Balancing act

Holly Shaw weighs the impact of costs reform in defamation and privacy claims

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COSTS REFORM

The lord chancellor David Gauke announced in November 2018 that the government will give effect to s44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in relation to defamation and privacy proceedings from 6 April 2019. This means that conditional fee agreement success fees will no longer be recoverable from the unsuccessful opponent.

S44 of LASPO, which abolishes the recovery of success fees from the unsuccessful opponent, came into force in April 2013 in respect of most areas of civil litigation. Defamation and privacy claims, however, were among the few exceptions; largely on the basis of Lord Justice Leveson's recommendation that costs protection should be extended to such claims in the wake of the huge number of victims of press abuse.

It was only a matter of time, however, before reform was required to deliver the government's legal obligations arising from *MGN v UK* [2011], in which the European Court of Human Rights held that the unsuccessful party's obligation to pay the successful party a 100% success fee under a CFA was disproportionate, and was in breach of Article 10 (Freedom of Expression) of the European Convention on Human Rights.

Such time is now up for defamation and privacy claims. The implementation of s44 LASPO signifies the government's attempt to strike a balance between controlling the costs of both parties in defamation cases, and preserving and promoting access to justice by continuing to offer costs protection for the other side's costs in the form of after-the-event (ATE) insurance. In simple terms, ATE will remain recoverable, at least for the foreseeable future, from the unsuccessful party in defamation and privacy claims. This is unlike other areas of civil litigation which saw the creation of qualified one-way costs shifting as a measure of costs protection in the absence of the recoverability of ATE premiums.

THE IMPACT

While this reform has been a long time coming, the government sees no alteration to the status quo, in that the effect of abolishing the recoverability of success fees while retaining costs protection will continue to promote and preserve access to justice - with the notion that parties with good cases can still benefit from recoverable ATE in respect of adverse costs.

Traditionally speaking, solicitors who offered CFAs as a method of funding to claimants and defendants did so on a basket of cases basis. Obtaining up to a 100% success fee in the successful cases enabled the riskier cases in the basket to be taken on, thus spreading the risk across

the entire basket of cases.

In bringing defamation and privacy proceedings in line with s44 LASPO, solicitors willing to offer claimant CFAs will now look to recover a success fee from the client's damages to cover the solicitor's loss of unsuccessful cases. This 'post-LASPO' CFA model is common throughout other areas of civil litigation, and permits solicitors' firms to recover up to 100% success fee from the damages award (although it is capped at 25% of the solicitors' base costs in personal injury claims).

What sets these other areas of civil litigation apart from that of defamation and privacy proceedings is the relationship between the damages awarded and the costs expended to achieve that award. Costs in defamation and privacy proceedings often far outweigh the monetary value sought by way of damages.

With general damages in defamation claims at a ceiling of £300,000 for the most serious of allegations such as terrorism or paedophilia, it is difficult to see the commercial attractiveness of claimant CFAs being available in claims with significantly lower damages. The same can be said of privacy claims, where there is a damages ceiling of between £250,000 and £300,000. Crudely put, it may mean a claimant seeking a sum in damages at around the damages ceiling will have better luck at obtaining CFA funding to bring their claim.

Claimants of modest means wishing to bring a defamation or privacy claim after April are likely to find the availability of CFAs reserved only for cases with a very high prospect of success, and where a significant sum of money is likely to be awarded in damages.

For a defendant with a meritorious defence, the CFA landscape looks bleak – as finding a solicitor who is prepared to act on a CFA is now even less likely. Defendant CFAs, which have always been a far riskier business given that claimants normally win, are now even more unattractive for solicitors, as there are no damages for them to recover a success fee from. Solicitors' firms will now question whether it is commercially viable to offer defendant CFAs, irrespective of prospects of success.

The abolishment of the recovery of success fees is potentially devastating for defendants, as there will be few, if any, solicitors' firms willing to take such a financial risk; and this creates a significant impediment to access to justice for defendants seeking to enforce their right to freedom of expression.

DEVELOPMENT OF THE LAW

Beyond the consideration of damages, for a claimant of modest means seeking to protect their reputation and privacy, CFAs are likely to be offered in only the strongest of cases, with tried and tested and outcomes. Predictability is a double-edged sword on which the risk of inhibiting important matters from being litigated rests at the sharper edge.

We have seen many important matters go on to shape the law surrounding defamation and privacy proceedings. Take, for example, the significance of Nicklin J's finding in *Monir v Wood* [2018], in which the defendant was found to be liable for a defamatory statement because the author of the statement was acting as his agent. Mr Monir was funded by a CFA and awarded damages of £40,000 – but in the new landscape, a 50/50 prospect of success and the prospect of a low damages award from which a success fee may be recovered is unlikely to be commercially attractive for solicitors' firms.

Recent landmark decisions concerning freedom of expression (*British Chiropractic Association v Simon Singh* [2010]), and public interest (*Alexander Economou v David de Freitas* [2014]) will almost certainly have needed to be privately funded by defendants in the absence of a CFA being available. Cases such as *Stocker v Stocker* [2018] may not have been litigated all the way to the Supreme Court, or even at all, but for the availability of a defendant CFA.

Solicitors (and barristers) may be forced to rethink their approach in order to continue to facilitate access to justice to litigants of modest means, which may include increasing their fees. That said, with hourly rates frequently the subject of objection by a paying party, there is uncertainty as to the financial assurances a firm might hope to achieve.

In continuing to allow the recoverability of ATE insurance under the existing regime, the government anticipates that weaker cases will be discouraged through the vetting of the merits of a potential claim undertaken by an ATE insurer, while parties with a good case to litigate can continue to do so 'without the fear of having to pay potentially ruinous legal costs if their case fails.' While most ATE insurance policies are self-insured, the cost of the premium is reflective of risk (and by extension, the merits of the case) and often runs into six figures, some being as costly as £500,000 in claims worth a fraction of the premium.

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The government agrees that there is merit in having a costs protection regime 'at least for the time being.' Harriet Harman MP has expressed concern that 'alternative adequate measures to enable access to justice must be put in place', which offers some comfort in the event that the government decides to abolish the recoverability of ATE premiums in favour of means-tested QOCS, for example. While the insurance market will not be monitored by the government, David Gauke said he would be happy to look into any concerns about the availability of ATE insurance brought to his attention by solicitors in the field.

In the months since the government's announcement, it is expected that solicitors will have acted quickly to enter into CFAs with litigants prior to the abolition of success fees. This will undoubtedly see a rise in claims in the short-term. However, as these legacy claims settle, there is expected to be a downturn in the number of defamation and privacy proceedings, the majority of which will be privately funded by those with sufficient personal wealth to seek representation. Litigants of modest means and who are unable to secure CFA funding may have no alternative but to consider crowdfunding options to raise enough funds to bring or defend a claim.

With fewer claims being pursued in the future, questions must be asked of the impediment to access to justice for litigants of modest means; and a solution must be found. Preserving the recoverability of ATE insurance does not go far enough to strike the balance the government set out to achieve.

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