



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE WARBY
JUDGE IN CHARGE OF THE MEDIA AND COMMUNICATIONS LIST

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Media Litigation in the High Court

Doing justice in the Media and Communications List

Introduction

The subject of my remarks today is the business of doing justice in media cases in the High Court of England and Wales.

I want to suggest that achieving justice requires three things, at least: a substantive law that is fair; procedures that are just and efficient; and a system that is managed and operated in such a way as to promote swift and effective dispute resolution in practice.

So this talk is in three parts. I am going to take the three elements I have mentioned in reverse order. There is limited scope for a sitting judge to comment on the substantive law. So my focus will be on the management of the system, and procedural issues. The first part of what I have to say will be about management.

I very much want to say a few things about the Media and Communications List. This is a recent and important innovation in our High Court, which I hope and believe will help all those involved in media litigation. I want to explain something about the background to its creation, what it is for, and where we are at this early stage in its life.

Some personal background

This will put into some context some of what I am about to say about the Media and Communications List, its creation, and its future.

I started out as a media lawyer in 1982, at the age of 23. For the next 32 years I practised as a barrister in Gray's Inn, just opposite the top of Chancery Lane, about 400 yards from where we are now. Most of my work was media work. Most of the court work was done in the Royal Courts of Justice, which are immediately behind us to the West. In 2002, after 20 years as an advocate, I became a Queen's Counsel, or QC. That, as you will no doubt know, is a senior rank among advocates. But the Bar is a precarious profession in some ways. As most if not all

of you probably also know, barristers in this country are self-employed rather than being employees or partners. There are no guarantees.

So it was not until June 2014 that I got what my father would recognize as “a proper job.” That is when I was appointed as a Judge of the High Court, where all our media litigation takes place. And it was not until this year that, still in that proper job, I got my first promotion, to the newly created role of Judge in Charge of the Media and Communications List.

The Media and Communications List

I was the obvious candidate for the job. I was at the time the only High Court Judge who had specialized in media law when at the Bar. That remains the position today, but only until next Monday, when I am pleased to report we will have another, the newly appointed specialist Mr Justice Nicklin.

This leaves of course the more important questions of why the Media and Communications List was created, and what it is for? Here, I hope you will forgive me filling in a little bit more history. Three major developments deserve mention. The first is the demise of the jury in media cases and the consequent, dramatic, reduction in the importance of the Jury List.

The Jury List

In the USA, you have the Seventh Amendment. For those in this audience who do not know, the Seventh Amendment provides that “in suits at common law” involving more than twenty dollars “the right to jury trial shall be preserved”. It is beyond the scope of this discussion to consider just what that means, but I understand it to be the basis on which jury trial is common in US civil litigation.

Here in England and Wales, jury trial remains available in theory for a large number of civil claims; but it was long ago abolished in practice for most kinds of claims. Trial by Judge alone is the norm, and has been for many years.¹ The limited exceptions used to be fraud, defamation, false imprisonment and malicious prosecution. At the same time as enacting a general rule that civil claims would be tried by a Judge sitting without a jury, Parliament created a presumption that cases of these kinds would be tried with a jury.

Jury cases call for different case management, and different trial management. To control and oversee this exceptional category of actions there was something called the Jury List. A case of one of these kinds would be categorized as a Jury List case, and placed under the management of a designated Judge – the Judge in Charge of the Jury List. This Judge conducted the case management and trials of all or most of the defamation cases. And all or the great majority of media litigation was defamation.

¹ The effective abolition of jury trial for most civil claims came in 1933. The history is outlined in [Yeo v Times Newspapers Ltd](#) [2014] EWHC 2853 (QB) [2015] 1 WLR 971 [17] et seq.

All that has changed. Defamation litigation has been in decline. In the earlier part of this century, there had been a strong move towards dispensing with the jury in these cases on a discretionary basis.² Then, in 2013, jury trial in defamation was abolished. More accurately, Parliament revoked the statutory “presumption” in favour of jury trial in defamation cases.³ That leaves only a handful of cases for which trial by jury is still the presumptive mode of trial. There still is a Jury List, but it has hardly any business nowadays, and little or none of this is media-related.

The expansion of media law

The second major historical development is an increase in both the diversity and complexity of media law. In the last 20 years, media litigation has become much more diverse in its nature, and a great deal more complex. This has mainly, though not entirely, resulted from legislation.

In the late 1990s we had the Protection from Harassment Act 1997, the Data Protection Act 1998 and, most importantly, the Human Rights Act 1998. The HRA requires Courts in this jurisdiction to ensure that our laws are interpreted and applied in a way that is compatible with the fundamental rights enshrined in the Convention of 1950. This, by the way, is a feature of our law which will be unaffected by Brexit, because the Human Rights Convention is a creature of the Council of Europe, a European institution which is separate from and independent of the European Union.

In the early part of this century, under the influence of European human rights law, privacy rights developed so as to become a prominent feature of our domestic law. The Convention right to respect for private life has had wide-ranging impacts on our law. Among them is the development of a new tort, that did not exist before 2004: misuse of private information. This has been much litigated here.

As privacy has grown in importance, and defamation litigation has tended to decline, many of the old certainties of our domestic law of defamation have had to be re-examined in the light of human rights law. Harassment has become actionable by statute. Its boundaries have had to be set and then tested and examined in individual cases, within the human rights prism. At the same time, profound changes were made to civil procedure, starting with the Civil Procedure Rules in 1997. Over that time, the jury boxes in Courts 13 and 14 at the Royal Courts of Justice have been used less and less often. The new world is mainly one in which judges decide more complex issues of law, or mixed fact and law, usually with reference to human rights laws.

² See [Cook v Telegraph Media Group](#) [2011] EWHC (QB) (Tugendhat J) [81]-[83] and following.

³ Following the amendments made by s 11 of the Defamation Act 2013, jury trial remains available, but this is on the same basis as it is for other claims such as personal injury and only exceptionally would it be ordered. See *Yeo* (n 1 above) at [43].

Increased specialization

The third point is related to the second. It has come to be recognized that media law is a significant speciality area, which deserves its own special attention, and requires the attention of Judges who themselves have relevant experience.

Although the Jury List dealt mostly with media cases, it was not until late in the 20th Century that specialist expertise was brought to bear. In my career at the Bar, I saw six Judges come and go as Judge in Charge of the Jury List. Four of these were non-specialists. Until the late 20th century, the custom was to assign the role to the senior – that is the longest-serving – Queen’s Bench Judge, regardless of whether they had any relevant experience. That was workable when media law mainly consisted of set piece jury trials, largely focused on factual issues. But as media litigation grew and began to become more complex and multi-faceted, that had to change.

Twenty years ago, in 1997, Sir David Eady became a High Court Judge. David had practiced at the defamation Bar all his professional life. During the same period, we had two other media law experts sitting at first instance in the Queen’s Bench Division: Dame Victoria Sharp and Sir Charles Gray. Eady J became the Judge in Charge of the Jury List. He remained in that role for some 15 years, succeeded by Sir Michael Tugendhat, who also came from media law chambers.

But the vanishing importance of jury trial vastly reduced the importance of the Jury List. By 2011, the role of Judge in Charge of the Jury List had been absorbed into the overall management of cases in the Queen’s Bench Division. By 2017 it had become clear to those responsible that it was time to take a different line, and to apply a new specialist focus to all forms of media and communications litigation.

The Media and Communications List, its scope and aims

Thus, it was that with effect from 1 March 2017 I was invited “to take primary responsibility” for cases in this field. Sir Brian Leveson, President of the QBD, described what was needed: “... to give new focus to this important specialism... and to modernize the listing arrangements.” To be precise, the kinds of case falling within the scope of my responsibility is described in the formal announcement in this way:

“cases involving one or more of the main media torts (defamation, misuse of private information and breach of duty under the Data Protection Act) and related or similar claims including malicious falsehood and harassment arising from publication or threatened publication by the print or broadcast media, online, on social media, or in speech.”

The vehicle for this – the Media and Communications List – is additional to the old Jury List.

This is a new list within the Queen’s Bench Division of the High Court.⁴ My role is, subject to the ultimate authority of more senior judges, to

“... exercise judicial responsibility for the listing of cases of the nature set out above and of applications within them and [to] be responsible for considering emerging procedural issues in this context.”

We started with a simple requirement, designed to give us a pool of cases to manage. Parties who consider their case meets the parameters I have described are required to label their claim with “Media and Communications List” when they issue it or when they respond to the claim by filing an Acknowledgement of Service. We retain the power to move cases in and out of this list of the Court’s own motion, or upon application. That has been in place since 1 March 2017. It enables us to have oversight of the case load.

The Consultation

The next step was to consult with those who litigate in this area, and the judiciary with relevant experience, with a view to establishing generally whether there are any improved practical arrangements that might be made for cases of the kind specified.

I launched the Consultation on 3 May 2017. The scope was narrow. As I put it in the report that followed, this was not a consultation “on concrete proposals, nor a wide-ranging examination of all the procedural issues that arise in this kind of litigation”. Rather it was “an exercise in eliciting some broad views on a range of key questions, as a prelude to some deeper consideration of what changes are desirable and can be made to the way the court manages this category of litigation.” The intention was to embark on engagement with Court users in a modest, limited, but achievable way.

There were 3 main consultation topics

- The adequacy or otherwise of the relevant CPR and Practice Directions, and areas for improvement
- The adequacy of the regime for collecting statistics on media injunctions, and means of improvement
- Whether respondents supported a meeting for users of the List and/or a Users’ Committee.

The first question is broad, but the way it was framed meant that there was relatively little scope for long answers. Those who considered the procedural regime to be deficient were asked to identify just two changes they would propose.

Limiting in this way the scope of this initial exercise meant that we could set a short

⁴ The QBD is the principal division of the High Court. It deals with civil cases other than family and Chancery matters (company, equity, trusts, wills etc.)

consultation period of only 28 days. The fact that it was all over by the end of May allowed me to absorb and analyze the responses and publish a report upon them at the end of June, just 4 weeks after the Consultation closed.

We had a high rate of response, a high quality of response, and some very clear messages. The [Report](#), which is short, bears reading in full. But the headlines are these. 90% of respondents considered that the relevant Civil Procedure Rules fall short of what they should be. The vast majority considered costs to be the single most important case management issue to be considered. Second in rank was the issue of delay. Just about everyone thought a Users Group meeting was a good idea.

A large number of suggestions were made for rule changes. Ultimately, that will be for the Civil Procedure Rule Committee to consider. But before anything is put to that Committee, we are to have a Court Users' meeting. This is fixed for 7 November 2017. I expect this will result in the creation of a Users' Committee and, before too long, concrete proposals for change. I am confident that several of the proposals put forward in the Consultation will be taken on board within the next 12 months if not sooner.

In the meantime, let me share with you some of my own thoughts about the business of managing the system, and procedural issues.

Managing the system

When I talk of managing the system I am speaking of the big picture, the overall landscape of media litigation. This is something different from the management of individual cases. That is an important managerial task, but I will come on to that. I am looking here at structural or systemic issues.

My overall aims can be simply stated: to resolve disputes fairly, promptly, and at reasonable cost. Easier said than done.

Some respondents to the Consultation have proposed the introduction of a kind of judicial triage. Each Media and Communications Case would be reviewed by a specialist judge at the time of filing, or shortly after it is filed, with a view to taking case management measures. We will look at that, of course. In principle one can see the attraction, though it would be a marked departure from the norm, and has fairly obvious and potentially problematic resource implications. We live in times of austerity, with recent shortfalls in judicial recruitment.

Managing the system certainly involves oversight of what is in it, once filed. It also involves a role in allocating Judges to cases. This is not as simple as it might appear. All judges in the QB Division have a variety of judicial commitments. It is not always possible to fit the person to the case. But technology can help here, I think. Today, I have one clear advantage over my predecessors, as the staff in the listing department provide me with schedules of the substantial applications and trials that are in prospect for the next few months.

I am keen to ensure a better understanding of the practical factors that affect the management of the system. I am optimistic that the User Group, the creation of which is in prospect, will help me address structural issues in the system, along with procedural ones.

Procedural matters (case management)

We need to be careful here. Some have warned against “managerial justice”. There are two main risks, I believe. There is the risk of elevating procedural aims, such as speed, over the requirements of substantial justice. The over-valuation of fair process as compared to just outcomes is something we see in many contexts in our everyday lives. It probably results from the fact that processes are easier to prescribe, implement, and evaluate. I do hope that the English legal system will continue to avoid this.

The second risk is that attempts to manage cases actively end up being counter-productive. A thoughtful assessment of this issue can be found in a speech given by Chief Justice Allsop of the Federal Court of Australia, in September 2014.⁵ He asked “Is judicial case management a solution to the ever-present problem of costs?” Active judicial case-management had become the received wisdom in Australia, as it had here following the Woolf reforms. Allsop CJ examined the results of research studies in the USA,⁶ this country,⁷ and Australia.⁸ He found that:

“the picture that emerges from these studies is, at best, blurry. It seems tolerably clear, however, that judicial case management, if it is done badly, will either have no impact on litigation costs or, worse, increase them.”⁹

Allsop CJ identified three particular risks that we will do well to keep in mind as we try to improve things here. One is the unnecessary front-loading of costs. A second is an over-active judiciary: one that gets involved too much, and generates unhelpful and costly activity. A third, related point, is unduly complex directions hearings.

These are important warnings. But it would be wrong to give up on managing the system. You can have the best laws that humans could devise, and the fairest procedural rules, yet still fail to produce justice by failing to managing and operate the system efficiently.

⁵ Chief Justice James Allsop, *Judicial Case Management and the Problem of Costs*, speech at the Lord Dyson lecture on “The Jackson Reforms to Civil Justice in the UK”, hosted by University of New South Wales, Faculty of Law at Herbert SmithFreehills, Sydney, 9 September 2014

⁶ JS Kakalik et al, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND, 1996)

⁷ J Peysner and M Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (UK Department of Constitutional Affairs, DCA Research Series 9/05, November 2005)

⁸ A Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (Law and Justice Foundation of NSW, July 2003)

⁹ P12

Two hundred and sixty years ago, on 11 November 1756, the Scots lawyer William Murray was appointed Chief Justice and became Lord Mansfield, aged 51. He was a great supporter of George III, and an opponent of the attempts by American colonies to break away. But he was not all bad. Let me pass over his decisions concerning the free speech advocate, John Wilkes, which have had mixed reviews. Let me focus on his important procedural reforms.

One such reform was swifter judgments. Before his time the custom was to reserve judgment, however modest the issue might be. It could take some time for the judgment to be delivered. This was inconvenient to the parties, and to others who might have an interest in the outcome and its reasoning. Mansfield's determination to avoid delay and expense led to extempore judgments whenever possible. This can be a challenge in the more complex media cases, especially when (as so often) there are late developments. But what we can do is to aim that, if judgment cannot be pronounced there and then, it will be given promptly after the hearing. That is a target I have set myself and generally met over recent years.

This will all be wasted effort, however, if we cannot achieve early definitive hearings. The maxim usually deployed in this context is of course that "Justice delayed is justice denied". The origins of the phrase itself are disputed. Some attribute it to William Gladstone, the British politician and Prime Minister of the 19th century. Others suggest it was William Penn, who was born in Tower Hill not far from here but – as some of you may know – went on to become the founder of the Commonwealth of Pennsylvania. Whatever the truth of this, there is no doubt that this principle - in one or another form of words - has been recognized on both sides of the Atlantic for a very long time.

Avoiding delay in doing justice must certainly mean cutting down the opportunities for unnecessary hearings. We have not always done this, in this country. Before Lord Mansfield came to office, it was the practice to allow Counsel to argue a given case two or even three times before the Court pronounced its (reserved) judgment. That was to change. In a case argued the day after his appointment as Chief Justice, the parties expected that it would be argued a second or perhaps a third time. Mansfield disabused them of that, saying "Where we have no doubt, we ought not to put the parties to the delay and expense of a further argument; nor leave other persons who may be interested in the determination ... under the anxiety of suspense."¹⁰

There is a modern parallel. In 2011, in *Cook v Telegraph Group*¹¹ Tugendhat J said this:

"114. ... Trials by jury in libel cases now commonly involve the arguing of the same point at least twice and sometimes several times over. It is often not one trial by a judge with a jury, but one trial by a judge followed by another trial by a jury. Each party commonly seeks a ruling from the judge on as many issues as possible to the effect that the opponent's case on that issue should be withdrawn from the jury.

...

¹⁰ *Raynard v Chase* 1 Burr. 6

¹¹ n 2 above

115. This multiplicity of opportunities to argue the same point is one of the major reasons why the costs of libel actions have become so disproportionate as to risk condemnation as an interference with freedom of expression and the right of access to the court (see *MGN v UK* [\[2008\] ECHR 1255](#)).”

This reasoning led to a discretionary decision to refuse a trial by jury in that case. The bigger step has since been taken by Parliament in the 2013 Act. The virtual abolition of jury trial in defamation has had many advantages. It has removed the territorial disputes that quite often used to arise, over whether a given issue is within the province of the judge, or that of the jury.¹² In addition, this reform has all but eliminated the practice of arguing the same point to different threshold standards on different occasions. It is now possible for many more cases to reach a final resolution more economically by early judicial decisions on key issues of fact, or mixed issues of law and fact.

This is an area in which we must always be alive to the risk of front-loading costs. We need to ensure that any order for a preliminary trial is really appropriate, and fits the particular case. The Court of Appeal has had something to say about this in its recent decision in *Lachaux*.¹³ I do not propose to comment in any detail on the implications of *Lachaux*, which will repay further study, and will benefit from the light shed by the adversarial process. One thing is certain, however: this decision will disabuse some of any notion that the issue of serious harm arises, or is suitable for early judicial resolution, in all or most defamation cases.

But I do believe that early trials of specific issues have a real and important future in this field of litigation. Orders for suitably framed trials of issues can save much time and expense. Nobody doubts, for instance, that the early resolution of meaning as an issue of fact remains a very useful feature of the modern procedural regime. I believe that in appropriate cases it will be right to resolve other, related issues at an early stage.

Which brings me to the issue of costs budgeting. This is, to be precise, the specific matter identified by the great majority of Consultation respondents as the procedural issue of pre-eminent importance. The particular worries that animated respondents will emerge at the Users’ meeting in November, and afterwards. For me, there are two main concerns. One of these was highlighted by Allsop CJ in his Sydney speech. He noted the particularly bitter irony, where case management undertaken to curb costs results in adding to them. That is a real risk attendant on the process of creating and then agreeing or disputing costs budgets.

The other concern is that costs budgeting takes place relatively late in the process - too late, if the costs of some early resolution measures are to be controlled. If I am right about the continued relevance of preliminary issues, there is a risk that cases will reach a relatively prompt resolution in court without any judicial cost control beforehand. One issue for consideration by the Court Users will be whether this is a problem that needs addressing and,

¹² Frequent enough in the years preceding the 2013 Act. For the historic problem, see Yeo (above) at [21], citing the summary of Lord Denning in *Rothermere v Times Newspapers*.

¹³ [Lachaux v Independent Print Ltd](#)

if so, how it would best be dealt with.

Evidence and substantive law

Finally, I shall make just a few short observations on evidence and the substantive law. I will confine myself to some comments on some broad features of the existing law and some apparent gaps or imperfections.

Let me start with defamation and, albeit with some trepidation, a point about the issue of serious harm. Visitors from abroad are probably familiar with this piece of our new law, but let me spell out what I am talking about here. The Defamation Act 2013 changed the threshold requirements for a defamation claim by providing that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. I know there will be debate about the significance of this later this morning. I am sure that this will inform the arguments that I expect to hear at a later date, about the meaning and effect of section 1 as interpreted by the Court of Appeal.

My observation is a narrow one. In several cases so far, of which [Monroe v Hopkins](#) (2017) is just one, there has been a good deal of argument about what inferences or conclusions the court should draw about the impact on reputation of publication via social media. It was argued in that case that Twitter is an essentially transient medium of communication, which lacks the authority of some other media. I decided that these points did not weigh very heavily. Whether that was right or wrong, and whatever test is to be applied in order to establish whether the statutory threshold has been crossed, I suspect that there will be more such cases. A difficulty with such arguments is how their accuracy can be proved or disproved.

Secondly, may I mention an issue about remedies. A recent paper by Adam Speker¹⁴ refers to one gap, which has been recognized for some time: the inability to obtain vindication in respect of a serious defamatory factual allegation, if the defendant chooses to defend it on grounds of public interest rather than truth. Mr Speker cites the case of *Economou v de Freitas*, about which – as the trial judge - I should make no comment. But whatever the merits of that case as an illustration, there is clearly force in the suggestion that the law should, in appropriate cases, enable a person whose reputation has been seriously injured by a false statement to secure a correction, even if the statement related to a matter of public interest and was reasonable at the time. It might be said that the public interest favours a correction in such a case.

English defamation law offers a limited range of “discursive” remedies – those which involve the making of an apology or some other corrective or mitigating statement about what was initially published. There does not seem to be any unifying principle, when it comes to remedies of this kind. It is not obvious, in principle, that such a remedy should only be

¹⁴ Adam Speker [Restrictions on Media Communications in the Interests of Truth and Privacy](#) paper for the Middle Temple Amity Visit to Washington DC, September 2017, delivered (in part) at a session at the US Institute of Peace on Thursday 14 September 2017.

available if the complainant can also establish a right to damages or compensation. The requirements for different remedies can in principle be different.

Regulators can provide discursive remedies, even where a defamation claim would fail. But perhaps there might be a remedy at law. Data protection law allows a court to order a correction, where personal data are inaccurate. The Court of Appeal has recently confirmed that a data protection claim for inaccuracy can properly be run alongside a claim in defamation, at least where it is capable of serving a separate and worthwhile aim.¹⁵ It will be interesting to see how this area of the law develops, once the General Data Protection Regulation has been adopted as part of domestic law.

Concluding comments

I look forward to engaging with some of this audience in debates on some of the issues on which I have touched today. For those who will be departing these shores, I wish you well and I thank you all for listening today.

¹⁵ [Moulay v Elaph](#) [2017] EWCA Civ 29 [2017] 4 WLR 28 [39]-[45].