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# "Everything should be as simple as possible but not simpler": practice and procedure in defamation proceedings

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Albert Einstein's pithy dictum that everything should be as simple as possible but not simpler in many ways encapsulates the attempts to modernise the approach to practice and procedure in defamation in the current era. It serves to add another perspective to the continuing public focus on the law of libel which has swept over us in recent months with a number of national newspapers pursuing campaigns seeking reform. Other integral parts of this wider context include non-governmental organisations like English PEN and Index on Censorship campaigning for greater freedom of speech, parliamentary debates, a Libel Reform Bill, a House of Commons Select Committee on Culture, Media and Sport report dealing with defamation, and a libel working group established by the Ministry of Justice which reported in March 2010.

The drive to create a simple but overriding objective in litigation, including defamation, found expression in Order 1 Rule 1A of the Rules of the Court of Judicature (NI) 1980. The declared overriding objective is to enable the court to deal with every action justly which includes so far as practicable, inter alia, saving expenses and dealing with each action in a manner proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party, ensuring that each action is dealt with expeditiously and fairly and allowing to every action an appropriate share of the court's resources by taking into account the need to allocate resources to other cases.

## Solving the mischief

Delay in defamation litigation had been endemic across the system for some time with cases being ill-prepared and lacking in appropriate readiness for trial in a timely fashion. Until recent years the role of pre-trial case management was virtually unknown with an absence of recognition of the benefit of early identification of the real matters in dispute and, where appropriate, the removal of impediments to timely determination of some such issues long before trial.

The courts and those appearing before them, through the medium of case management in defamation litigation, have now been driven to accept a more businesslike approach. Whilst the overriding principle is that justice must be done, litigants are now entitled to have their case resolved with reasonable expedition in a manner that invests the process with appropriate sanctions, inducements and time constraints calculated to reduce cost, streamline procedures and encourage early discussion leading wherever possible to a just

resolution. Not the least rationale behind this philosophy is that in defamation a person whose reputation has been traduced should pursue legal address with vigour. "Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods."[1]

## The pre-action protocol

The concept of pre-action protocols in Northern Ireland has crystallised from about 2008 when a pre-action protocol for the Queen's Bench Division was introduced. It was the first of a number of steps aimed at implementing the spirit of Order 1 Rule 1A. The purpose of a protocol is multifaceted. It is to govern the contents of a letter of claim and replies thereto, streamline the approach to documents and encourage settlement without frontloading the process with unnecessary cost. It raises the possibility of alternative dispute resolution (ADR) by way of recognition that litigation before the courts is not the only path to justice. The aim is to achieve more pre-action contact between the parties, better and earlier exchange of information, and better pre-action investigations by both sides, placing the parties in a position where they may be able to settle cases early without litigation in appropriate instances. It enables the litigation to proceed according to the court's timetable and promotes an overall "cards on the table" approach.

The defamation protocol that was introduced in April 2011 encourages both parties to disclose sufficient information to enable each to understand the other's case and to promote the prospect of early resolution, sets a timetable for the exchange of information relevant to the dispute, sets standards for the content of correspondence, identifies options which either party might adopt to encourage settlement of the claim and indicates that the extent to which the protocol has been followed both in practice and in spirit by the parties will assist the court in dealing with liability for costs and making other orders. It has a specific section indicating that the parties should consider whether some form of ADR would be more suitable than litigation and if so to endeavour to agree which form to adopt.

There are those who feel that there ought to be more beef in the sandwich and that letters of claim and defendants' responses should be even more detailed touching upon meanings/identification etc. in a fairly sophisticated and thoroughly comprehensive manner. The counter-concern is that such nuances might be better suited to the more specialist field of counsel rather than the solicitors dealing with a case in the initial stages. However, the protocol will be reviewed in a year's time and a further tightening up of the claim and response thereto can then be considered.

## Offer of amends

The introduction of the offer of amends procedure is another simple but far-reaching procedure that has impacted greatly on the number of cases that come to trial in England and Wales. Prior to the coming into force of current defamation legislation, some 20 libel cases a year were heard in the London courts. Now only between three and five cases a year come to trial and most libel lawyers agree that the reduction is much to do with the offer of amends procedure.

Offers of amends are creatures of statute brought to life by ss 2–4 of the Defamation Act 1996 which has now come into effect in Northern Ireland. This procedure has its origins in the recommendations of Sir Brian Neill's Committee on Defamation, Practice and Procedure, July 1991. It caters for the situation where a complaint of defamation is made against someone who accepts that their allegations were false and wishes to make amends. An offer under the statutory provisions can be made at any stage up to and

1 *The Neill Report* (1991), PIRA, viii.2.

including the time, if it arises, when a defence becomes due. On the other hand, the procedure is also designed to enable an offer to be made and accepted without the need for proceedings even to be started. If such an offer, properly made, is rejected then a defendant (or potential defendant) will have a complete defence to any libel claim unless the complainant can take on and discharge the burden of proving, in effect, that the defamatory words were published in bad faith.[2]

If, however, the offer is accepted, it is then for the parties to attempt to reach agreement on the appropriate remedies including financial compensation, an apology, correction, the payment of costs and so on. If the parties are unable to do this, then an application can be made to a judge (sitting without a jury) to resolve any of the outstanding issues. The statute is drafted so as to permit such a hearing to take place without a need for an action to be commenced at all. Section 3(5) of the 1996 Act provides that:

> If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.
>
> The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

The reasons why the section speaks of "compensation" to be determined "on the same principles as damages" is precisely because it contemplates an award being made without the commencement of proceedings. Technically a judge who is asked in such circumstances to award compensation is not awarding damages in an action for libel. This means that it is appropriate to hear evidence and submissions in the same way as in the course of a "damages only" defamation trial. This procedure should not be confused with that of summary judgment. There is no cap on the level of compensation permitted, as there is in the context of the summary judgment regime introduced in ss 8-10 of the 1996 Act. The "offer of amends" procedure is by no means confined to the less serious cases. It can come into operation because the parties have chosen to take that route and can apply in relation to defamatory allegations at any level of gravity.

It may well thus be legitimate in some cases to raise issues relevant to mitigation, aggravation and causation of loss in exactly the same way as during a conventional trial. What is precluded is anything tantamount to introducing a defence such as justification or fair comment.[3]

This legislation is an example of policy-making brought into force to encourage simpler and swifter dispute resolution and reduce the number of costly libel trials being heard in court. The procedure aims to give the makers of defamatory statements a chance to wave an early white flag without being taken to task over what is more often than not, an unintentional and unwitting libel. It remains to be seen if the advent of the offer of amends procedure in Northern Ireland leads to earlier resolution of cases on the scale that seems to have occurred in England and Wales.

## Mediation

Active case management is a means of furthering the overriding objective of Order 1 Rule 1A. This must include at appropriate times both encouraging the parties to use an

2 *Milne* v *Express Newspapers Ltd* [2002] EWHC 2564 (QB) and *Cleese* v *Peter Clarke, Associated Newspapers Ltd* (2003) EWHC 137 (QB).

3 *ABU* v *MGM Ltd* [2002] EWHC 2345 (QB).

ADR procedure if the court considers it appropriate and facilitating the use of that procedure. The English system under the Civil Procedure Rules 1998 (CPR) has embraced this for some time and parties are given the opportunity, when filling in an allocation questionnaire, to request a stay for one month while the parties try to settle the case by ADR or other means. Alternatively the court may order a one-month stay of its own initiative per CPR 26.4(2) and the court may extend the stay as appropriate under CPR 26.4(3).

Mediation has been a buzz word in legal circles for many years. It can take different forms. For those parties who cannot negotiate a way through the issues themselves, different mediation support is available from legal advisers with appropriate training to an independent third party, whether a judge or trained mediator, stepping in to assist, and from round-table discussion to more arms-length engagement. It is certainly not a one-size-fits-all discipline.

Mediation is said to shorten disputes and to allow parties to resolve differences without doing terminal damage to their continuing relationship. It empowers individuals by giving them a voice and enabling them to craft solutions which properly meet their needs. Importantly, in these difficult financial times, it is often said to be more cost-effective than litigation.

A major component of the drive towards mediation has been the European Union, which in Directive 2008/52/EC required states to put in place mechanisms to facilitate mediation in civil and commercial disputes with a cross-border dimension. Article 1 of the directive expresses the objectives as "encouraging the use of mediation and . . . ensuring a balanced relationship between mediation and judicial proceedings". The directive required member states to legislate by 21 May 2011 about certain fundamentals of mediation in order to facilitate the conduct of cross-border disputes of a civil or commercial nature through the mediation process. The main requirements of the directive may be summarised as follows in that member states:

- Shall encourage the development of and adherence to voluntary codes of conduct and other effective quality mechanisms and training of mediators to ensure they are competent.[4] Courts may invite parties to use mediation to settle disputes.[5]
- Shall ensure that written agreements arising from mediation shall be made enforceable.[6]
- Shall ensure that mediators and mediation provider organisations shall be prevented from being compelled to give evidence subject to specified exceptions.[7]
- Shall ensure that if a limitation or prescription period in domestic law expires while mediation is ongoing parties should not be subsequently prevented from seeking a remedy for that dispute through the courts or arbitration if the mediation fails.[8]
- Shall encourage the availability of information on how to contact mediators and organisations providing mediation services.[9]

In Northern Ireland recent steps have been taken by the judiciary and court staff working together with the legal profession and others in the field of mediation. Family

4 Article 4.
5 Article 5.
6 Article 6.
7 Article 7.
8 Article 8.
9 Article 9.

mediation schemes already run extremely successfully at several court venues and legal aid is available. The Legal Services Commission is considering ways to make legal aid for family mediation available before proceedings are issued. There is a judicial mediation committee looking at methods to assist the courts towards saving of time, expense and stress.

Importantly, the Cross Border Mediation Regulations (Northern Ireland) 2011 which came into operation on 18 April 2011 implement Directive 2008/52/EC. Regulation 3 sets out when mediators and those involved in the administration of mediation may be compelled to give evidence in civil and commercial judicial proceedings or arbitration and provides for the extension of limitation periods so that these do not expire during the mediation process. Where a period would otherwise have expired while mediation is ongoing or within eight weeks of its ending, the regulations extend the period so that it will expire eight weeks after the end of mediation. A mediator is not to be compelled in any civil proceedings to give evidence or produce anything regarding any information arising out of or in connection with that mediation.

The UK has decided to implement only the requirements of the directive and it will, therefore, apply to cross-border disputes only. In Northern Ireland we have adopted the somewhat more liberal approach followed in Ireland and have introduced the Rules of the Court of Judicature (Northern Ireland) (Amendment) Rules 2011 which empower the courts to adjourn any case – whether cross-border or internal – either on request of the parties or of its own volition for such time as the court thinks just and convenient and invite the parties to use an ADR process to settle or determine the case or, where the parties consent, refer the proceedings to such process. The court, as well as extending time for compliance with any other rule pending this occurrence, may give any other direction which will facilitate the effective use of that process. In order to encourage early use of this provision, the rule sets a time limit for its invocation, namely 56 days before the date on which the proceedings are first listed for hearing. Already an increase in the number of cases availing of this process may be noted.

A potent means of persuasion has always been a costs sanction. In England when the court comes to exercise its discretion on costs it must have regard to all the circumstances including the party's conduct and accordingly if a party turns down out of hand the chances of ADR when suggested by the court, it may face "uncomfortable costs consequences".[10] However, refusal to take part in ADR need not, if reasonable, be visited with cost sanctions.[11]

It is difficult to know how successful ADR/mediation will prove in defamation cases in Northern Ireland or how often it will be invoked. However, anecdotal evidence in England suggests that it has the capacity to achieve an harmonious outcome even in apparently uncompromising circumstances.[12] The legal department of at least one national newspaper publisher[13] offers claimants a form of ADR through "fast-track arbitration", a system of binding arbitration used in disputes over meaning and quantum, and as to whether the words complained of are fact or comment, which has undoubtedly succeeded in offering a cheap and speedy resolution of defamation disputes where there is no great issue of fact.[14]

10 *Dunnett* v *Railtrack plc* [2002] EWCA Civ 303; (2002) 2 All ER 850 per Brooke LJ, paras 14–15.

11 *Scoyett Internationale de Telecommunications Aeronautiquis SC* v *Wyatt* [2002] EWHC 2401 (Ch).

12 E.g. it provided an amicable resolution of the litigation in *Fayed* v *Telegraph Group Ltd* [2002] EWHC 1631 (QB).

13 Times Newspapers Ltd (Mr Alastair Brett).

14 W V H Rogers and P Milmo, *Gatley on Libel and Slander* 11th edn (London: Sweet & Maxwell 2008), p. 1066, note 171.

## Case management

The furthering of the overriding objective of enabling the court to deal with cases justly has in recent years led to active case management dealing with as many aspects of cases as is practicable on the same occasion. Although in Northern Ireland we do not have the Civil Procedure Rules 1998 and in particular the provision in CPR 1.4(1)(i) or even a Practice Direction such as Practice Direction (Civil Litigation) Case Management (1995) 1 WLR 262 which govern proceedings in England and Wales, nonetheless the advent of Order 1 Rule 1A has given fresh momentum to the court's inherent jurisdiction to control its own process by active case management.[15] The significance of current case management procedures is that, whilst simple in conception, they mark a change from the traditional position under which the progress of cases was left largely in the hands of the parties.

Accordingly, during the pre-trial stages of a case, in defamation cases no less than others, the court stands ready to react to the needs of the parties by making necessary orders, decisions and directions either by its own initiative or on the request of the parties. Clearly, costs and delays would be increased and court resources wasted if, in dealing with a case for one purpose (whether by a hearing, directions or otherwise), the court did not deal with other matters which had arisen or were looming and which required or justified the court's attention. It is important, particularly in the field of defamation, that parties and judges should not be encouraged to deal with several aspects of a case on successive occasions when it would be practicable to deal with them on one occasion.

Equally so in the course of case management it is important not to attempt to oversimplify the approach and to recognise that the courts remain constrained by both statutory and regulatory rules. A distinction must be made between directions on the one hand and orders, decisions or judgments on the other. The role of directions is to oil the wheels of case management. As such they can be and are often varied or revoked where it is just and reasonable to do so. On appropriate occasions this can be done administratively by way of a letter of consent of the parties with the approval of the court or alternatively before the court without the necessity for pleadings. They do not bear the seal of court orders, decisions or judgments but are nonetheless an integral part of the case management system.

It is thus important to distinguish between directions calculated to cut through peripheral and time-wasting issues on the one hand and full hearings with necessary court orders on the other. The House of Lords[16] strongly protested against the practice of the court of first instance allowing preliminary points of law to be tried before and instead of first finding the facts since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. Preliminary questions of law should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue. Such applications need the careful scrutiny of the court even where the parties are consenting to such a course at direction hearings before any such order is made. Hence, case management hearings must not sacrifice appropriate full hearings on the altar of simplicity and expedience.

Nonetheless, case management has become a crucial tool in dealing with defamation cases in Northern Ireland. Rigorous and early scrutiny of defamation litigation at an early stage, and in any event never more than nine months after the writ has been issued in every such case, has enabled the courts to clear a heavy backlog of cases that have been waiting

15 *Caldwell* v *Morgan Walker Solicitors* (2010) NIQB 115.

16 *Tilling* v *Whiteman* (1980) AC 1.

in the aisles in some instances for years and streamline all other cases towards early resolution or hearing. The aim is to ensure that within nine months of the issue of proceedings every single defamation case in Northern Ireland has been given at least a target date for hearing even if the pleadings are at a comparatively early stage. The setting of realistic deadlines made after informed discussion with the parties at early case management proceedings and which can be extended only with the compliance and consent of the court, ensures that minds are concentrated in what is and should be seen to be a fairly specialised and difficult area of law in Northern Ireland.

Thus, a typical defamation review will deal with and confront the following issues, setting deadlines for the completion of same and pointing inexorably towards the target date for hearing:

- Deadlines are set for the completion of all pleadings where an extension of the time limits set out in the Rules of the Court of Judicature is sought. The presumption always is that the rules and the time limits therein prescribed are there to be met and are to be extended only for good reason.
- Deadlines are set for any outstanding interlocutory proceedings which are anticipated or are outstanding, including amendment of pleadings, hearing of preliminary issues, meanings applications, interlocutories, disclosure, strikeout applications, notices for particulars, and pleadings in general etc.
- These time limits are rigorously enforced and extended only upon application to the court.
- A deadline is set for exchange of discoverable documents. Disclosure in defamation cases is fertile ground where delay and spiralling costs breed. It has to be gripped at an early stage and carefully monitored by appropriate directions leading to early court determinations if logjams emerge.
- The parties are specifically asked whether mediation has been considered.
- The court insists that only the solicitor with carriage of the case or barrister retained will attend the hearing.
- The mode of eventual trial has to be addressed at an early stage, e.g. is a jury required or appropriate for all issues?
- Once a date is fixed for trial, specific directions are given as to the nature of the documents to be produced in orderly, paginated and collated form with an emphasis on the need to furnish only core and relevant papers; skeleton arguments must be furnished prior to trial on any legal issues; a date for negotiation is fixed in every case even if the defendant chooses, as is his or her right, to state that the case is to be contested at that meeting; and provision is made for the exchange of a timetable for witnesses; and, if necessary, evidence by way of live television link set up for witnesses outside the jurisdiction.
- The case must be set down by a specified date determined at the review.
- The review system is also used to encourage counsel to address the issue of damages so that the parties come to the trial well prepared. Hence every review in a defamation case includes a direction to consider a number of specified authorities touching on quantum so that the matter is addressed by every single practitioner prior to the hearing.

## Pre-trial attendance

Particular attention is drawn to the need to clarify outstanding preliminary issues prior to the day when the jury will attend to determine the case. Thus, meanings applications, preliminary issues to strike out etc., all must be addressed at a hearing before the trial date. A genuine attempt is made by the court to anticipate legal issues that require determination prior to the hearing. Thus attendance of counsel is required at a final pre-trial review listed seven days prior to the hearing geared to the following matters:

- Impediments to jurors serving, e.g. connections with the case.
- Confirmation that all other preliminary issues have been determined, e.g. meanings/pleading points etc.
- The order of play. Where justification/qualified privilege have been pleaded, have the parties agreed which party shall give evidence first?
- Where for example a *Reynolds*[17] defence arises, what questions need to be determined by the jury as opposed to the judge?[18]
- Have the parties agreed a timetable for the witnesses? Courts must become user-friendly so that witnesses no longer attend needlessly for days on end.
- Have the parties considered written directions to the jury? Whilst ultimately a trial judge must decide whether to reduce his directions of law, or some of them, into writing or whether written steps to verdict may be particularly useful if there are several possible avenues for an award, it is important that counsel have a considered view rather than produce a spontaneous unprepared reaction. In all instances counsel must be prepared to engage in the process with written submissions if necessary. All such written documents will need to be discussed with counsel before they are finalised but counsel need to be appraised of this possibility before the trial commences.

## Conclusion

Defamation is a specialist and difficult area where only experienced and proficient lawyers should dare to tread. For far too long delay – often as a tactic by one party or another – and spiralling costs in the process have been the enemy of justice and the rule of law in this field. Costs have often been used as a weapon to deter claimants from the seat of justice and equally claimants have often used defamation as a means of silencing those who ought not to be silenced. Simple, efficient and expeditious justice is the key to proper resolution of these cases executed by professionals who know what they are doing and are procedurally well informed. Einstein was right to emphasise the need to keep things simple so that obfuscation and cost do not become impediments to justice. Equally so, it cannot be made so simple that the complexities of one of the most fascinating areas of law become ignored. Simple but not too simple must be the clarion call for the future.

17 *Reynolds* v *Times Newspapers* [2001] AC 127.

18 *Jameel (Mohammed)* v *Wall Street Journal Europe* [2005] QB 904 where Lord Phillips of Worth Matravers MR said: "The division between the role of the judge and that of the jury when Reynolds privileges and issues arise is not an easy one; indeed it is open to question whether a jury trial is desirable at all in such a case." For an example where this was canvassed see *O'Rawe* v *William Trimble Ltd* [2010] NIQB 135.