel actions, with a settlement occurring in all of the (approximately) 12 cases referred to a retired judge or QC for a decision on a distinct issue.

This record of success means arbitration is an attractive option for those who are willing to entrust the outcome of the case (or key parts of it) to a retired judge or experienced practitioner. However, as it is a process by which parties exclude their right to a judicial decision, it must be voluntary.

People who choose to use this route swap the benefit of judicial authority for the benefit of expediency and lower costs. This pragmatic

[20] Lord Justice Rix at para 41, *Rolf* v *De Guerin* [2011] EWCA Civ 78

approach should be recognised by the courts as a genuine attempt to settle the dispute. If, after arbitration has settled the key issues, parties cannot resolve the outstanding matters between themselves and apply to the court to resolve these matters, the court must recognise that a genuine attempt to settle the case has been made through ADR.

EARLY NEUTRAL EVALUATION

Early Neutral Evaluation (ENE) is a process in which an independent expert considers all aspects of a case at a preliminary stage and gives an opinion on the likely outcome. Judges in the relevant court often carry out the evaluation. It is based on the understanding that once the parties have heard the opinion of a respected expert on the expected outcome of the case, they will be more likely to settle. If the case does not settle and goes to trial, a different judge will hear the case.

ENE usually takes place after disclosure of relevant documents, so that the judge can take a view of the case overall. The outcome is an opinion rather than an order.

The judge carrying out the ENE will say what is most likely to happen if the case proceeds to trial. It is open to the judge, however, to suggest alternative remedies at this stage. The parties can negotiate any remedy they choose.

The practicalities can be varied to suit the type of law and particular case. In the Technology and Construction Court (TCC), where ENE is offered, parties are given the option. If they choose it, the judge gives directions to ensure the case is prepared for the ENE, and the evaluative process itself usually lasts for about half a day. There is no charge for ENE in the TCC at present: it is possible that the savings to the court in avoiding a full trial mean that no fee will continue to be levied.

Mr Justice Akenhead, the judge in charge of the TCC, said when interviewed for this project that ENE almost never fails, with settlements being reached within weeks of the process taking place.

ENE has the potential to save judicial resources. Although it requires judges to consider papers before the ENE and spend time carrying out the evaluation itself, if the case settles it will save judges the time that they may have spent on any future interim applications and a full trial.

ENE almost never fails, with settlements being reached within weeks of the process taking place

These factors make ENE an attractive option: it would, however, add another layer of costs for both parties and the court in the event that it fails. A further disadvantage is that for it to be effective, it needs to take place after disclosure of evidence so the judge can reach an informed opinion. It is not therefore as effective in reducing costs as, for example, mediation, which can happen before such costs have been incurred. If ENE could be carried out pre-issue, it would, however, be likely to be as cost effective as mediation.

Part of the difficulty in analysing ENE lies in the fact that, outside of family proceedings, it is still largely untested. In the TCC only about ten cases a year opt for ENE.

Despite this, considering ENE's relative success, we believe that it has potential to be very useful in defamation proceedings and would be particularly appropriate in cases where parties believe that mediation or arbitration are unlikely to succeed.

In our view, parties are most likely to refuse to mediate either because they are so convinced of their position that they are not willing to concede or the other party is so unreasonable that mediation will fail to result

in a settlement. Parties may not want to go to arbitration because they seek a judicial rather than private determination of their claim. An early judicial opinion would provide a reality check in all of these scenarios, revealing any weaknesses or confirming the strengths of the case in the first example, and exposing any unreasonable positions in the second.

We envisage that ENE would take place following the government's proposed Early Resolution Hearing.[21] Whether or not it could happen as swiftly as the same day, for example, would depend on when the proposed Early Resolution Hearing is to take place and whether enough evidence has been produced to enable a judge to carry out an ENE.

The select committee on the draft defamation bill recommended that neutral evaluation be used in libel cases, if mediation is not.[22] The committee's focus was on neutral evaluation, before proceedings have been issued, by an experienced practitioner; our focus in on evaluation, post-issue, by a judge. We believe that in many cases the very fact that the evaluation is carried out by the same rank of judge as would hear any trial in the case could help it settle. We have focussed on ENE happening post-issue because this is when parties have paid a court fee and can ask the court to assist in resolving the case. If it was possible, however, for a judge to hear ENE pre-issue, we believe that this could offer a very significant opportunity for parties to settle their case. For ENE to be carried out pre-issue, a separate rule and procedure and court fee may need to be introduced. We recommend, however, that serious consideration be given to introducing such provisions.

We understand that there is some judicial concern that carrying out early neutral evaluations would put more pressure on limited court resources, but we believe that on the contrary, it could save judicial time. A small amount of a judge's time spent on an early neutral evaluation would, in most cases, save a significant amount of judicial time later on. Early neutral evaluations carried out in other areas of law result in settlement of the case more often than not, and, even if a case did not settle in its entirety, the issues in dispute are likely to be significantly narrowed, leaving less scope for future applications and shortening any trial considerably. In addition, with three full-time judges and two deputy high court judges available to hear defamation claims, allocating the few defamation cases that do proceed to trial to a judge who has not heard the early neutral evaluation should not be problematic.

We believe a change to the civil procedure rules should be made to enable the court to carry out early neutral evaluation. We also believe that guidance should be issued to judges, saying that parties should be invited to apply for an ENE where they have not been to mediation, or narrowed the issues through arbitration, unless it appears to the judge that one party is using its wealth to try to bully another party to proceedings. We include the final proviso because of the potential for a party who has substantial resources to try to use ENE as an extra route to go down, to drive up the costs of the case with absolutely no intention of settling, irrespective of the outcome of the ENE.

a change to the civil procedure rules should be made to enable the court to carry out early neutral evaluation

We believe the following rule may be suitable to allow the court to carry out Early Neutral Evaluation in defamation claims.

[21] p. 47 and following, "Draft Defamation Bill Consultation" CP3/11, Ministry of Justice, March 2011

[22] Para 82, Report of the House of Lords and House of Commons Joint Committee on the Draft Defamation Bill http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf

ADD AFTER RULE 3.1
(the court's general powers of management)

3.1A
(1) Pursuant to rule 3.1(2)(m), the court may, on the application of at least two opposing parties to a claim, conduct a preliminary evaluation of the case, or of an issue or issues within it, and give its view, with brief reasons, of the likely outcome.

(2) The court will give directions for the efficient conduct and hearing of the application. No more than one day shall be allocated to the hearing unless the court exceptionally considers it essential to do so.

(3) Application for a preliminary evaluation may be made either in extant proceedings or on a summons issued by both or all parties in relation to prospective proceedings between them. But in the latter case the court may not entertain the application unless satisfied that, in the absence of agreement, proceedings are imminent.

(3) All parties should personally attend the hearing unless the court directs otherwise. Where a party is not a natural person, a person who has authority to settle the case should attend on that party's behalf.

(4) The court will ordinarily reserve the costs of an application to the conclusion of the trial but may order one or more parties to pay costs if satisfied that their conduct has been unreasonable, for example in requiring evaluation of an unarguable contention.

(5) The court shall have regard, when dealing with costs in a defamation case, to whether a preliminary evaluation was obtained and, if it was, to its relation to the eventual outcome.

(6) A judge who has conducted a preliminary evaluation shall not sit to try the case or to hear any appeal relating to it without the express consent of all parties.

CASE MANAGEMENT

Strict case management could be key to reducing costs in defamation proceedings. Adrienne Page QC and Desmond Browne QC, in evidence to the Select Committee on the Draft Defamation Bill, were of the view that 'traditionally judges are not interventionist'.[23] It is our firm view that to control costs in defamation proceedings, judges need to intervene.

We believe judges should consider a case shortly after it is issued and make directions for its conduct. Lawyers try to run arguments and produce evidence to cover every possible angle in a case. While lawyers are acting in the best interests of their clients, this approach can mean a case is not dealt with 'in ways which are proportionate',[24] which forms part of the court's overriding objective to deal with cases justly. While the Civil Procedure Rules do give judges the power to limit the evidence and argument produced in a case, this is used sparingly in defamation claims.

We believe judges would be assisted if given a specific mandate to use tighter case management tools, rather than just the potential to do so. This mandate has recently been given to Judge Birss in the renewed Patents County Court, who applies a cost-benefit analysis test to each application he receives, and with apparent success. This mandate comes from the relevant practice direction in the Civil Procedure Rules, and says the court will only make certain orders 'if the court is satisfied that the benefit of the further material in terms of its value in resolving those issues appears likely to justify the cost of producing and dealing with it'.[25]

As a recent example, an application was made to amend statements of case in a Patents County Court case.[26] Though such an application would usually routinely be approved in the High Court Patents Court, it was refused. Applying the cost-benefit test in this case, HHJ Birss considered 'issues of proportionality, whether the amendment is a "killer blow" and costs. The judge also held that the reasons why an amendment was not

23 Pages 13 & 14, Corrected transcript of oral evidence given to the House of Lords and House of Commons joint committee on the Draft Defamation Bill, 22nd June 2011
24 Part 1.1(2) Civil Procedure Rules
25 Paragraph 29.2(2) of Practice Direction 63 of the Civil Procedure Rules
26 *Temple Island* v *New English Teas* ([2011] EWPCC 019)

made earlier will be considered in the appropriate circumstances. Applying this to the instant case, HHJ Birss QC refused the amendment on the grounds that the incremental increase in the chance of winning was outweighed by the increased cost and complexity of allowing the amendment'.[27]

Further examples of robust case management in the Patents County Court include the judge being pro-active by making directions not asked for, when the case came before him on another matter;[28] the court making directions regarding the joining of two related cases of its own motion;[29] and the court not postponing the trial at late notice due to a witness becoming unavailable. The witness said himself that he could not be regarded as a reliable witness after 25 years, and the claimant said that if the trial did not proceed as planned he would not be able to afford to continue with the case.[30]

The court has also been willing to use its powers of case management in defamation cases. For example, Mr Justice Eady recently gave a decision in which he carefully considered the cost consequences – and the subsequent effect on the efficient administration of justice – in applications to amend the mode of trial belatedly and for a hearing of a discreet preliminary issue.[31] Likewise, Mr Justice Tugendhat recently held that a defendant may not be given permission to amend his defence after a draft judgment had been handed down in favour of the claimant's application for summary judgement.[32] One of the reasons for the refusal of the permission to amend (and therefore upholding judgment in favour of the claimant) was that it was contrary to the overriding objective of the Civil Procedure Rules.

However, the approach does not seem to be consistent, and judges often seem reluctant to intervene. As an example, in one libel case, parties are said to have had three days set aside to argue what could or could not be included in the statements of case; after the three days were up, the matter was still not decided and the case had to be adjourned until six weeks later to resolve the issue. This illustrates that libel cases often get prolonged by technical difficulties, rather than focussing on the real issues and evidence. Judges ought to manage cases to trial rather than allowing the process to be overwhelmed with technicalities.

We believe a practice direction requiring the court to carry out a cost benefit analysis of all applications would assist judges in defamation cases in complying with the overriding objective of the Civil Procedure Rules and ensure that costs are proportionate to the issues involved.

A HEARING TO DETERMINE MEANING

Uncertainty about the meaning of a statement can be a major obstacle to settling cases; once the meaning is decided, a defendant may be in a position to make an offer of amends or a claimant may opt to withdraw the claim. A party to a defamation dispute ought to be able to make an application to the court to determine the ordinary meaning of the alleged defamatory statement and decide whether it is opinion or fact, independent of full proceedings.

In the majority of cases (i.e. all cases except where an 'innuendo' meaning is alleged), these are both determinations that can be made on consideration of the publication itself: no other evidence is needed. Submissions could be limited in length, and the parties could only recover fixed costs. In order to allow such applications, the presumption that there will be a jury in defamation proceedings must first be removed.

We are proposing this as an option so that it can be used in cases where deciding the issue of meaning may lead to a settlement. In current defamation law, the alleged defamatory statement is taken to have a single meaning. This may be artificial as a statement may be open to more than one interpretation. Nevertheless, there are no proposals from government to

27 "London Image Case Gives Direction On PCC Pleading Amendments" Hogarth Chambers Latest News 24 June 2011, http://www.hogarthchambers.com/Asp/uploadedFiles/File/NEWS/Clarification/on/when/amendments/of/pleading/are/allowable/in/the/PCC/PDF/(2).pdf
28 *Hoffman* v *Drug Abuse Resistance Education (UK) Ltd* [2011] EWPCC 32
29 *Goldeneye(International) Ltd* v. *Maricar and Goldeneye(International) Ltd* v. *Vithlan*i [2011] EWPCC 27
30 *Victor Ifejika* v. *Charles Ifejika & Anr* [2011] EWPCC 28
31 *McKeown* v. *Attheraces Ltd* [2011] EWHC 3232 (QB)
32 *Waterson* v. *Lloyd* (No. 2) [2011] EWHC 3292 (QB) – see case comment by 5RB http://www.5rb.com/case/Waterson-v-Lloyd-(No-2)

change the single meaning rule, not least because it is practical and proportionate.

The single meaning can be agreed by the parties, or in the absence of an agreement, will be determined by the jury (if there is one) or the judge (if not).

In many cases, the parties cannot agree the ordinary meaning of the statement in question. The claimant must set out the highest defamatory meaning they allege the publication bears (as the court may find that there is a lesser defamatory meaning, but not a higher one); the defendant must respond and almost invariably seeks to assert a different level of meaning.[33] This not only results in time and therefore money being spent on arguing the meaning, it results in cases being prepared and pleaded in the alternative.

When parties are able to settle the issue of meaning, it often leads to resolution of the case. This is because parties are able to take a view on whether they have the evidence to justify their position, the cost of establishing their position, and what remedies might result.

when parties are able to settle the issue of meaning, it often leads to resolution of the case

The court will not currently decide the ordinary meaning of allegations while there is still a possibility of a jury trial, it will only determine a range of capable meanings: the jury, after all, is supposed to represent the view of the 'ordinary person'. If defamation claims are removed from the scope of s.69 of the Senior Courts Act 1981 (which prescribes that defamation claims will be heard by a jury unless the court determines otherwise) as the government proposes,[34] this will allow for hearings on meaning to be heard by judges when a defamation claim has been issued.

Issuing a claim, however, involves (at least in theory) Pre-Action Protocol compliance, and usually requires full statements of case to be set out before the court gives directions and decides whether to hold an early hearing. This process can easily cost each party £5,000.

meaning can and should be resolved early

We believe that meaning can and should be resolved early. The meaning of an article can often be decided on considering the publication alone; there is no need for any other evidence to be adduced. Whether a statement is opinion or alleging fact can also be decided by consideration of the publication alone.

A hearing that considers only the publication could be suitable for an application under Part 8 of the Civil Procedure Rules. This part of the CPR allows parties to ask the court to decide an issue, using an abbreviated procedure, if there is no substantial dispute of fact. It is designed to be used when a person wants a court decision on a discrete issue that does not require substantial evidence: we believe that determining the meaning of a statement and whether the statement is opinion or fact fits these criteria, as the only evidence required would be the publication itself.

As well as listing the type of application that may be made using the abbreviated Part 8 procedure, there is also a list of specified circumstances for which the process must be used. To make this process easily accessible, we believe that an application to consider the meaning of what has been published, and whether this is opinion or fact, should be made one of these specified circumstances.

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[33] Since the case of *Lucas Box* v *News Group Newspapers Ltd* ([1986] 1 WLR 147) a defendant must set out in their statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. In 2003, the Court of Appeal delivered its judgment in the case of *Chase* v *News Group Newspapers Ltd* ([2002] EWCA Civ 1772; [2003] EMLR 11) which led to three levels of 'meaning' being referred to: Level 1 - guilt or serious grounds to suspect; Level 2 - reasonable grounds to suspect; Level 3 - grounds to investigate. It has, however, been recognised that there cannot be strict categories for meaning in every case and the gravity of the allegation published can fall between these levels.

[34] Ibid. 18, p36

THE PROPOSED SOLUTION

To ensure this does not become another layer of litigation leading to endless argument, attempts at production of evidence, and more cost, this hearing should:

- Be limited to consideration of the publication, with no other evidence to be adduced
- Allow limited argument, e.g. each party should only be allowed to make submissions of no more than two sides of A4 paper
- Attract fixed recoverable costs e.g. the winning party should be able to recover £1,000

The consequence of the hearing would be that a binding decision on meaning will have been made by a High Court judge. It would be possible to appeal only on the basis of misapplied law or because of a serious procedural or other irregularity in the proceedings.

The decision would stand on its own: it is not part of a larger claim, where parties have opened themselves up to the possibility of mounting cost liabilities.

The court fee would currently be £465, which is the fee for a non-money claim in the High Court. If it was agreed between the parties the claim could be issued in the County Court for £175 (we note that this is unlikely, unless a judge who has experience as a defamation practitioner happens to sit in the relevant County Court).

The application could be decided very quickly. It may even be suitable for determination on paper. Otherwise, a one-hour hearing would usually be sufficient. This could be listed at the Royal Courts of Justice very quickly. A hearing would usually be held within a month of the application.[35]

This procedure could be used in cases where the parties require a binding decision on meaning where this issue seems to be the major hurdle to resolving the dispute.

The disadvantage of this approach would be that if parties are unable to settle the case following the decision on meaning, proceedings would have to be issued under Part 7 of the CPR, which means paying a new court fee. It would also mean preparing different statements of case, and although this might involve a small amount of repetition regarding scene-setting, it is unlikely to recount arguments made in the decision on meaning: the application would simply state that the meaning has been decided.

The advantages are that either party can apply to the court for a decision to be made on meaning at any time, irrespective of the status of other elements of the case. The maximum length of submissions and fixed recoverable costs mean there is certainty as to the cost of proceedings (and there won't be arguments over costs themselves).

This is a small but significant departure from the government's proposed early resolution hearing.[36] A key difference between a hearing on meaning which takes places independent of full proceedings being issued (as is proposed here) and an early hearing to determine preliminary issues in full proceedings (as proposed by the government) is that an independent hearing can take place before a defence is filed. The Early Resolution Procedure Group said: 'The principal obstacle to early resolution in defamation cases is the lack of a procedure for determining the actual meaning of the material complained of before service of a defence.'[37]

The reason this is important is, if meaning is determined before a defence is filed, a defendant can make a formal offer of amends based on that meaning. An offer of amends is made under section 2 of the Defamation Act 1996, and is designed as a formal way of a defendant correcting, apologising for and paying compensation for a defamatory statement. Making a formal offer of amends provides the defendant with a defence to the libel action, unless the claimant shows that the defendant did not know the statement in question was false and defamatory at the time of making that statement. A procedural

35 Clerks in the listing office of the Queen's Bench Division of the High Court interviewed on 11 August 2011
36 Ibid 18, p.48
37 Ibid. 10, at para 1.4

requirement of an offer of amends is that it must be made before the defence is filed. Often, the parties may agree the terms of settlement, but are not willing to accept the other's interpretation of meaning. A court's decision on meaning would remove this obstacle to settlement.

An alternative approach, that would still allow a defendant to make an offer of amends following the determination of meaning, would allow a claimant to initiate a claim with limited documentation. A preliminary hearing on meaning, again with the restrictions on evidence, arguments and costs which are set out above, could then be heard before the defence needs to be served.

if meaning is determined before a defence is filed, a defendant can make a formal offer of amends based on that meaning

COSTS

The government is reforming the funding of civil litigation. Legislative changes are proposed in the Legal Aid, Sentencing and Punishment of Offenders Bill. Changes to the Civil Procedure Rules are being developed between the Ministry of Justice and the Civil Justice Council, which has set up a working group to address this issue. Together, the measures proposed would radically change the way that defamation proceedings can be funded.

Many of these changes were proposed by Lord Justice Jackson in his comprehensive Review of Civil Litigation Costs, published in December 2009. The government is introducing most, but not all of Lord Justice Jackson's proposals.

We call for the government to review costs in defamation proceedings. It is taking measures to protect litigants in personal injury proceedings, but for parties involved in other types of proceedings, the funding landscape is being radically redrawn in a way which will leave many people without access to justice.

It is important that the government does not approach the reform of civil litigation costs with a one size fits all approach. Defamation actions are important and often complex. They involve the balancing of two rights recognised by the European Court of Human Rights, the right to reputation (derived from the article 8 right to respect for private life) and the right of freedom of expression (article 10).

Funding arrangements for defamation do need to change. We have set out above the problems that the extremely high costs of defamation proceedings are causing. Conditional fee agreements (CFAs, or no-win, no-fee agreements) with 100 per cent uplift can double already significant costs. The European Court of Human Rights has said that the risk of defendants in free speech cases having to pay such costs breaches the right to freedom of expression.[38] The government recognises this concern and seeks to make changes to CFAs.

Yet while we welcome the government's intentions to cut litigation costs we are concerned its proposals go too far: the proposals may mean that less money changes hands in defamation cases but they won't make litigation any more affordable or accessible.

38 *MGN* v. *United Kingdom* (Case No. 39401/04)

THE PROPOSED SOLUTION

The new funding landscape as proposed by the government would allow cases to be funded as follows:

WITH A CONDITIONAL FEE AGREEMENT (CFA)

A litigant enters a 'no-win, no-fee' agreement with their lawyer. If the litigant's case is successful, their lawyers get paid base costs (i.e. costs incurred as a result of the actual work done, most likely calculated on a time-spent basis, at an agreed hourly rate) plus an agreed uplift ('success fee') which can be up to 100 per cent of their base costs. Unlike the situation now, the uplift would be paid by the client – rather than the losing party.

The other side could be ordered to pay the winning party's reasonable costs (but not the uplift).

If unsuccessful, a party could be ordered to pay the other side's reasonable costs, but would not be liable for his/her own lawyers' costs.

WITH A DAMAGES BASED AGREEMENT (DBA)

A litigant enters a 'no-win, no-fee' agreement with their lawyers. If he or she wins, the lawyers get paid their base costs plus a proportion of the damages, up to 100 per cent. The other side could be ordered to pay the winning party's reasonable costs.

If unsuccessful, he or she could be ordered to pay the other side's reasonable costs, but would not be liable for his/her own lawyer's costs.

PRIVATELY FUNDED

A litigant would be responsible for their own lawyer's fees, which would most likely be calculated on a time-spent basis, at an agreed hourly rate. If he or she is successful, the other side could be ordered to pay the winning party's reasonable costs. The balance would be payable by the lawyer's own client.

If unsuccessful, he or she could be ordered to pay the other side's reasonable costs.

OTHER AMENDMENTS

A test of 'proportionality'will be applied if one party has to pay the other's reasonable costs.

To offset the fact that successful litigants will now have to pay more of their own lawyer's costs, the government proposes to increase general damages by 10 per cent.

A new rule will be introduced to redress a perceived imbalance between the incentives for claimants and defendants to accept offers to settle made under Part 36 of the CPR. This will say that a court may order the defendant to pay an additional amount to the claimant if it has made a judgement for the claimant which is as least as advantageous to the claimant as the claimant's offer. The effect of this will be to increase the amount of costs a defendant must pay a claimant if the defendant should have accepted an offer from the claimant but failed to do so.

CONSEQUENCES

These changes are likely to make CFAs unviable in defamation cases. Many potential litigants will not be able to pay a success fee from their own pocket.

The idea that the changes will only have the impact of reducing a party's damages is fanciful: firstly, a successful defendant will not recover any damages; and secondly a successful claimant is likely to recover damages which are far less than the success fee payable. DBAs will likewise not work in defamation cases because the damages are usually in the £10,000-£50,000 range and costs can be ten times this figure.

Removing recoverable success fees altogether will at the very least limit the number of lawyers willing to take on riskier cases, and at worst mean that there are some important but very risky cases that do not get taken on at all. Limiting the recoverable success fee would significantly reduce costs but still allow lawyers to take on riskier cases.

Even if a litigant can afford their own legal costs, the risk of paying the other side's costs will be prohibitive in the vast majority of cases.

The government proposals will prevent a successful party from recovering an insurance premium for a policy that protects against having to pay the other side's costs in the event of losing ('ATE insurance'). We believe that this is the right approach, as it will help save costs. However, it would also leave parties exposed to having to pay the other side's costs. We believe that this could be a serious impediment to justice for many people. To prevent this, the Government needs to implement its proposed proportionality test

for all costs and offer costs protection to people who are not 'conspicuously wealthy'[39]. Without these measures, well-resourced litigants will continue to abuse the costly court system to try and ensure defamation cases are settled on the basis of wealth rather than the merits of the case.

Finally, the proposed changes to Part 36 of the CPR will unfairly penalise defendants in defamation proceedings, who are already faced with paying punitive costs if they fail to better a claimant's offer to settle. Offers to settle in defamation proceedings are often predicated on apologies being made, and a defendant may be willing to pay to settle the case but not to apologise (for example, if they genuinely believe they are right but cannot prove it in court because, for example, they cannot reveal a source). To add an extra penalty to those already existing would be inequitable.

RECOMMENDATIONS ON COSTS

We believe that the government needs to make changes to the costs rules for libel, as part of a coherent package that includes wholesale reform of the substantive law and procedural reform.[40] These changes in costs rules are needed to redress any inequalities of arms between the parties. There is precedent in the English and Welsh courts system for a variety of measures such as fixed recoverable costs or costs caps to be used; both these measures can reduce a party's exposure to financial bullying by another, more wealthy litigant.

We therefore make the following recommendations which we believe will improve the government's current proposals:

- Success fees of up to 25 per cent should remain recoverable in defamation actions if the party claiming this is of limited means as defined by the changes to CPR provisions suggested by Lord Justice Jackson (Chapter 32, 3.10)
- Costs protection could be introduced to protect a party who is not conspicuously wealthy from having to pay the other side's cost in the event of losing. This should be extended to include defamation actions, with either party being able to attract such protection. In the event of both parties having limited means, each would qualify for costs protection and neither would be able to recover costs from the other
- Proposals to amend Part 36 of the CPR should be dropped
- The percentage of a client's damages that a lawyer ought to be able to take as part of his or her fee should be set at 25 per cent
- A costs cap ought to be introduced, so that there is certainty over the potential cost of proceedings and parties will be incentivised to control their own costs to keep them within recoverable limits. The level of the cap should be set periodically by the Ministry of Justice and might bet set, for example, at the level of the average UK house price. There is no good reason why a libel trial should ever cost more than a home. This is still beyond the means of most people in this country - but it would mark a significant drop on today costs. If our recommendations on ADR are adopted, most cases will not run up costs which are anywhere near as high as the cap, but never the less a cap would be an important backstop

We believe that these changes should be made alongside our proposals for orders in relation to ADR as suitable adjustments could be made if a judge thinks a party with costs protection has unreasonably refused to use ADR. Together these proposals would enable affordable access to a fair process in defamation claims.

39 Para 4.8, Chapter 19, Jackson LJ "Review of Civil Litigation Costs: Final Report" December 2009 http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

40 See the Ministry of Justice's Draft Defamation Bill Consultation, March 2011 http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf, the Libel Reform Campaign website http://libelreform.org/ and the Alternative Libel Project preliminary report http://www.englishpen.org/usr/alternative_libel_project_oct2011.pdf

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Information Commissioner’s Office http://www.ico.gov.uk

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Law Society Gazette http://www.lawgazette.co.uk/

Media Standards Trust http://mediastandardstrust.org/

Ministry of Justice http://www.justice.gov.uk/

National Audit Office http://www.nao.org.uk

New Law Journal http://www.newlawjournal.co.uk/nlj/

Parliament http://www.parliament.uk/

Press Complaints Commission http://www.pcc.org.uk/

Professional Publishers Association http://www.ppa.co.uk/

Schillings Lawyers http://www.schillings.co.uk/

Scottish Civil Courts Review http://www.scotcourts.gov.uk/civilcourtsreview/

The Centre for Effective Dispute Resolution http://www.cedr.com/

The Guardian http://www.guardian.co.uk/

The International Forum for Responsible Media Blog http://inforrm.wordpress.com/

The Leveson Inquiry http://www.levesoninquiry.org.uk/

The London School of Economics and Political Science http://www2.lse.ac.uk/home.aspx

The Telegraph http://www.telegraph.co.uk/

APPENDIX 1
PEOPLE WHO HAVE ASSISTED IN THE COURSE OF THE PROJECT

MEMBERS OF ADVISORY COMMITTEE

The Rt. Hon. Sir Stephen Sedley (Chair)

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Dr Karl Mackie CBE, Chief Executive, CEDR

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Gillian Phillips, Director of Editorial Legal Services, Guardian News and Media

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OTHERS

Mr Justice Akenhead, Judge in Charge of the Technology and Construction Court

Emma Ascroft, Yahoo!

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Jeremy Clark-Williams, Russell Jones and Walker

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Alan Johnson, Bristows

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Adrienne Page QC, 5RB

Lavinia Shaw-Brown, LawWorks Mediation

Hardeep Singh, Journalist

Quentin Smith, Mediator

Nigel Tait, Carter-Ruck

Sally Thompson, Atkinson Bevan Chambers

APPENDIX 2
THE ALTERNATIVE LIBEL PROJECT

The Alternative Libel Project has investigated the feasibility of a procedure for resolving libel claims which would offer litigants an alternative to the current High Court based process, in order to reduce impediments to justice and to clarify the relationship in English law between Articles 6, 8 and 10 of the European Convention of Human Rights the right to a fair trial, privacy, including reputation, and freedom of speech.

The work has being carried out by English PEN and Index on Censorship alongside a wider Libel Reform Campaign, which considers changes to the substantive law and is a partnership between Index on Censorship, English PEN and Sense About Science. The Libel Reform Campaign is seeking to ensure that the substantive law deters unjustifiably damaging speech and protects freedom of expression.

In the course of the project we have considered the full landscape of dispute resolution mechanisms currently in use across England and Wales in different areas of law, as well as considering current schemes or proposals for defamation claims. We also analysed the factors believed to drive costs, reflected on the aims of defamation litigation and considered what the parties to such cases want from the process.

On recommendations from our advisory body, we carried out more detailed research into five forums which, at first glance, appeared potentially attractive options for defamation procedure, and produced models based on these.

On consideration of these options, some of the features of the models were attractive, and we have drawn on these in our recommendations, but none were thought in themselves alone to be appropriate for defamation actions.

We have reproduced these models, with notes on their perceived advantages and disadvantages, as appendices. Further papers are available on request.

This project has taken place in a changing landscape for journalists, who are often libel defendants. The Leveson Inquiry into the culture, practice and ethics of the press was launched last summer amongst allegations of criminal behaviour and unethical practices used by tabloid newspapers. One of the Inquiry's tasks is to consider how the printed press in this country is and should be regulated. This has generated several proposals for regulators whose functions could include considering all potential actions against the press, including libel claims.

We would be delighted if the findings of Leveson Inquiry led to the establishment of an arbitration or adjudication scheme for libel cases that was so good, fair, cheap and quick that people would choose to use this instead of turning to the courts.

However, libel defendants are not always part of the mainstream media and many defamation cases would not therefore fall within the remit of a new press regulator. Bloggers, scientists, doctors, authors and university lecturers have all been defendants to libel cases over the last decade. With the rise of the citizen journalist, this trend is only likely to continue.

Implementing Lord Justice Leveson's recommendations, whatever they may be, could take several years whereas the measures we propose could be introduced very quickly.

In addition, irrespective of media regulation, while libel and slander remain justiciable torts, there must be a timely and affordable court procedure available in order for justice to be done.

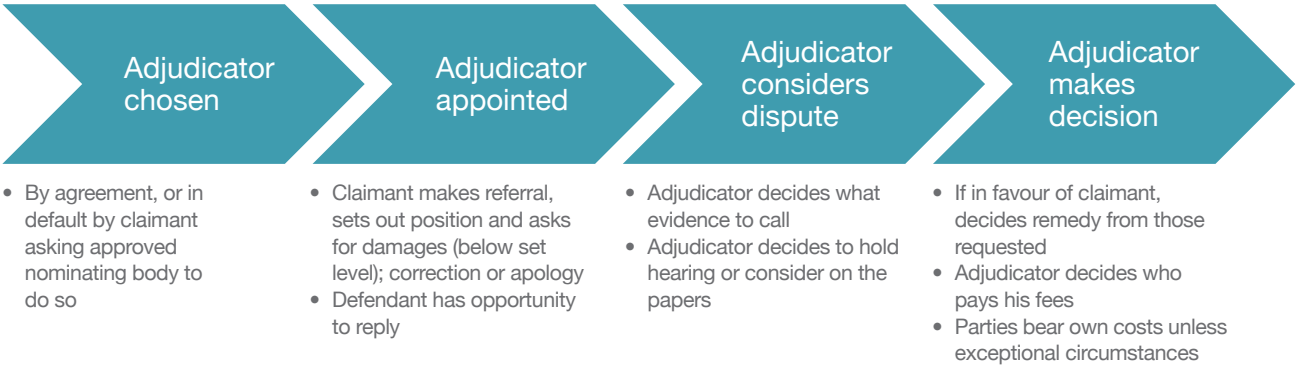
Our research is being carried out in the wake of Lord Justice Jackson's report on Civil Costs and Funding. In his report, Lord Justice Jackson refers to the issue of early resolution and jury trials, but says 'it is not the function of this Costs Review to become involved in the procedures for defamation litigation at that level of detail'.[41] In contrast, it is the function of this project to consider procedure in such detail to see if any improvements and costs savings can be made. However, as the overall problem we are trying to address is a question of access to justice, we found that it was also necessary to address the issue of how defamation actions are funded.

We published a preliminary report in October 2011. The feedback of those who read that preliminary publication has led to some changes being made in this final report.

41 Para 5.2, Chapter 32, Jackson LJ "Review of Civil Litigation Costs: Final Report" December 2009 http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

APPENDIX 3 ANALYSIS OF POTENTIAL MODELS FOR DEFAMATION ACTIONS

MODEL A: DEFAMATION ADJUDICATION



Adjudication is intended to be a quick and low cost process. An expert in the relevant field is appointed as an adjudicator. The referrer asks the adjudicator to decide whether the other party should apologise, publish a correction or pay damages.

The adjudicator decides what facts need to be established and calls evidence as appropriate. The adjudicator can make a decision on the papers or hold a hearing.

The adjudicator's decision is binding unless and until the parties agree or a court decides otherwise. An unchallenged adjudicator's decision can therefore be enforced through the courts.

The process is privately funded, with the adjudicator deciding which party should pay his or her fee.

The parties usually bear their own costs if they choose to be represented.

To compel defamation litigants to adjudicate, having an adjudicator's decision would have to be made a pre-requisite to starting a court claim.

This model is based on adjudication used in the construction industry.

ANALYSIS

Parties wishing to adjudicate defamation proceedings would have to overcome an additional hurdle to, for example, the construction industry, because there is no contract to assist with choosing the adjudicator and determining the process to be followed. All of this would have to be agreed before the adjudication began.

The evidence required to make a determination in a defamation dispute may be more expensive to obtain than in a contractual dispute about, for example, non-payment of monies due.

In addition, the fact that the adjudicator's decision is not binding is likely just to defer the dispute, with court proceedings being started by the unhappy party after a decision has been made.

The big advantage of adjudication is the potential for speed. This is also an advantage of arbitration, which is a similar model to adjudication, but the parties agree to be bound by the outcome (by entering into an agreement under the Arbitration Act 1996). Neither involve a public body, thus have the advantage from a government (and taxpayer) perspective of not relying on the public purse. Arbitration is probably the ADR model which comes closest to being a private court.

Decisions made at adjudication are different from arbitration, because an adjudicator's decision is only binding if it is not challenged in court.

Practical concerns about arranging the adjudication could be overcome if such a service was offered by a recognised body, such as a press regulator. To compel anybody to use such a system, however, it would either have to be

APPENDIX 3

statutory or be a procedural requirement to take before court proceedings commenced (either in a pre-action protocol which was enforced, or by the court staying any case which had been issued without first going through the adjudication system).

Index and PEN oppose statutory regulation of the press. This applies even if the statute is said to be enabling, such as the Irish Defamation Act 2009, which says the government will recognise a 'Press Council'. Even though the statute says the Council is to be independent, it also lets politicians exert control over the selection panel which appoints its directors, and politicians can ultimately revoke the council's status. If such an enabling statute sets up such a body without any such controls, what is the point of the statute?

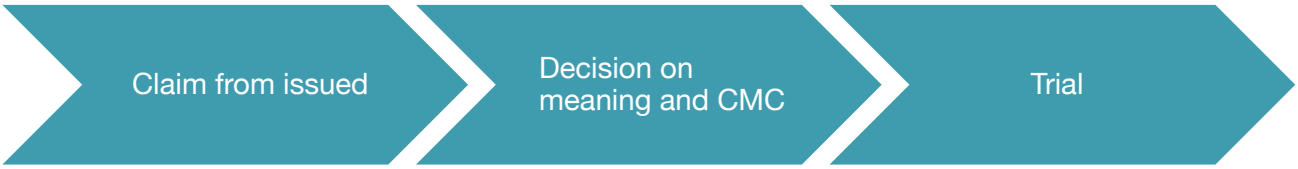
Statutory compulsion to use an adjudication scheme offered by a body such as a press regulator is also problematic, if the press are incentivised to join the scheme. Why should a claimant be compelled to use a body that the defendant has chosen to join because of the commercial advantages it offers? This would not have the appearance of being fair.

If part of court procedure, compulsion to use such a scheme might work if it did not affect any subsequent court case. If additional defences were on offer, this could fall foul of Article 6 of the European Convention on Human Rights, the right to a fair trial. However, using an existing procedure such as the offer of amends, or making a Part 36 offer, based on the adjudicator's decision, would offer a defendant protection in costs. The problem of an unhappy party issuing court proceedings does nevertheless remain.

A voluntary system, however, which is established and offers parties a cheap, fast and fair way of resolving defamation claims would be incredibly attractive to potential litigants who have a genuine interest in resolving their dispute. A voluntary system would seem fairer to parties and they would therefore be less likely to issue proceedings if unhappy with the adjudicator's decision.

Any voluntary system would fall foul of the 'financial bully' problem but this will always exist whilst libel is still a justiciable tort.

MODEL B: DEFAMATION COURT



- Court fee paid
- Parties make detailed statements of case

- Before circuit judge
- Decides meaning
- Judge identifies issues and makes directions

- No more than two days
- Cost cap - for each stage and overall

A specialist defamation court is established with similar status to the Mercantile Court. It is part of the High Court but junior to it. Its administration is carried out by High Court staff. The judge(s) are senior circuit judges who specialise in defamation law. It is a self-funding court, paid for from the fees levied when a claim is made. The exception to this is if a party qualifies for fee exemption, when the government covers the cost of the fee.

The judge may award the same remedies as a High Court judge – damages, injunction preventing republication of the same or similar allegations, a statement read in open court, or an order that the court's judgment be published.

The judge manages the case very robustly after reading detailed statements of case, and applies a cost-benefit analysis in considering what evidence to allow. The trial is limited in time perhaps to two days. A costs cap on each stage of the process, as well as an overall cap, is applied.

If a case is too complex for the Defamation Court it would be transferred to the specialist judges in the High Court.

The model that has been used for this court is the Patents County Court.

ANALYSIS

The Patents County Court offers an attractive model on which to base a defamation court. The name of the Patents County Court is somewhat misleading: though its status is technically that of a County Court, it is in reality one court based in central London that sits with a specialist senior circuit judge.

The Patents County Court is more cost effective than the High Court Patents Court because of the strict case management and the costs cap. It can only work so well, however, with a specialist judge.

A defamation court based on this model (but as part of the High Court as opposed to with a County Court jurisdiction, similar to the Mercantile Court) is an attractive proposition. Strict case management is needed in defamation claims, so this is an advantage of the proposed defamation court. A costs cap offers certainty for the parties, but at £50,000, for example, would be still be unaffordable for most people and at this level would often mean that the winning party would frequently be out of pocket. Finally, a new court could be set up within the High Court with relatively little tax-payer expense.

There are already specialist judges in defamation claims, however, and strict case management rules could be introduced in to the current procedure. Costs caps too could be introduced to High Court defamation claims (and in fact are available on application on case-by-case basis). A defamation court is not therefore significantly different from the current forum to warrant setting up a new court, but its features offer benefits for defamation cases.

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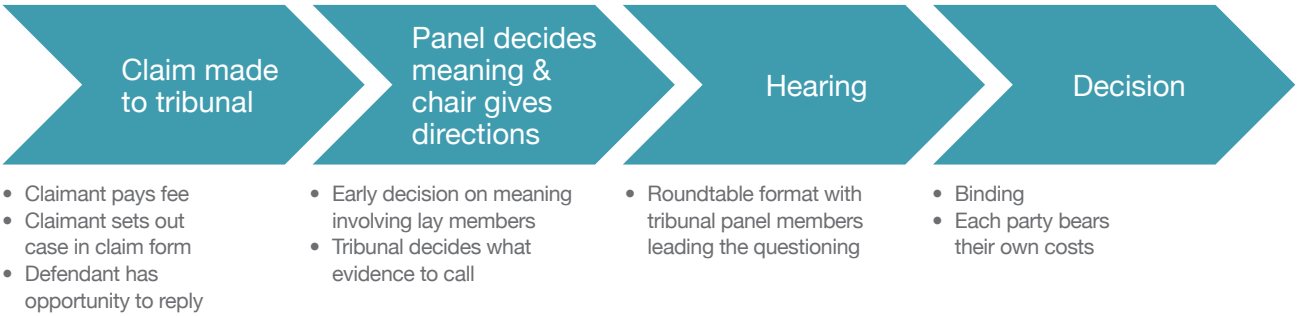
MODEL C: DEFAMATION TRIBUNAL



New legislation would establish a defamation tribunal which would sit within the existing General Regulatory Chamber of the First Tier Tribunal. It would be self funding, through fees levied when a claim is made. The exception to this is that the government will pay the fee where the claimant has a low income and few assets (through the existing fee exemption scheme).

Parties would state their case in initial paperwork. A panel consisting of the chair and two lay people would give a decision on meaning and the Tribunal Chair (a lawyer) would give directions as necessary, including specifying the evidence which is required. The panel would hear the case, in round-table format, and with the panel members making inquiries.

The tribunal could be given the power to award the same remedies as the High Court currently does.

Any decision the tribunal reaches would be binding. Appeals to the Upper Tribunal would be allowed on certain points, subject to permission being granted.

If the substantive law were to change to require some judicial action before secondary publishers become liable in defamation, the tribunal could handle these cases.

This is a hybrid model based on features of a number of tribunals.

ANALYSIS

An advantage of a defamation tribunal would be the involvement of lay assessors. This would help retain the element of a case being decided by lay people (as happens with a jury) as opposed to by a judge alone.

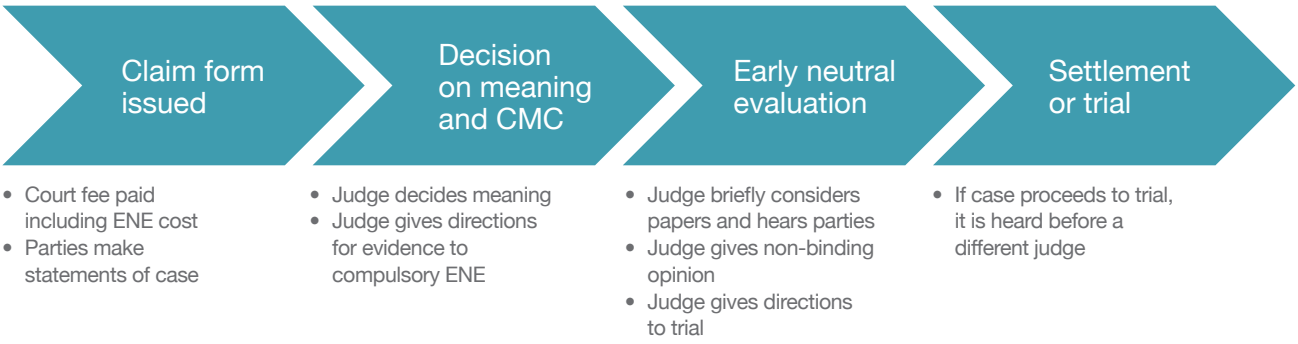
Where would such lay assessors be drawn from? Traditionally a tribunal panel is made up from a chairman (a lawyer) and one assessor who represents one relevant interest group, and one assessor who represents the other (i.e. an Employment Tribunal would sit with one assessor from an employer's association and one assessor from a trade union) and such interest groups do not really exist in defamation because the parties can be so different in nature.

Furthermore, the tribunal costs model, where parties bear their own costs, is disapplied if a case is taken to the Court of Appeal, meaning that once a party is involved in a tribunal claim, if the other side escalates this to the Court of Appeal, he or she might suddenly find themselves exposed to the risk of having to pay the other side's costs for the whole of the case.

The main disadvantage of setting up a tribunal is that, with the exception of lay assessors, it would not offer anything significantly different from a court. It would also be expensive to establish.

Overall, the introduction of a Defamation Tribunal, or even a tribunal to deal with all cases concerning Article 10 of the European Convention on Human Rights, would essentially be a re-branding exercise. If it brought with it a significant change in approach with a faster, simpler procedure and a strict and low costs cap, then it would offer a solution to the high costs of defamation cases. But it is the changes themselves, rather than the forum, that are important, and they could be introduced in the High Court, where specialist judges already handle defamation claims.

MODEL D: EARLY NEUTRAL EVALUATION IN DEFAMATION



High Court judges could give an opinion on the likely outcome of a case once the parties had outlined their case and evidence. They could give an indication on both whether they think the claim would succeed and the likely damages. ENE would be compulsory.

The idea behind it is that once the parties have heard the opinion of a respected expert on the likely outcome of the case, they will be more likely to want to settle. If the case does not settle and goes to trial, a different judge will hear the case.

The court would be funded as it is now, through the levy of Court fees, with a potential additional payment for the ENE, and with exemptions available. An ENE would work best in a case without a jury, so if the presumption against a jury was introduced (as opposed to current presumption in favour of a jury), ENE would be more effective. An ENE would also be more effective if a decision had been made in respect of meaning.

The models considered are ENE in the Technology and Construction Court (TCC) and the Financial Dispute Resolution (FDR) hearing in family cases.

ANALYSIS

The success rate of Early Neutral Evaluation in the TCC is impressive. Mr Justice Akenhead has said that he believes that every case in which he has carried out an early neutral evaluation has settled as a result of that. Despite this success rate, there is not a lot of take up of this option of ADR in the TCC with ten or so cases every year opting for this process.

ENE also takes place in family financial disputes, and many cases settle as a result of this, with few going to a final hearing. ENE is certainly useful as it acts as a reality check: people rightly treat judges' opinions as having gravitas, and even when they have perhaps had the same advice on a likely outcome from their legal advisor, hearing a judge's view on the case can frequently encourage settlement.

Some people, of course, would readily take such advice from their barrister or solicitor, but there is no doubt that others need to hear a judge's view before they accept the likely outcome of a case, particularly if it is contrary to their sense of justice. It would be a particularly good form of ADR if a party is unrepresented.

Yet for an effective Early Neutral Evaluation to take place, evidence must have been disclosed, so some costs have already been built up. It cannot therefore take place as early as mediation can, for example. The advantage of ENE over mediation though, is that apart from the usual steps that a party would take in litigation (such as disclosure) it does not require the active participation of the parties to be successful. All ENE requires is for the parties to hear the judge's opinion.

A successful ENE could result in a case settling earlier than it would have without the evaluation having taken place; an unsuccessful ENE could add to the costs of the case.

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MODEL E: JUDICIAL MEDIATION IN DEFAMATION

- Court fee paid
- Parties make statements of case

- Mediation fee paid
- Judge qualified to hear trial acts as a mediator for no more than one day

- If no settlement, case goes before judge
- Decision on meaning
- Directions

- If case proceeds to trial, it is heard before a different judge

High Court judges could mediate cases that come before them. This could be voluntary or compulsory. Mediation could take place as soon as the defence has been served. Even if the mediation doesn't settle the case, it may narrow the issues.

The judge would not be able to give an opinion, but could guide the parties through all the issues in dispute, clearing barriers to settlement. The court would be funded as it is now, through the levy of court fees, with an additional payment for the mediation, and with exemptions available. An important question to ask is whether the mediation would be compulsory.

The model we have used is judicial mediation in Employment Tribunals.

ANALYSIS

Mediation is well suited to defamation claims. It takes the heat out of litigation and focuses on settlement, not presentation of the strongest possible case. It is being used increasingly in defamation litigation, with a lot of success. If judges were to carry out mediation, they would have to be trained: mediation requires different skills to managing and deciding the outcome of a case.

The parties' respect for judges may in some cases be beneficial in assisting mediation, but the court environment, and the fact that proceedings would already have to be issued to access this service, may negate that potential benefit. Part of the benefit of mediation – that it is about the personal circumstances of the case and not the parties' rights in law – may be lost if mediation is carried out by judges.

Mediation which takes place outside the court process can take place early, before parties have set down their strongest arguments in statements of case and incurred perhaps £5,000 in the process. Compelling parties to mediate has the potential to ensure that parties with an entrenched view of proceedings will consider other possibilities.

With the assistance of the mediator as a skilled third party, mediation may lead to settlements in cases which were thought to be incapable of settling.

It is important that parties themselves attend mediation, not just their lawyers. The costs of attempting a failed mediation will however add to the overall cost of proceedings, which is contrary to the aim of an alternative procedure. Furthermore it is impossible to compel parties to engage constructively in mediation even if they are compelled to attend.

Parties who choose not to mediate should be made to give a reason for their choice, and costs sanctions for failing to mediate without good reason should be imposed.

COMPARISON TABLE

	Model A Adjudication	Model B Defamation Court	Model C Defamation Tribunal	Model D Early Neutral Evaluation	Model E Judicial Mediation
Public body	No	Yes	Yes	Yes	Yes
Forum	N/A	Specialist part of High Court	First Tier Tribunal	High Court	High Court
Personnel	Private adjudicator	Senior Circuit Judge	Panel of one judge and two lay members	High Court Judge	High Court Judge
Compulsory	Yes	Yes but cases can be transferred to High Court	Yes	Yes	No
Remedies	Damages, correction, apology	Damages, injunction, statement in open court, publication of judgment	Damages, injunction, statement in open court, publication of judgment	Any	Any
Who pays the fees?	Adjudicator decides who pays	Claimant but Court decides if recoverable	Claimant but Court decides if recoverable	Claimant but Court decides if recoverable	Both parties but recoverable by negotiation
Who pays the costs?	Parties bear their own costs	Court decides who pays costs up to cap	Parties bear their own costs	Negotiated	Negotiated
Length of process*	5 weeks	6 months	6 months	4 months	1 month
Nature of decision	Binding unless challenged in court	Binding	Binding	Not binding	Not binding
Other key features	Low cost	Strict case management	Inquisitorial	Early judicial opinion on likely outcome of case	Gets all parties talking early

*This is reflective of the time the process should take from complaint until conclusion of the case (in the case of the non-binding processes assuming this happens shortly after the process is complete) and necessarily involves a degree of guess work as well as relying on information obtained from existing courts and procedures that these models are based on. It is also noted that the length of time a process will take will depend on the resources available.

APPENDIX 4
NOTES TO EDITORS

This report is the second and final report published as part of a project by Index on Censorship and English PEN and funded by the Nuffield Foundation.

The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org

English PEN is a registered charity (number 1125610), with the object of promoting the human rights of writers, authors, editors, publishers and other persons similarly engaged throughout the world.

Index on Censorship promotes the public understanding of freedom of expression through the Writers and Scholars Educational Trust (registered charity, number 325003).

Jonathan Heawood (Director, English PEN), John Kampfner (Chief Executive, Index on Censorship), Jo Glanville (Editor, Index on Censorship) and Rob Sharp (Head of Campaigns and Communications, English PEN) form the steering group for the Alternative Libel Project.

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