

DEFAMATION ACTIONS AND THE NEW CPR

New Civil Procedure Rules ("CPR") have been introduced to simplify and accelerate litigation and make it more cost effective. The rules leave the overall structure of a defamation action unchanged. The main elements of the old rules specific to defamation have been expressly incorporated. A "pre-action protocol" specific to libel actions is currently being drafted, covering e.g. pre-action duties to exchange information and documentation, the aim being to avoid litigation.

However, other new provisions of the CPR apply equally to defamation actions as to other actions. They are likely to have a considerable impact on the conduct of defamation claims. The general trend of the new rules is to encourage amicable resolution of disputes wherever possible, and if not possible, to ensure that litigation proceeds as swiftly as possible.

The rules set tight timetables for written pleadings and oral hearings, severely limiting the parties' ability to agree on short delays. This means in practice a far higher burden on media organisations to ensure that all evidence is available at the time of broadcast or publication - there will be little time to obtain evidence during any subsequent litigation.

The media will have to be absolutely sure of its evidence, since a senior member of the client organisation is now required to sign a "statement of truth" for all written pleadings.

It is now even more critical that care is taken with the recording of interviews with potential witnesses. Good notes of interviews are a minimum. With a central source making serious allegations, a sensible precaution must now be to get a statement prior to broadcast.

Documentation will also have to be in order at a very early stage. The rules envisage early disclosure and indeed provide for requests (and, if necessary, applications to court) for disclosure of documents before the start of proceedings. Likely Plaintiffs (or "Claimants" as they will now be known) are entitled to seek pre-action disclosure of documents which previously would only be disclosable once proceedings started.

It remains to be seen how far this will displace the established rule that a libel defendant can not normally rely solely on documents disclosed by the complainant to establish his plea of justification. Recent experience suggests that Claimants may be forced into early disclosure allowing Defendants to use this material in their pleadings.

These provisions mean that internal journalistic housekeeping during the making and immediately after broadcast of programmes are crucial. Keep all useful documents; excess and unnecessary material should be edited as you work on the programme.

Parties to litigation are encouraged to make formal offers or payments into court in an attempt to settle the proceedings. The rules are technical but, in essence, make provision as to payment of legal costs which encourage the acceptance of sensible offers and penalise unreasonable refusal. A party who refuses an offer and fails to do better at court faces a costs order on the indemnity basis plus a punitive interest rate on those costs.

Another general provision which has already had a significant impact in defamation is that which provides for summary judgment against a party if the court considers that it has no real prospect of succeeding in the litigation. The application can be based on a point of law or on the likely evidence (or lack of it) which can be expected to be available at the trial. If the court agrees with the application, it can strike out the claim or give judgment as appropriate. The recent decision of the Courts (22.6.99) striking out the claim by Keith Schellenberg against the BBC indicates that the Courts are likely to be keen to dispose of tenuous libel claims. In that decision, the judge also

invoked the concept of 'proportionality' underlying the new rules - he found that there was no "realistic prospect of a trial yielding any advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources".

This simple moral of these rule changes is to ensure you are well prepared and have good evidence readily available. If not, the fast track approach will quickly reveal this and you will face real difficulty in defending the proceedings with the prospect of being struck out or penalised in costs.

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further information:

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