THE FOURTH ESTATE
AND
ACCESS TO JUSTICE:
DEFENDANT CORPORATIONS AND
GROUP LITIGATION

LAURENCE C. T. GEORGE
INSTITUTE OF ADVANCED LEGAL STUDIES
SCHOOL OF ADVANCED STUDY
UNIVERSITY OF LONDON
PHD

DECLARATION

I hereby certify that the work presented
in this thesis is my own.

……
Laurence C. T. George

ABSTRACT

The thesis examines the activation and use of all forms of media in association with group litigation in England as a weapon in the armoury of claimant lawyers. The thesis assesses the impact that this may have on the corporate defendant to discover whether it may force them towards a settlement they may not otherwise have made or on terms or at a time when they may not otherwise have made it. It then questions whether such impact may amount to a denial or limitation of a right of access to justice.

Unusually, this thesis looks at the issue of access to justice from a defendant corporation's perspective and not from the perspective of an impecunious or disadvantaged claimant.

It describes how quickly and effectively the public can be affected by information from the media and thus at how powerful a weapon media activation can be in terms of negative impact on the reputation of a defendant. In order to be able to examine relevant questions of regulation and ethics, it looks at the current environment in which claimant lawyers work and at changes and developments that have affected the legal profession and its regulation. It also discusses changes regarding legal costs, legal aid and litigation funding, all of which have affected the approach to group litigation, its availability to claimants and its commercial viability for claimant lawyers.

The media are a tremendous force in our society and the more recent advent of social media has the possibility of affecting large numbers of targeted individuals. Media can clearly be used within the legal sphere as a means of obtaining justice as occurred in the Thalidomide case when a group of parents, unsophisticated in the use of the law and with very limited resources were met by the unequal force of a large corporation and had only the press to speak out for them. However, the media can also be misused and there is a danger that lawyers can be involved strategically in such misuse of the media, unfairly making unproven suggestions, sometimes without *any* proof or even physical possibility of proof, in order to even out the imbalance between the parties. The imbalance of power for claimants before the courts needs to be addressed, but the imbalance of power in the media can be taken advantage of sometimes in an unfair and unethical way by claimant lawyers. This thesis deals with the latter issue, how lawyers' misuse of the media can be carried out in an unethical way.

Whilst little attention has been paid in the literature to rights of access to justice for corporations, items of relevance to the research issue and literature on related and connected topics were reviewed.

Absent research that specifically analysed or discussed the impact of media activation on defendant corporations in group litigation cases, answering the research questions required direct information from legal professionals involved in the practice of group litigation.

Interviews were conducted with practitioners involved in multi-party litigation on both the claimant and the defence side. As a possible check on the views of the protagonists, some useful interviews were also conducted with journalists and some with PR professionals and one with a retired judge.

The research was conducted as qualitative research using aspects of grounded theory. Semi-structured interviews were conducted using a Topic Guide. A summary of results was set out in a Data Analysis Matrix which is appended to the thesis. Aspects of grounded theory used in the research included theoretical sampling, coding and theoretical saturation.

The conclusions were that media is being activated by claimant lawyers in group litigation and that such activation has an impact on corporate defendants in influencing their decisions regarding settlement. The absolute extent of that influence was not quantifiable but it is a major factor in decision making regarding settlement. Whilst the impact of activated media cannot be said to amount to an absolute denial of a right of access to justice it can be said to amount to a significant limitation on a right of access to justice and as something which could, for a corporate defendant, make actually using a right of access to justice counter-productive.

The research demonstrates that an extra-judicial process is being routinely used and exploited by claimant lawyers alongside or prior to the judicial process. All the claimant lawyers who commented, considered this to be a legitimate course of action; some because they felt the odds were stacked against claimants, some because they simply saw it as an inevitable part of the process, as indeed did some of the defence lawyers.

This is considered a concern because it is a deliberate and unfair exertion of pressure outside a judicial process (therefore outside the framework of rules of procedure designed to make the judicial process fair and evenly balanced). Second, it is a process conducted by lawyers who see it at the lowest as an adjunct to the judicial process and at the highest as a replacement for it. Serious ethical issues are therefore raised, which it is concluded, the current outcomes focussed regulatory environment is not equipped to deal with.

The conclusion is that this activation of media ought to be a clear breach of well-defined rules of professional conduct. Such rules would not necessarily need to prevent publicity regarding such cases and should be designed to prevent prejudice to the Article 10 rights of lawyers, litigants and interest parties; however, such rules should be designed to prevent the gratuitous repetition of sensational headline grabbing, unproven allegations and especially the publication of such allegations as apparent statements of fact. To that extent such regulation would need to address issues of content of statements and releases via all forms of media.

QUOTATIONS

"…that a press conference is an adjunct to litigation ... is frankly disturbing"
Timothy Dutton QC

"A clear case of media over merit"
PR Professional (Legally qualified)

"It doesn't have to be your fault to be your problem"
In-House Counsel

“Journalists and lawyers are often rivals for the mantle
of protector of the public interest”
Richard Abel

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

SECTION 1 - GENERAL INTRODUCTION

The system of justice in England and Wales is open and public. It can, and should, be observed publicly and that includes being reported on by the media or "fourth estate"[1]. The media can be used as an effective balance to the power of large corporate or public bodies which have the experience, finance and expertise to fight court actions. However, litigation in both unitary and multi-party actions involves the defendant being accused by the claimant of some wrong for which the claimant requires recompense and that will necessarily involve the making of allegations. Depending on the nature of the allegations, media reports of them, even as unproven accusations, have the potential to cause extensive damage to the reputation of a defendant.

Litigation - Media Interest and Interest in Media - Some reports may emanate from a journalist's or a publication's wish to report on a particular case or issue but media interest may also be activated by those with a motivation to draw attention to particular issues in order to assist their cause and to serve their own aims as well as those of their clients. Media interest in litigation can be and often is activated in order to enhance a case in the public eye or in the "court of public opinion", a forum devoid of the rules, protections and safeguards which are at the core of the operations of a court of law, and where positions are taken and conclusions are reached by the public often without reference to either law or fact. Two recent cases, both involving terminally ill infants, clearly show how intense and immediate the effect of media involvement can be. These cases are only mentioned as examples showing the propensity of the public to reach conclusions and form opinions on the basis of the information presented to them, irrespective of the extent to which such information is accurate, whether or not it is complete and whether or not it contains proven fact. They also show the speed at which the public, through a combination of traditional and social media, can reach a high level of excitement based on what they have seen and heard, irrespective of the authenticity of the sources. Charlie Gard was an infant whose parents were refused permission to take him out of the

[1] Thomas Carlyle attributes the expression "fourth estate" to Whig MP Edmund Burke "Burke said there were Three Estates in Parliament [the Crown, the Lords and the Commons]; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all" - from 'On Heroes, Hero-Worship, and the Heroic in History' Lecture V (of Six lectures ed Dent 1908 – P200) – Project Gutenberg http://www.gutenberg.org/files/20585/20585-h/20585-h.htm#lecturev - accessed 15 Nov 2015

jurisdiction for treatment[2]. In that case there was an extremely high degree of public comment both nationally and internationally and Francis J observed in paragraph 1 of his final judgment:

> "A lot of things have been said, particularly in recent days, by those who know almost nothing about this case but who feel entitled to express opinions. Many opinions have been expressed based on feelings rather than facts."[3]

In paragraph 11 of the judgment he felt driven to comment that:

> "The world of social media doubtless has very many benefits but one of its pitfalls, I suggest, is that when cases such as this go viral, the watching world feels entitled to express opinions, whether or not they are evidence-based."

This compared with his role in which he:

> "…could only consider the case on the basis of evidence and not on the basis of partially informed or ill-informed opinion, however eminent the source of that opinion …"

This presents a clear summary of the difference between the rigours of the court process and the dangers of the forum of public opinion.

Alfie Evans, a 23 month old, was suffering from a degenerative neurological condition which in the words of the judgment issued by the Supreme Court meant that although he looked like a normal baby "… the unanimous opinion of the doctors who have examined him and the scans of his brain is that almost all of his brain has been destroyed".[4] Alfie's parents had wanted to take him from the care of the Alder Hey Hospital in Liverpool, where he had been treated to Bambino Gesu Hospital in Rome where doctors were of the same opinion but where it was understood they

---

[2] Judgement of Francis J on 11 April, 2017 in Great Ormond Street Hospital ("GOSH") v Yates and Gard - Case No. FD17P00103 – GOSH had applied to the court for orders in respect of Charlie Gard who was suffering from infantile onset encephalomyopathy mitochondrial DNA depletion syndrome, including: "that it is lawful, and in Charlie's best interests, for artificial ventilation to be withdrawn … for his treating clinicians to provide him with palliative care only … and … [for Charlie] not to undergo nucleoside therapy [as the parents, Yates and Gard had wished in opposing the application] provided always that the measures and treatments adopted are the most compatible with maintaining Charlie's dignity".

[3] Judgement of Francis J on 24 July, 2017 in Great Ormond Street Hospital v Yates and Gard - Case No. FD17P00103 https://www.judiciary.gov.uk/wp-content/uploads/2017/07/gosh-v-gard-24072017.pdf - accessed 1 August, 2017

[4] Judgement of LJJ Hale, Kerr and Wilson – In the Matter of Alfie Evans No.2 - https://www.supremecourt.uk/docs/in-the-matter-of-alfie-evans-court-order.pdf - accessed 13 May, 2018.

were willing to undertake a tracheotomy[5]. The Supreme Court had rejected that appeal in the referenced judgment. The activity on social media reached such a pitch that the police found it necessary to issue a warning relating to the "… malicious communications and threatening behaviour" relating to staff at the Alder Hey hospital[6]. The referenced Evening Standard Article included a quote from Sir David Henshaw, chairman of the Alder Hey Children's NHS Foundation Trust:

> "Alfie Evans has deeply affected us all at Alder Hey. There isn't one member of our staff untouched by his desperate story, the facts of the case and the publicity surrounding it. … Yet in the last two weeks we have found ourselves at the centre of a social media storm that has included many untrue statements about our work and the motivations of our staff."

There is in terms of fairness to the parties, a significant difference between the rigours of the court process and the "partially informed or ill-informed opinion" emanating from the forum of public opinion whether resulting from social or conventional media. These cases are not group litigation cases and there is no suggestion that the conventional and social media coverage was activated by lawyers; nor is there any suggestion that the parents of these children would not have had the right to turn to the media to put their side of the cases and in fact under Article 10 European Convention on Human Rights ("ECHR")[7] they would have had every right to do so. These cases purely show how a "storm" can develop in the media based on what has been described variously by those who did have first-hand detailed knowledge, as inaccurate, incomplete or incorrect information. This in turn shows the environment into which activated media is introduced; an environment willing to accept published statements as fact and to form instant conclusions on the basis of them. As will be discussed later in this thesis, once a particular view of an issue or a case has emerged in the media, it is very difficult to change the narrative and view that it establishes and whatever that view or narrative is, it is likely to be accepted as factually correct by large numbers of the public.

This is an aspect of media coverage that can be very useful and powerful to anyone who knows how to use and deploy the media in its various different forms in support of a particular position or proposition. Whilst deployment of media and the consequent media attention may be helpful to one party to group litigation, it may be highly unhelpful and potentially unfairly damaging to the other if it is based on inaccurate information or if it portrays an incorrect account of facts and events.

---

[5] Josh Parry 'Here's why the Supreme Court rejected the latest Alfie Evans appeal - decision in full' (Liverpool Echo 20 April, 2018) - https://www.liverpoolecho.co.uk/news/liverpool-news/heres-supreme-court-rejected-latest-14556664 - accessed 13 May, 2018

[6] Sean Morrison 'Alfie Evans latest: Police vow to combat 'highly abusive and threatening' online messages sent to hospital staff' (Evening Standard 26 April, 2018) https://www.standard.co.uk/news/uk/alfie-evans-latest-police-vow-to-combat-highly-abusive-and-threatening-online-messages-sent-to-a3823891.html - accessed 13 May, 2018

[7] Article 10 ECHR – (Freedom of Expression) http://www.echr.coe.int/Documents/Convention_ENG.pdf - accessed 7 October, 2014 and 10 December, 2018

Lawyers for the parties have an ethical and public duty to be careful about how they present information to the media.

Introduction to Media Activation - This thesis looks at the activation and use of the media in association with group litigation, much of which, but not all, in England is conducted under Group Litigation Orders ("GLOs"). As will be discussed in Section 2 of this Chapter, the GLO is the English law system of formally managing collective actions which fulfils a role equivalent to the US system of 'class actions' "where there are multiple parties or claimants to the same cause of action". The GLO was introduced in 2000 under amendments to the Civil Procedure Rules (CPRs)[8]. The thesis considers the use of media activation as a weapon in the armoury of claimant lawyers involved in multi-party litigation both formally under GLOs and under other forms of collective procedure. The thesis seeks to identify the impact that media activation may have on the corporate defendant, whether it may force them towards a settlement they may not otherwise have made, and if so, whether that may amount to a denial or limitation of a right of access to justice.

Whilst the majority of literature and comment on access to justice looks at the issue from the standpoint of the claimant and in particular the impecunious or otherwise disadvantaged claimant[9], this thesis considers the issue of access to justice and its possible denial or restriction for the corporate defendant. In researching the topic of access to justice from the standpoint of the defendant, the thesis is not intended to countermand the clear research on behalf of claimants who may have to use the media to balance their lack of power in the context of litigation. This thesis considers only how the use of the media by lawyers in such circumstances can be taken advantage of unfairly, without merit or fairness, in such a way as to limit the defendants' opportunity to gain access to justice in order to present their side of a case.

That the court process itself should not be influenced by the media is clear. There are protections aimed at preventing that from happening in the form of the contempt of court and sub-judice rules. The laws of defamation, whilst not preventative of reputational damage, can in some cases provide injunctive relief and may provide some recompense subsequently for damage to reputation if accusations go too far; they therefore may provide some incentive for writers and publishers to tread more warily than they otherwise might. However, these rules and protections cannot provide a complete shield for any person whether or not

[8] Part 19 of the Civil Procedure Rules ("CPR") introduced in 2000 under the provisions of the Civil Procedure (Amendment) Rules, 2000 which came into force (with respect to Part 19) on 2 May, 2000 - (Civil Procedure (Amendment) Rules 2000)

[9] See Appendix 3 which lists articles on Westlaw taken at random on 4 August, 2017 – the list contains details of the first 20 articles found by searching with the key words 'access to justice', the extracts for all of which disclose that they look at access to justice in one way or another from the claimant perspective with the sole exception of the article numbered 15 'Lord Woolf's Access to Justice: plus ca change...' which is described as "Proposals to speed up litigation procedures and reduce costs" and to the extent it relates to matters of civil procedure is of more general application.

involved as a defendant in legal proceedings facing serious unproven allegations in the media.

Unproven Allegations and Rush to Judgement - Recent examples which also show how easy it is for the media to affect the public view include the Duke of York and Harvard lawyer Alan Dershowitz who had been the subject of what Dershowitz called "salacious and scurrilous" allegations and "absolutely outrageous claims"[10]. The BBC report[11] described Buckingham Palace's straight but measured denial of substance to the allegations compared with the actions of the outraged Dershowitz in the USA who filed defamation claims, applied to intervene in the action in which the allegations were made and even indicated his intention to have the lawyers concerned disbarred. For his pains he became himself the subject of a defamation suit from the lawyers. Although the case was in the US, its press coverage is illustrative of the basis for concerns about the publication of unproven allegations and the obvious potential for damage with the public forming views on what they see and read. As Dershowitz himself said:

> "Clients, whether civil or criminal, are increasingly brought to trial not only before a judge … and jury … but also in the court of public opinion, where every citizen gets to "cast a vote" on the legal and moral aspects of the case".[12]

Another well-known case that gives rise to concern is that of the doubts now cast on the conviction of the "Coughing Major"[13]. Such was the effect of "relentless media antipathy" towards Ingram that any admonition from the judge to the jury to put all they may have read or heard from their minds in reaching their decision on guilt or innocence must be seriously doubtful in effect.[14] In that case there was also more

---

[10] The claims were made by a complainant accusing Dershowitz and the Duke of York of having sexual relations with her while she was still a minor.

[11] BBC (unattributed) "New legal bid in Andrew sex claim case," (BBC 7th January, 2015) http://www.bbc.co.uk/news/uk-30692699 - accessed 19 January, 2015

[12] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100 – P7 Foreword by Alan M. Dershowitz

[13] "In 2001, Major Charles Ingram won the top prize on the TV competition "Who Wants to be a Millionaire?". Days later he was accused of cheating. He lost his job, got a criminal record and became infamous around the world" Bob Woffinden and James Plaskett 'Bad Show: the Quiz, The Cough, the Millionaire Major' 1st edn. Bojangles Books 2015; referred to in "The Last Word" "*The Week*" Issue 1015, 28 March, 2015 – Pp56-57

[14] The case against Ingram was that a "would-be contestant" (Tecwen Whittock) waiting in the audience had "coughed" to indicate right answers to Ingram; the media had blown the story to a higher profile than the Twin Towers reports, yet later it emerged that Whittock and Ingram had never even met, although Ingram's wife had had 3 short phone calls with him as a fellow quiz enthusiast; it was pure coincidence they were in the studio at the same time because Ingram's appearance was carried over from an unfinished appearance the day before. Why Whittock, a fellow competitor with a long interest in quizzes, himself anxious to compete should have an interest in assisting Ingram was never explained; Whittock had a more or less permanent cough, which it is suggested would have been far from reliable in giving assistance and an 18 minute

than a suggestion that even the Crown Prosecution Service had been affected by the media in the way they approached what was actually a very thin prosecution case.

A further case that demonstrated the folly of a rush to "judgement" based on media coverage but which also shows clearly the power of media coverage was that of former Tory treasurer Peter Cruddas who was said in an article in the Sunday Times to have been prepared to breach electoral law by accepting foreign donations[15]. The coverage had led the Tory Party to abandon Mr Cruddas and cease contact with him within hours of the publication[16]. In Cruddas v Calvert & Others[17] Cruddas won on appeal a malicious falsehood claim against the Sunday Times[18]. The finding of Mr Justice Tugenhadt[19] in relation to malicious falsehood based on the allegations of criminality in regard to breaches of the Political Parties, Elections and Referendums Act 2000[20] was upheld. The case shows that the rush to "judgement" led by the media was unreliable. The accusations in so far as they related to illegality and criminality were false[21]; but his reputation was tarnished maliciously for ever.

---

silence in his coughing was also never explained. Far from being the "bumbling and dim witted" military person portrayed by the media, Ingram had a degree in civil engineering, a Masters from Cranfield and was a member of MENSA; of the 10 people it is said who were in the studio who were in a position to hear anything suspicious, 9 said they did not and only the 10th who said they thought they had was called to give evidence, "the CPS ignored the evidence of the 90% majority and recruited the solitary witness whose testimony would chime with their script" – from "The Last Word" "*The Week*" Issue 1015, 28 March, 2015 – Pp56-57.

[15] "The Sunday Times had published an article in March 2012 with the headline: 'Tory treasurer charges £250,000 to meet PM'. - Jim Pickard and Kiran Stacey 'Cruddas wins damages from Sunday Times' (*Financial Times* 31 July, 2013) - http://www.ft.com/ cms/s/0/f81fdd70-f9cf-11e2-b8ef-00144feabdc0.html?siteedition=uk#axzz3WKvZPDCL – accessed 4 April, 2015

[16] Jim Pickard and Kiran Stacey 'Cruddas wins damages from Sunday Times' (*Financial Times* 31 July, 2013) - http://www.ft.com/cms/s/0/f81fdd70-f9cf-11e2-b8ef-00144feabdc0.html?siteedition=uk#axzz3WKvZPDCL – accessed 4 April, 2015

[17] [2015] EWCA Civ 171

[18] Although it was held on appeal that he had indeed "effectively [said] to the journalists that if they donated large sums to the Conservative Party, they would have an opportunity to influence Government policy and to gain unfair commercial advantage through confidential meetings with the Prime Minister and other senior ministers" [2015] EWCA Civ 171 – at paragraph 85

[19] [2013] EWHC 2298 (QB)

[20] [2015] EWCA Civ 171 – at paragraph 121

[21] "The Claimant repeatedly stressed […] that donations […] had to be compliant with the law. […for] donations made by companies, the relevant company had to be a bona fide operating British company and […] donations funnelled through third parties were not acceptable.[…] both journalists were found to be malicious on the basis that they knew that the meanings conveyed by the Articles were false and that they had a dominant intention to injur[e] the Claimant." - Desmond Browne QC, Matthew Nicklin QC, & Victoria Jolliffe, (Article entitled 'Cruddas v Calvert & Others No.4' on the '5RB' chambers web site – undated) The Financial Times spelled out Tugendhat's finding that "(the journalists who wrote the piece) did know that the articles were false … they did have a dominant intention to injure Mr Cruddas and they expressed delight when

These examples include cases that reached the courts. They show how readily and quickly people are prepared to reach judgements based on what they see, hear or read in the media irrespective of any facts having been proved as a result of any judicial process.

The Al Sweady Case - A further recent case with a high profile began with lawyers Martyn Day and Phil Shiner alleging that UK troops had tortured and executed Iraqi prisoners following a gun battle in May, 2004. That case led to the Al Sweady Inquiry[22] and eventually to the Solicitors' Regulation Authority ("SRA") taking disciplinary proceedings against Shiner, Day, law firm Leigh Day and 2 other members of that firm[23]. There is no question here that initial coverage was activated by claimant lawyers because it originated at a press conference held by the two lawyers on 21 February, 2008. The press conference was reported by the BBC[24] and the Evening Standard[25] the following day. The BBC report was headlined "Claim UK troops 'executed' Iraqis – British troops executed as many as 20 Iraqi prisoners after a gun battle in May 2004, lawyers claim". The report stated that at the press conference:

> "…lawyers Mr Shiner and Martyn Day suggested prisoners taken after the three-hour gun battle - known as the Battle of Danny Boy after a checkpoint - were moved to a British base at Abu Naji and killed.",

and referred to them having "published written statements from five alleged survivors". Phil Shiner was quoted as saying:

> "We would be very surprised if [the evidence] did not shock the nation … There is the clearest evidence available of systematic abuse and systematic failings at the very highest levels of politicians, the civil service and the military."

The report continued:

---

they learnt that they had caused his resignation". 5RB Website - http://www.5rb.com/case/ cruddas-v-calvert-others-no-4/ - accessed 4 April, 2015.

[22] Al-Sweady Inquiry Report (MOD and Sir Michael Fallon MP 17 December, 2014) ISBN 9781474112796, HC 818-I 2014-15 https://www.gov.uk/government/publications/al-sweady-inquiry-report - accessed 28 June, 2017

[23] Solicitors' Disciplinary Tribunal Case No. 11502-2016 SRA v Day, Malik, Crowther and Leigh Day – Press Summary – issued 9 June, 2017 - http://www.solicitorstribunal.org.uk/news/case-no-11502-2016-sra-v-day-malik-crowther-and-leigh-day-firm – accessed 28 June, 2017

[24] BBC (Unattributed) 'Claim UK troops 'executed' Iraqis' (BBC 22 February 2008) http://news.bbc.co.uk/1/hi/uk/7258374.stm - accessed 28 June, 2017

[25] Evening Standard (Unattributed) 'Fury as human rights lawyers accuse British soldiers of executing up to 20 Iraqi prisoners in cold blood' (Evening Standard 22 February, 2008) http://www.standard.co.uk/news/ fury-as-human-rights-lawyers-accuse-british-soldiers-of-executing-up-to-20-iraqi-prisoners-in-cold-6669022.html – accessed 28 June, 2017

> "Showing images of corpses from the battle, Mr Day said: 'The nature of a number of the injuries of the Iraqis would seem to us to be highly unusual in a battlefield...".

The Evening Standard report was headlined "Fury as human rights lawyers accuse British soldiers of executing up to 20 Iraqi prisoners in cold blood" and quoted Mr Shiner as saying that "the statements described 'merciless and unbelievably brutal and cruel' treatment by soldiers" and that he had "likened the alleged killings to Japanese atrocities during the Second World War."

The press conference had contained very graphic description and accusation and was accompanied by publication of the statements made by the 5 complainants.

This particular case did not become the subject of a formal GLO partly no doubt because it did not proceed far enough, but it was a collective action. It began in the Administrative Court with 6 claimants seeking judicial review in respect of the alleged failure by the Secretary of State for Defence to conduct an independent Inquiry into their allegations, for the Secretary of State to accept liability for the deaths of the deceased Iraqis and for the ill-treatment and unlawful detention of five of the six as detainees and for the Secretary of State to pay compensation[26]. A stay was granted "until such time as a proper investigation in to the allegations had concluded"[27] and the Al Sweady inquiry led by Sir Thayne Forbes was established. In a report on the findings of the inquiry, the Independent carried a headline:

> "Al-Sweady Inquiry: 'Deliberate lies' – the verdict on claims that British soldiers tortured Iraqi detainees"[28].

The article stated:

> "Sir Thayne said the allegations that live prisoners had been brutalised, mutilated and murdered following the Battle of Danny Boy near Al Amarah in southern Iraq had been shown to be 'wholly and entirely without merit or justification' ".

Thus the case did not proceed and there followed disciplinary proceedings taken by the SRA against both Phil Shiner and Martyn Day and his firm. Predominantly the charges related to issues other than the question of the press conference but the press conference did feature as the subject of a charge in both cases.

---

[26] Al-Sweady Inquiry Report (MOD and Sir Michael Fallon MP 17 December, 2014) ISBN 9781474112796, HC 818-I 2014-15 https://www.gov.uk/government/publications/al-sweady-inquiry-report - accessed 29 June, 2017 - P3

[27] Ibid – P4

[28] Cahal Milmo 'Al-Sweady Inquiry: 'Deliberate lies' – the verdict on claims that British soldiers tortured Iraqi detainees' (The Independent17 December, 2014) http://www.independent.co.uk/ news/uk/crime/ al-sweady-inquiry-deliberate-lies-made-on-allegations-of-torture-by-british-soldiers-in-iraq-9931724.html – accessed 29 June, 2017

In Professor Shiner's disciplinary proceedings 24 charges against him were found proven. Finding 22 related to the press conference and reads:

> "At a press conference on 22 February 2008, Professor Shiner made and personally endorsed allegations that the British Army had unlawfully killed, tortured and mistreated Iraqi civilians, including his clients, who had been innocent bystanders at the Battle of Danny Boy in circumstances where it was improper to do so. This allegation was admitted including the allegation of acting recklessly. The allegation of acting without integrity was not admitted, and was not pursued. The SDT [Solicitors' Disciplinary Tribunal] found the allegation proven."[29]

In the case of Leigh Day, the SRA charged 3 members of the law firm (Day, Malik and Crowther) and the firm itself under the 2007 SRA Code of Conduct Rule 1 with regard to the press conference citing "Improper allegations at Press Conference" under Rule 1.02 (You must act with integrity), Rule 1.03 (You must not allow your independence to be compromised) and Rule 1.06 (You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession).

The SDT cleared Leigh Day and its lawyers of all the charges against them[30] however, it has subsequently been reported that the SRA would appeal the SDT decision on the basis of both law and judgment[31]; the appeal was to be heard on 17th July, 2018[32]. On the basis of the approach that the SRA took to the press conference in both the Leigh Day and the Shiner cases, notwithstanding the finding, it is an issue which can be said to raise both ethical and disciplinary concerns.

These concerns were expressed by the SRA prosecution counsel, Timothy Dutton QC. The Law Society Gazette reported that Dutton recounted details of the charge relating to the press conference[33]. The article reported him saying:

---

[29] SRA News Release 'Professor Phil Shiner and the Solicitors Disciplinary Tribunal' (SRA News Release 2 February, 2017) http://www.sra.org.uk/sra/news/press/shiner-strike-off-sdt-february-2017.page - accessed 28 June, 2017

[30] John Hyde 'Leigh Day and its lawyers cleared of all 19 charges' (Law Society Gazette - 9 June, 2017) https://www.lawgazette.co.uk/news/leigh-day-cleared-of-all-allegations/5061472.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 9 June, 2017

[31] John Hyde 'SRA to appeal Leigh Day tribunal verdicts' (Law Society Gazette – 14 November, 2017) https://www.lawgazette.co.uk/news/exclusive-sra-to-appeal-leigh-day-tribunal-verdicts/5063687.article - accessed 16 December, 2017

[32] John Hyde 'SRA given five-day July hearing for Leigh Day appeal' (Law Society Gazette – 12 June, 2018) - https://www.lawgazette.co.uk/news/sra-given-five-day-july-hearing-for-leigh-day-appeal/5066442.article - accessed 25 July, 2018

[33] John Hyde 'Leigh Day: tribunal hears of 'orchestration' of defence' (Law Society Gazette – 1 June, 2017) https://www.lawgazette.co.uk/news/leigh-day-tribunal-hears-of-orchestration-of-

> "…there was no precedent of this type of press conference in British legal history. The lawyers took it in turns to make serious allegations against the British Army of torture and unlawful killing of Iraqi detainees, with the media shown graphic images of the alleged mistreatment. … Dutton stressed the SRA was not seeking to stop solicitors saying they were conducting claims or asking for a public inquiry, but instead the lawyers went further by endorsing the 'sensationalist' allegations and aligning themselves with their clients, in turn losing their independence. They were throwing their professional expertise and referring to their lengths of service as solicitors – at the time reviewing the evidence – behind their opinion … The risks were obvious … their approach to this was less responsible than that of journalists and yet they are members of the legal profession that aspires to high standards."

The article continued with a direct quote from Dutton:

> "If a solicitor is going to state personal opinions in public he had better be right. The courts have stated since the 1970s that lawyers, and indeed journalists, must not conduct trial by press: the idea that a press conference is an adjunct to litigation [and] something that will put pressure on your opponent is frankly disturbing."

The last phrase will be particularly significant later in looking at the use of press (not necessarily just by press conference) as the very "adjunct to litigation" that Dutton had in mind as "something that will put pressure on [the defendant]".

Pre-Trial Publicity - Not all pre-trial publicity is as extreme as that in the Al-Sweady case but the examples of the other four cases do show strong claimant statements of allegation and little if any balance from the defendant side and all long before any court process has taken place to investigate the allegations and examine questions of any loss, damage and liability.

Perhaps some defendants may reach the conclusion that to protect themselves from actual or potential reputational damage (whether or not an action to recover compensation may be sustainable), it would be better for them to reach a settlement than to fight a case, irrespective of the merits of the claim itself.

Some of the rules and protections referred to above could positively act against a defendant. For example, the defence in defamation proceedings of "honest opinion"[34] where applied to reporting of judicial proceedings, at the very least

---

defence/5061328.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 June, 2017

[34] The defence of honest opinion (formerly known as 'fair comment' until the Supreme Court judgment of Joseph v Spiller [2010] UKSC 53) applies only to expressions of opinion, rather than to statements of fact. To succeed in the defence of honest comment the defendant must show per Lord Phillips giving the judgement, that "the statement in issue is comment and not fact; the matter in respect of which the comment is made is a matter of public interest [although he did add that there may be scope for removing this qualification]; where that matter consists of facts

permits the constant public repetition of comment. To qualify as “honest opinion” the comment would have to disclose the facts on which the comments are made from the accusations that are the basis of the litigation, but even where the comments can be shown to be prejudiced, unfair or exaggerated they may still qualify and there is no necessity to show that the “facts” being commented on are true because of the privilege attaching to the proceedings, provided that there is no actual malice[35]. In effect the defence of honest opinion will therefore afford a measure of protection for media comment that would not have been enjoyed but for the litigation.

Thus defendants can find that on the one hand they are under the tactical and strategic pressure of facing a case as a defendant litigant and on the other hand simultaneously under equal or greater pressure facing a case being mounted against them in the media.

Where the media is activated by the representatives of the claimant it is possible that a defendant, forced to the conclusion that settlement may be less damaging than having to endure a sustained media campaign against it, is in effect thereby denied, or prevented from exercising, a right of access to justice.

For a corporate defendant there will be other influential factors in a decision to settle and it may be that media pressure may not be the sole driver in defendants concluding that it is in their best interests to reach a settlement rather than to fight the case. There may be financial issues or issues connected to a particular product or service, political issues or perhaps insurance may play a part; the legal costs and management costs and time involved in defending the case will be significant factors and costs on their own are a factor that may deprive a litigant of the right of access to justice. The aim of the thesis is therefore not to investigate the comparative effects of various factors that may drive a corporate defendant to settle a case despite the legal merits but to establish whether or not the damage to reputation arising from activated media is an influential one. If it is influential to any extent in what might be termed the ‘fight or settle’ question for a corporate defendant, at the minimum it may be a factor that has an adverse impact on the corporate defendant’s right of access to justice.

Group litigation cases are a more specialised form of litigation which can be of major media interest for a variety of reasons. The numbers of claimants involved in a case would clearly attract media attention as would the subject matter if it were a matter

---

alleged to have occurred, the facts are true [or protected by the defence of privilege]; the comment is “fair”; the statement is not made maliciously”
https://www.supremecourt.uk/cases/docs/uksc-2009-0210-judgment.pdf - accessed 10 July, 2017

[35] If the claimant can show that the comment was actuated by malice (meaning that the defendant was not expressing his genuine opinion) the defence of honest opinion will be defeated. It is not enough, however, to show that the comment was prejudiced, exaggerated or 'unfair' so in practice it can be difficult to prove that the commentator acted 'maliciously'. - CR – Q and A - http://www.carter ruck.com/Media%20Law/Questions_And_Answers.asp - accessed 6th October, 2014

of major public interest which in group litigation it often will be. For example the MMR case involved in excess of 1000 families[36] and as it concerned a vaccine that was mostly given to children, it was of very wide public interest. In addition, slightly unusually, it involved multiple defendants, MMR manufacturers GlaxoSmithKline, Aventis Pasteur and Merck[37].

Media Activation and GLOs – Considerations - This thesis considers in regard to group litigation cases whether and to what extent, as one of a number of relevant factors:

(i) pre-trial media attention activated on behalf of the claimant side impacts the corporate defendants in those cases;

(ii) any such impact is significant in influencing decisions to settle such cases irrespective of legal merits; and

(iii) any such influence may result in unfairness or an effective denial of or interference with the exercise of the right of access to justice for such defendant corporations.

SECTION 2 – BACKGROUND

The background elements of significance to the thesis include the concept of group litigation and its characteristics as a litigation procedure. Relevant to the conduct of group litigation are such issues as fee structures, litigation funding and the costs regime. In addition, the structure and regulation of the legal profession has much to do not only with the business models employed by individual lawyers and law firms involved with group litigation and therefore with how cases are selected and pursued, but also with the way in which the legal profession relates to society and conducts itself, including in its media relations. To date there have been 105 group litigation orders in England since their introduction in 2001[38] and many collective actions have continued to be run without formal GLOs. During that time all of those influences and factors have been subject to quite radical change and development. Those changes and developments and their impact on civil litigation are described in brief in the remainder of this chapter.

Media and the Judicial Process - The issue of the interaction of media and the judicial process itself is neither new nor unique to England and Wales. The relationship between the media and the system of justice was described by Lord

---

[36] Mark Tran 'MMR Vaccine: lawyers sued for pursuing claim based on link to autism' (The Guardian 26th June, 2014) - https://www.theguardian.com/society/2014/jun/26/mmr-autism-lawyers-sued-hodge-jones-allen-claim-legal-aid accessed 20 January, 2015

[37] Jamie Doward 'MMR parents win legal victory' (The Observer 26 December, 2004) https://www.theguardian.com/uk/2004/dec/26/health.politics - accessed 20 January, 2015

[38] https://www.gov.uk/guidance/group-litigation-orders - last accessed 19 March, 2019

Taylor, LCJ as an issue "which confronts every jurisdiction in the free world"[39]. In his address to the Commonwealth judges' and Magistrates' Association Symposium in April, 1996, he began by setting out 3 principles which he considered fundamental:

1. That justice be administered in public;

2. That citizens (including those who comment through the media) should enjoy freedom of expression; and

3. The overriding importance of maintaining the integrity of the judicial process.

The first principle had its origins in the well-known dictum "Justice must not only be done but must be seen to be done". "Now", that "means not merely by those who can attend the trial but by the wider community via the media"[40].

His observations focussed more on the question of influence over the proceedings than the effect of media reporting on reputational issues affecting the parties, "… the problem now is to prevent media coverage from not merely reporting proceedings but adversely influencing them".

The problem "creates tension and potential conflict with the second fundamental principle", that of the right to freedom of expression which "is often enshrined in a country's constitution when it is written and it is specifically recognised by both the European and International Conventions on Human Rights". "When the right is exercised not by an individual but by the mass media, its impact on public opinion and on the legal process itself can be very powerful" and will have a consequential effect on the parties themselves. This tension is specifically a tension between Article 6 ECHR, (Right to a Fair Trial) and Article 10 ECHR (Freedom of Expression). Similarly in the US, the tension in the Constitution[41] is between the First Amendment (Freedom of Religion, Press and Expression) and the Sixth Amendment (Right to a Speedy Trial, Confrontation of Witnesses).

---

[39] Lord Justice Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996)
http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

[40] Ibid

[41] http://www.usconstitution.net/const.pdf - accessed 7th October, 2014

Articles 6 and 10 ECHR - At this point is it important to consider further the issue of the tension between Articles 6[42] and 10[43] of the ECHR referred to above[44] and to look specifically at Article 10 in the context of this thesis.

The issue was examined by the European Court of Human Rights[45] in the case of the Sunday Times v UK (Series A No. 30)[46]. The case involved an injunction on the grounds of contempt of court regarding publication of an article relating to the Thalidomide litigation. The litigation had arisen in regard to Distillers' marketing of the drug, 'thalidomide', which had been taken by a number of pregnant women who later gave birth to deformed children. Writs were issued by the parents and a lengthy period of negotiations followed without the cases proceeding to trial. The Sunday Times, began a series of articles with the aim of assisting the parents in obtaining a more generous settlement of their actions. One proposed article was to deal with the history of the testing, manufacture and marketing of the drug, but the Attorney-General obtained an injunction restraining publication of the article

---

[42] Article 6 - Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[43] Article 10 - Freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[44] See Section 2 of Chapter 1 under "Media and the Judicial Process"

[45] Hereafter the "ECtHR"

[46] (1979-1980) 2 EHRR 245 – 26 April, 1979
http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015

on the ground that it would constitute a contempt of court. The injunction had been granted in the High Court, rescinded by the Court of Appeal but restored by the House of Lords. The House of Lords in their unanimous decision[47] found that:

> "…the projected article was avowedly written with the purpose and object of arousing public sympathy with, and support for, the claims that were being made and in order to bring pressure upon Distillers to pay more."

The publisher, editor and a group of journalists of The Sunday Times filed an application with the European Commission of Human Rights claiming that the injunction infringed their right to freedom of expression guaranteed by Article 10 ECHR. The Commission, by a majority, concluded that there had been a breach of Article 10 and referred the case to the ECtHR. It was held, by the plenary Court by 11 votes to 9, that the 'interference' with the applicants' freedom of expression was not justified under Article 10(2) which permits such restrictions 'as are prescribed by law and are necessary in a democratic society . . . for maintaining the authority and impartiality of the judiciary', the Court deciding that, though prescribed by law and for the purpose of maintaining the authority of the judiciary, the restriction was not justified by a 'pressing social need' and could not therefore be regarded as 'necessary' within the meaning of Article 10(2). Accordingly, there had been a violation of Article 10.

In the Court's judgment[48] there was discussion of the issues of the right to a fair trial pursuant to Article 6 as against the right to freedom of expression under Article 10. It was noted that the case did not directly concern an issue under Article 6 but one that clearly related to it:

> "It is, moreover, to be noted that the instant case does not bear upon a matter governed by Article 6, but is concerned with whether or not the publication of certain specific appraisals and statements regarding *sub judice* litigation could interfere with the due administration of justice. The due administration of justice depends, in addition to what is mentioned in Article 6, upon other rules of procedure and upon the satisfactory functioning of the judicial institutions."[49]

Regarding the Article 10 issues Judge Zekia specifically noted that:

> "The right of the press to freedom of expression is undoubtedly one of the fundamental characteristics of a democratic society and indispensable for maintaining freedom and democracy in a country."[50]

---

[47] Attorney General v Times Newspapers Ltd: HL [1973] 3 All ER 54

[48] https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf - accessed 24 December, 2018

[49] Ibid at P90

[50] Ibid at P 295

He also noted that as contempt of court is a criminal offence a "clear and unambiguous definition of an offence" (that Article 6(3) ECHR would require) was also required here; from the House of Lords Judgment it would seem that the state of the law at that time was that this was not the case.

The judgment with reference to Article 10[51] noted that the minority of the Commission and the Government had attached importance to the fact that:

> "… the institution of contempt of court is peculiar to common law countries and suggest[ed] that the concluding words of Article 10 (2)[52] were designed to cover this institution which has no equivalent in many other member States of the Council of Europe."

However, the reference in paragraph 60 continues:

> "However, even if this were so, the Court considers that the reason for the insertion of those words [the concluding words of Article 10(2)] would have been to ensure that the general aims of the law of contempt of court should be considered legitimate aims under Article 10 (2) but not to make that law the standard by which to assess whether a given measure was 'necessary' [for the purposes of Article 10(2)]."

So, it was being made clear that just because a law on contempt was in place, that in and of itself, did not mean that it qualified it to fulfil the criteria of Article 10(2); and to make that clear the reference continued:

> "It is 'necessity' in terms of the Convention which the Court has to assess, its role being to review the conformity of national acts with the standards of that instrument."

The judgment discussed the issue of trial by media[53] noting the concern expressed by the House of Lords as to the "process of the law" being:

> "… brought into disrespect and the functions of the court usurped either if the public is led to form an opinion on the subject-matter of litigation before adjudication by the courts or if the parties to litigation have to undergo 'trial by newspaper' ".

The judgment found that "Such concern is 'relevant' to the maintenance of the 'authority of the judiciary'". Here the judgment referred back to paragraph 55 of the judgment where the authority of the judiciary had been discussed and where

---

[51] Ibid at paragraph 60 of the Judgement regarding Article 10 at P277

[52] "The exercise of these freedoms [*from Article 10.1*] … may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary …for maintaining the authority and impartiality of the judiciary."

[53] https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf at paragraph 63 of the Judgement regarding Article 10 at Pp278-279 - accessed 24 December, 2018

the "… central position occupied in this context by Article 6, which reflects the fundamental principle of the rule of law" had been noted.

The judgment went on to confirm the view that:

> "If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes."

As has been introduced above, the issues of trial by media and the formation of conclusions in advance of adjudication by the courts are very relevant to this thesis and will be discussed more fully later in the thesis, but in this context it is important to note that this judgment was made some 40 years ago in the context of a different character of press and before the widespread use of social media, in a different context of professional regulation and prior to the many changes and developments that are discussed in Sections 3 to 5 of Chapter 1 and Sections 3 and 4 of Chapter 2.

Equally important in the context of this thesis is the next finding in the judgment that the press article in question in this case was not sensational, was not one sided and did not present only one possible result for the court to reach; further, as well as making its own points, it summarised the position of the defendants:

> "Nevertheless, the proposed Sunday Times article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: There appears to be no neat set of answers."[54]

Murray Rosen in his Report on the Sunday Times case[55] observed that on one side of this case was "… an eminent newspaper endeavouring to publish careful, balanced and unquestionably accurate articles, researched beyond reproach."[56] This, it is submitted is therefore an article of quite a different character from those referred to above in Section 1 of this Chapter, and as will be seen and developed in the thesis, is of quite a different character to the articles and publications which result from the activation of media by the lawyers for one party in connection with GLOs.

---

[54] https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf at paragraph 63 of the Judgement regarding Article 10 at P279 - accessed 24 December, 2018

[55] Murray Rosen 'The Sunday Times thalidomide case: Contempt of court and the Freedom of the Press' (Writers and Scholars Educational Trust in association with the British Institute of Human Rights – November, 1979)

[56] Ibid paragraph 1.08, P4

The Court concluded that this was not an article that would lead readers to one conclusion, but that their conclusions would vary from reader to reader:

> "In the Court's opinion, the effect of the article, if published, would therefore have varied from reader to reader. Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the authority of the judiciary…".[57]

However, what is also important to note from the judgment is that in addition to pointing to Article 6 ECHR as reflecting the fundamental principle of the rule of law[58], the Court emphasised that, whatever the content of information or ideas that are being conveyed, freedom of expression constitutes one of the essential foundations of a democratic society:

> "… as the Court had remarked in its Handyside judgment[59], freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."

The Court in this case concluded that the "interference"[60] did not qualify under the provisions of Article 10(2), viz:

> "… the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom

---

[57] https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf at paragraph 63 of the Judgement regarding Article 10 at P279 - accessed 24 December, 2018

[58] Ibid at paragraph 55, Pp273-274

[59] Handyside v U.K., 1976 Series A, No. 24 – "In the Handyside Case, which concerned a publication whose prohibition was adjudged by the national courts to be necessary ' for the protection of morals ', the Court considered that the competent domestic courts ' were entitled . . . to think ' at the relevant time that this publication would have pernicious effects on the morals of the children or adolescents who would read it. In the instant case, the Court has to examine whether the House of Lords was ' entitled to think' that publication of the article in question would have detrimental effects upon the due administration of justice in relation to actions pending before the courts at the relevant time." - https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf at paragraph 9 of the Joint Dissenting Opinion of Judges Wiarda, Cremona, Thor Vilhjalmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher at P289 - accessed 24 December, 2018

[60] "interference with recourse to the courts" – See https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf at P275 - accessed 24 December, 2018

> of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary."[61]

However, in reaching that conclusion, the Court had noted that:

> "The Court is faced not with a choice between two conflicting principles[62], but with a principle of freedom of expression that is subject to a number of exceptions[63] which must be narrowly interpreted."[64]

That part of the judgment continued with an exposition of the process the Court considered it must adopt in looking at those exceptions:

> "It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[65]

In other words, recognition of some action as within the exceptions could not be a totally objective "tick-box" exercise but required to be appropriate or "necessary" in the circumstances of the particular case. The Court's final conclusion on this basis was that the reasons given for the interference in the circumstances of this case were "not … sufficient under Article 10(2)" and the interference "was not necessary in a democratic society for maintaining the authority of the judiciary"[66].

As final notes on this case, it is important firstly that in addition to accepting that the article in question was balanced and well researched, it is clear both from Rosen's Report, referred to above and from Phillip Knightley's book[67] that this was a case of

---

[61] Ibid at paragraph 67 P282

[62] i.e. between Articles 6 and 10

[63] In Article 10(2)

[64] Ibid at paragraph 65 P281

[65] Ibid at paragraph 65 P281

[66] Ibid at paragraph 67 P282

[67] Phillip Knightley 'A Hack's Progress' (Jonathan Cape Random House, 1997) ISBN 0-224-04399-4

a public campaign joined by and on the initiative of the publication itself[68] as distinct from one activated or run by parties to the litigation or the wider dispute or their lawyers. Secondly, despite the fact that this became a widely publicised public campaign, not unlike the later Hillsborough case,[69] which is referred to below, this was a case in which the public had for some years paid no attention to the true facts; Knightley makes the point that they could have discovered the truth 4 years earlier in 1968; he said:

> "Prevett's[70] articles in the Modern Law Review were basically what he had said in the witness box and the reason he had written them was that no journalist would listen to him. All the scientific material to rebut Distiller's defence was available to anyone who had the inclination and time to find it."[71]

The awards given in the original 1968/69 settlement of the claims, later to be described by Knightley as "immorally low"[72] had he said been treated by Fleet Street "as a pools win"[73] and he described how both The Times and the Guardian had "carried on the same day remarkably similar stories that were basically a comprehensive exoneration of Distillers"[74]. According to Knightley the stories had, both originated from Distillers. He refers to Harry Evans, editor of the Sunday Times as saying that the "… thalidomide story concerns some shortcomings in journalism as we all as a legal debacle" and Bruce Page, Sunday Times team leader on the Thalidomide scandal as saying that if they wrote a book "… it should be called 'How the Sunday Times Gradually Recovered From Its Own Mistakes and Did Something about the Thalidomide Scandal – Just In time'"[75]. This underscores, even from a journalist's point of view, how difficult it can be to change the narrative as it is understood by the public once

---

[68] Rosen states in paragraph 1.01 P1 that "In late 1972 the Sunday Times newspaper took up a prominent place in the widespread public campaign …" and Knightley refers at P158 to "When the Sunday Times campaign on behalf of the thalidomide children got underway in 1972…".

[69] The Hillsborough Victims Litigation (GLO 96 – 23rd January, 2017) https://www.gov.uk/guidance/group-litigation-orders – accessed 17 March, 2018 and 20 March, 2019

[70] John Prevett was an actuary who had given evidence in a test case to establish damages and his evidence had been rejected by the judge; Knightley at P 157 of his book noted that the outraged Prevett had written his articles in the Modern Law Review attacking the court's decision.

[71] Phillip Knightley 'A Hack's Progress' (Jonathan Cape Random House, 1997) ISBN 0-224-04399-4 – P158

[72] Ibid

[73] Ibid

[74] Ibid P157

[75] Ibid P158 – he added "it wasn't, of course – it was called 'Suffer the Children'"

it has become set. As mentioned above, the Hillsborough case[76] was also noteworthy as an illustration of how difficult changing the narrative can be once it has become set in the media and the public mind. In an article in the Independent[77], was the assertion that

> "The [inquest] jury's conclusions meant that the behaviour of the fans had finally been exonerated after decades of smears and the newspaper headlines, including *The Sun's* notorious "the Truth" front page[78], suggesting they were at fault".

In another article[79] was a quotation from Margaret Aspinall one of the leading Hillsborough campaigners:

> "Let's be honest about this – people were against us …We had the media against us, as well as the establishment … Everything was against us. The only people that weren't against us was our own city."

It was changed in both those cases but the circumstances of the cases and how the narrative was changed are perhaps exceptional and quite different from those faced by a single corporation defendant fighting a group action independently.

---

[76] The Hillsborough Victims Litigation (GLO 96 – 23rd January, 2017) https://www.gov.uk/guidance/group-litigation-orders – accessed 17 March, 2018 and 20 March, 2019

[77] Lizzie Dearden 'Hillsborough victims' relatives to launch class action lawsuit against South Yorkshire and West Midlands Police' - http://www.independent.co.uk/news/uk/home-news/hillsborough-victims-relatives-to-launch-class-action-lawsuit-against-south-yorkshire-and-west-a7004901.html - accessed 26 June, 2017

[78] The notorious front page headlined "The Truth" published a week after the 1989 disaster under which were the headlines now known to be false "Some fans picked pockets of victims" "Some fans urinated on the brave cops" "Some fans beat up PCs giving the kiss of life" and the text "Drunken Liverpool fans viciously attacked rescue workers as they tried to revive victims of the Hillsborough soccer disaster, it was revealed last night." "Police officers, firemen and ambulance crew were punched, kicked and urinated upon by a hooligan element in the crowd." "Some thugs rifled the pockets of injured fans as they were stretched out unconscious on the pitch." The Guardian online – (unattributed) 'What the Sun said 15 years ago' https://www.theguardian.com/media/2004/jul/07/press and publishing.football1 - accessed 20 March, 2019

[79] Lizzie Dearden "Hillsborough verdict: Emotional families celebrate justice for the 96 after jury rules fans were unlawfully killed" (The Independent undated) https://www.independent.co.uk/news/uk/crime/hillsborough-disaster-verdict-inquest-jury-rules-96-liverpool-fans-were-unlawfully-killed-in-1989-a7001271.html – accessed 10 December, 2018

The issue of the interaction of Articles 6 and 10 was also looked at in detail by the ECtHR in the case of Steel and Morris v UK[80], the so called "McLibel" case. The case involved a claim for defamation by McDonalds against Steel and Morris who had been involved in the production and distribution of a 6 page campaign leaflet entitled "What's wrong with McDonalds?". Steel and Morris were refused legal aid so represented themselves throughout the trial and the appeal. They submitted that they were severely hampered by lack of resources:

> "… not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses."[81]

Conversely:

> "Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law and by one or, at times, two solicitors and other assistants."[82]

Following the trial, which at 313 days was then the longest in English court history, judgment was given for McDonalds and damages of £60,000 were awarded. This was reduced on appeal to £40,000 and leave to appeal to the House of Lords was refused. The ECtHR noted that "McDonald's, who had not applied for costs, have not sought to enforce the award."[83]

Steel and Morris in their application made two complaints to the ECtHR namely that under Article 6 ECHR the proceedings were unfair because they had been denied legal aid and under Article 10 ECHR that the proceedings and their outcome constituted a disproportionate interference with their right to freedom of expression.

With regard to the Article 6 complaint, the ECtHR noted that the 313 day trial had been preceded by 28 interlocutory applications and the appeal hearing itself had lasted 23 days. In addition:

---

[80] Steel and Morris v The UK [2005] – ECHR https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – accessed 06 January, 2019

[81] ECHR Registrar's Press Release 15.02.2005 https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – P2 – accessed 06 January, 2019

[82] Ibid

[83] Ibid

> "The factual case which the applicants had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses."[84]

The ECtHR found in favour of Steel and Morris in regard to the Article 6 complaint on the basis that:

> "In an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel."

The ECtHR concluded that:

> "… the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's."[85]

It should be noted, with regard to the current legal aid situation that defamation cases are listed now among those where legal aid would not be available[86] although it is possible that a case such as this may be regarded as a case which would qualify on an exceptional basis. It should further be noted that following Defamation Act 2013[87] to be awarded damages at all, McDonalds would have had to show "serious harm"[88] which for companies under section 1(2) of the Act requires them to show damage likely to cause "serious financial loss"[89]. This is discussed further below in Section 8 of this Chapter "Restrictions and Controls on Media Activity"[90].

---

[84] Ibid P 3

[85] Ibid

[86] A Step-by-Step Guide to Legal Aid - http://www.thlc.co.uk/resources/A_Step-by-Step_Guide_to_Legal_Aid.pdf - published by the Legal Services Commission and the Ministry of Justice – accessed 07 January, 2019

[87] Defamation Act, 2013

[88] It is of interest to note that Steel and Morris had themselves effectively argued just that – "They had also argued that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage." ECtHR Registrar's Press Release 15.02.2005 https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – P4 – accessed 06 January, 2019

[89] Section 1(2) Defamation Act 2013 "For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

[90] See point 3 "Defamation" under "Restrictions on media activity related to litigation"

With regard to Article 10, the UK had contended that as the applicants were not journalists, they should not attract the "high level of protection afforded to the press under Article 10."[91] It is submitted that such an argument seems both unattractive and devoid of logic and in answer to it the ECtHR noted that:

> "… in a democratic society even small and informal campaign groups … had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."[92]

and it is submitted that it certainly seems right that it should not only be the press that has any level of protection in regard to the exercise of Article 10 rights; they should extend to everyone if only on the basis that there are some matters that deserve public airing and attention that for one reason or another the media may not pick up or choose to publish.

It is of significance that the ECtHR also observed that the safeguard applied to journalists was not such as to give them carte blanche but was subject to an important proviso; the ECtHR noted that:

> "The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they acted in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism …"[93]

and, as importantly they added "… and the same principle applied to others who engaged in public debate." They recognised that "… in a campaigning leaflet a certain degree of hyperbole and exaggeration could be tolerated, and even expected …"[94] but noted that here that:

> "… in the case under review the allegations had been of a very serious nature and had been presented as statements of fact rather than value judgments."[95]

The issue of presentation of allegations as statements of fact is very relevant to this thesis as has been observed in regard to certain of the GLO cases already referred to in Section 1 of this Chapter.

---

[91] ECHR Registrar's Press Release 15.02.2005
https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – P4 – accessed 06 January, 2019

[92] Ibid

[93] Ibid

[94] Ibid

[95] Ibid

The ECtHR did find a breach of Article 10 in favour of Steel and Morris but it is clear that this was in large measure due to the same lack of procedural fairness observed in regard to the Article 6 issue. The ECtHR had observed that the fact that "… the plaintiff in the present case was a large multinational company …" should not:

> "… deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made." [96]

Whilst noting that:

> "… large public companies inevitably and knowingly laid themselves open to close scrutiny of their acts and the limits of acceptable criticism are wider in the case of such companies."[97]

they also pointed out that:

> "… in addition to the public interest in open debate about business practices, there was a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good."[98]

That they said meant that:

> "… the State therefore enjoyed a margin of appreciation as to the means it provided under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation."[99]

However, if a State did provide such a remedy to a corporate body:

> "…it was essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms was provided for."[100]

Additionally, the ECtHR ruled that "… an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered" and in spite of the fact that no steps had been taken to enforce the award, as it was still payable as of the Court of Appeal judgment "In those circumstances, the award of damages in the present case was disproportionate to the legitimate aim served."[101]

Whilst, under the Defamation Act, a different approach would now be taken to damages, and whilst the ECtHR did find that this award was disproportionate, it is useful to note that they seem to underscore in their comment the legitimacy of the

---

[96] Ibid

[97] Ibid

[98] Ibid

[99] Ibid P5

[100] Ibid

[101] Ibid

aim of providing protection for the company and the "competing interest" that they had noted earlier.

Media Interest in Litigation – Media interest in civil cases is described as increasing since the 1980s and different explanations are proffered. Thomas Beke points to an increase generally in media attention to the courts. In part this he says was brought about by the changing climate in legal business and the legal system happening partly as a result of the deregulation and the changing economic climate of the late 1980s. This change increasingly attracted the attention of the media.[102] He notes Abel's observation too that "The English legal profession experienced extraordinary turmoil in the 1990's".[103] In addition, Beke points to the review of the litigation and procedural rules not only attracting the attention of the media but also exerting [its influence] heavily on the evolution of what he describes as the new litigation public relations ("Litigation PR") market. In addition he points to notable failures of the legal process around big business disputes as attracting major media attention: examples are the Guinness take-over of Distillers case in 1985[104], (although, there were 4 convictions following the Guinness case, all 4 convictions were later ruled "unsafe" by the ECtHR)[105], the Mirror Group Pension fund scandal[106] in 1991 (no convictions) and the Blue Arrow case in 1992[107] (convictions set aside).

---

[102] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management' ISBN 978-3-319-01872-0 1st edn, Springer, 2014 - P116

[103] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004

[104] "In 1986 Distillers became the subject of a hostile bid from Argyll, a retailing group. Guinness's £2.7 billion … cash-and-shares counter-offer eventually won the day. Only later did it emerge that the stock market had been rigged by … supporters buying Guinness shares in return for obese fees and indemnities against loss" - The Economist – (unattributed) 'Bitter End' Review of Jonathan Guinness 'Requiem for a Family Business' Macmillan 1997 - http://www.economist.com/node/107492 - accessed 6 October, 2014

[105] Saunders, Ronson and Parnes were sentenced to periods ranging from 12 months to five years. Ronson was also fined £5m. Saunders was freed after only 10 months of his 30 month sentence when doctors diagnosed him as suffering from dementia. Lyons, 74, escaped jail because of ill health but was stripped of his knighthood and fined £3m. In 1996 Saunders' conviction was ruled "unsafe" by the ECtHR. In 2000 the court reached the same verdict in cases brought by the remaining three. However, in 2001 the UK's Court of Appeal threw out the men's claim not to have received a fair trial. BBC (unattributed) 27 August 1990 http://news.bbc.co.uk/onthisday/hi/dates/stories/august/27/newsid_2536000/2536035.stm - accessed 6th October, 2014

[106] Robert Maxwell had diverted over £400m from his companies' pension funds in order to fund other Maxwell group companies; his two sons Kevin and Ian were cleared of accusations regarding a pensions conspiracy – BBC (unattributed) - http://news.bbc.co.uk/1/hi/business/526038.stm - accessed 6th October, 2014

[107] "[After a trial costing in excess of £40m, the Court of Appeal] cleared [4] senior executives of County NatWest, the merchant banking arm of the National Westminster Bank, and set aside their 18-month suspended prison sentences [one of whom] also had his conviction and 12-month suspended sentence quashed [and] three other accused and three corporate defendants were

In both the Thalidomide and Steel and Morris cases the issue of access to justice and equality of arms was all important. In both cases there was a demonstrable lack of knowledge of the law, resources, expertise and therefore a lack of equality of arms; in the Thalidomide case there were also accounts of the defendants seeking to exploit this inequality to apply pressure on parents to settle at too low a value as part of their defence strategy. In these cases it was important that the clients had the ability to address the public through the media and it was this ability that the English courts had effectively denied them. Access to the public through the media was important to redress the balance of equality of arms and that was accepted by the European Court. Although, as is pointed out above, these are not cases where media attention was activated by claimant lawyers nor, especially in the Thalidomide case, examples of sensationalist and inaccurate reporting, it is noteworthy that this thesis takes no argument with clients or the media providing true information to the public through the media. The Thalidomide case can therefore be distinguished from the cases to which this thesis is addressed. Thalidomide shows rightly how important it can be for clients to have access to the media and for interested journalists to be able to press their case before the public. However, the media in the 1970s may be seen to have behaved quite differently to social media and even paper media in 2019. This thesis is, however, concerned with the appearance in the media of assumptions as to liability and in particular with lawyers mis-using the media with sensationalist or inaccurate information prior to any possibility of testing allegations regarding fact and liability before a court.

It is accepted that there is an inequality of arms between complainants without resources, knowledge and expertise and defendants from the public or corporate sectors (even though, as will be discussed below in Section 2 of Chapter 2 there is a perceived changing of the balance of power where class actions or group litigations are concerned), but it will be submitted that this should be corrected by other means and not by the unrestricted (and sometimes unfair) use of media by claimant lawyers as an extra-judicial process or ultimately as a replacement for the court process.

Group Litigation/Collective Actions – As noted above in Section 1, the Group Litigation Order is the English law system of formally managing collective actions. The GLO is an "opt in" system which demands that individual claimants have to positively sign up to become parties, rather than automatically becoming parties unless they signify otherwise as they would under the "opt out" system used in US class actions. A Group Litigation Order is an order that will provide for the case management of claims which give rise to common or related issues of fact or law; it may, for example be used where a large number of people are affected by one

---

acquitted during the trial. The four cleared on appeal were awarded their trial and appeal costs from public funds. They had been convicted … of conspiring to mislead the markets over the result of the 1987 £837m Blue Arrow rights issue - launched to finance the company's takeover of the larger American employment agency Manpower - by secretly buying shares themselves to raise the take-up level announced to other investors" – Geoff Frost, Press Association – 'Blue Arrow trial labelled pounds 40m disaster' – (The Independent – 28 July, 1992) http://www.independent.co.uk/news/business/blue-arrow-trial-labelled-pounds-40m-disaster-1536262.html - accessed 6th October, 2014

event, as a result of which they may all wish to pursue action through the courts against the same defendant. This will very often involve a company or a public or state authority as a defendant, indeed as yet there are no examples of GLOs against an individual or private defendant[108].

The first GLO in England was the Prentice Ltd/DaimlerChrysler UK Ltd Litigation GLO which was made on 30th April 2001. That was a case brought against Daimler/Chrysler UK Ltd to determine the effectiveness of termination notices served by Daimler/Chrysler UK Ltd on Prentice Ltd and on all the other members of Daimler/Chrysler UK Ltd's dealer network. The GLO enabled all of the dealers to participate in a single action against one corporate defendant. As a fundamental characteristic of the system of GLOs in England is that it is, with certain exceptions, an "opt in" system, only those claimants who express a wish to join the group can be included and there is no question of those who do not volunteer either being included in the group or being bound by any judgment or settlement or other outcome. That means that other potential claimants, who under the US system would have been clearly included within a class unless they opted out (see below), could in England still bring separate claims against the same defendant even following resolution of a case under a GLO, provided that their claim was within any applicable limitation period.

The origin of the GLO is to be found in the Woolf Report[109] in which Lord Woolf identified a need for "a new approach [for dealing with multi-party actions] both in relation to court procedures and legal aid"[110] with the following three objectives[111]:

"(a) [to] provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;

(b) [to] provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;

(c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."

---

[108] Group Litigation Orders Register – HM Courts and Tribunal Service http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders - last accessed 19 March, 2019 (Referred to below as the "Group Litigation Orders Register")

[109] Lord Chancellor's Department 'Final Report of Lord Woolf to the Lord Chancellor on the Civil Justice System 1996 ("The Woolf Report") – (Stationery Office Books - ISBN-10: 0113800991)

[110] The Woolf Report - Section IV, Chapter 17 para 2

[111] The Woolf Report - Section IV, Chapter 17 para 2

Prior to the introduction of the GLO, multi-party actions in England and Wales had according to Lord Woolf been treated "as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others"[112]. Lord Woolf identified a lack of specific rules of court for multi-party actions and concluded that "in addition to the existing procedures being difficult to use, they have proved disproportionately costly."[113] Nevertheless, many collective actions without GLOs are still conducted[114].

The issue of collective actions has been approached in different ways in common law countries and below is a brief outline of the approaches in England, the USA and Australia and New Zealand.

England – GLOs - The GLO was introduced as CPR 19.10 in 2000 under the provisions of the Civil Procedure (Amendment) Rules, 2000 which came into force (with respect to Part 19) on 2 May, 2000.

Under Schedule 2 to this amendment, a new Part 19 was introduced to the Civil Procedure Rules ("CPR"). CPR 19 provides:

> "A Group Litigation Order ("GLO") means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the "GLO Issues")."
>
> "[A] Group Litigation Order can be made in any Claim where there are multiple parties or Claimants to the same cause of action. The Order will provide for the case management of claims which give rise to common or related issues of fact or law. These will be specified in the Order as the GLO Issues. The Law Society may be able to assist in putting the applicant in touch with other parties who may also be interested in applying for a Group Litigation Order in their case. When an Order has been made a Group Register will be set up and maintained in the Management Court, of all the parties to the group of claims being managed. A Group Litigation Order will normally be publicised through the Law Society."[115]

Any judgment or order in respect of one claim "will be binding on all of the claims on the register, unless the court orders otherwise".[116] Theoretically, the GLO can be used for both claimants and defendants although Practice Direction 19B applies "only where the multiple parties are claimants. Where the multiple parties are

---

[112] The Woolf Report - Section IV, Chapter 17 para 1

[113] The Woolf Report - Section IV, Chapter 17 para 2

[114] See "Non-GLO Multi-Party Actions" below

[115] Group Litigation Orders Register

[116] Ryan Hocking 'So vast a throng the stage can ne'er contain: litigation involving groups' (Lexology 25 July, 2017) http://www.lexology.com/library/detail.aspx?g=c6990a33-10b0-4763-b313-b1a317dd0436 – accessed 31 July, 2017 – P2

defendants, the process of applying for a GLO and the application of CPR 19 are less clear"[117]. The GLO is fundamentally an instrument of management and the court has "wide case management powers" including nominating one of the claims as a test case, appointing a solicitor as lead solicitor for all the parties and directing a group filing of a "group particulars of claim"; the default position under CPR 46.6 is that "each of the multiple parties will be liable for an equal share of any costs order, although the court retains its discretion in that regard.[118]

England - Non-GLO Multi-Party Actions - As an alternative to GLOs, "multiple claims may be dealt with using the representative parties procedure, also set out in CPR 19"; this requires the parties to have the "same interest" in the proceedings so "if there is any conflict of interest within the group, the requirement cannot be satisfied".[119]

If the GLO and the representative parties procedure cannot be used, "the court still has wide case management powers under CPR 3.1 "…albeit that the available solutions are far from perfect."[120] The court can "consolidate claims which have already been started or join non-parties in respect of whom there are no ongoing proceedings … nominating lead cases within that group"[121] the decisions and orders on which will apply to the non-lead cases.

In addition, less formally, "the issue can be addressed without the court taking any procedural steps at all if there is a freestanding agreement from the relevant parties to be bound by the outcome of one particular case."[122]

All of the alternatives to the GLO have complexities with regard to expenses and costs and getting necessary consents from parties and as Hocking points out, "the problem is at its most pronounced in mid-sized cases, where obtaining a GLO is likely to be disproportionately onerous but where the alternatives are inadequate."[123]

USA and Australia - The US and Australia have equivalent systems for multi-party actions, although they are class action systems rather than Group Litigation style case management systems. The US system is based on Rule 23 of the Federal Civil Procedure Rules and the Australian system has its foundation in Section 33C of the Federal Court of Australia Act, 1976. Both involve representative parties pursuing their cases with the results applicable to the group or class. In the US the cases require approval from the court to be treated as class actions and this will include

[117] Hocking – P1

[118] Ibid – P2

[119] Ibid - P3

[120] Ibid – P3

[121] Ibid – P3

[122] Ibid - P3

[123] Ibid P4

defining the class, appointing class counsel and giving requisite notices to the class[124].

Whilst the English system of Group Litigation and the representative action are, as already noted, in the main "opt in" systems for claimants, the US and Australian class action systems are "opt out" systems[125]. An exception to the "opt in" system in England is the introduction of the "opt out" approach for competition law claims under the Consumer Rights Act, 2015 and which is discussed in Chapter 2.

From the media perspective, an important difference with the US system is its use of juries in civil cases. As Beke points out, "In the United States, most cases are heard in front of a jury. Litigation communication, as a result of the local circumstances deals with different issues relating to public opinion", whereas, as civil cases in England are held without juries "in front of a judge or … a panel of judges. Litigation PR … therefore places emphasis on different sets of issues … [and] is about managing a kind of crisis ... a form of persuasive communication, and enforcing settlement when avoiding trial procedure of defending [the] client's reputation before, during and after the trial."[126] This shifts the emphasis and target of any media campaign and it is interesting to note that Beke focusses on settlement and the pre-trial period which is very much the focus in this thesis.

New Zealand - In New Zealand there is currently no formal class action system although in certain circumstances, group litigation is possible by way of representative action"[127]. There has been a draft of class action legislation that has been with the Ministry of Justice since 2008[128]. Liesle Theron confirms in an April

---

[124] Rule 23(a) states: "(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defences of the representative parties are typical of the claims or defences of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class."

[125] For Rule 23(3)(b)(3) classes, it is specifically provided in Rule 23(c)(2)(b)(v) that notice must be given to class members that the court will exclude any member who requests exclusion.

[126] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management' ISBN 978-3-319-01872-0 1st edn, Springer, 2014 – P22

[127] John Shackleton and Gerald Joe – 'Class Actions and Litigation Funding' – (Simpson Grierson 2011). http://www.simpsongrierson.com/litigation-class-actions-litigation-funding/ accessed 12 October, 2012.

[128] Draft Class Action Bill - New Zealand - available on the Stanford University web site (Stanford University 2012) -http://globalclassactions.stanford.edu/sites/default/files/documents/ - accessed 9 November, 2012

2014 article[129] that despite the fact that there seems to have been no progress with the draft legislation since being passed to the Secretary of State for Justice, there is nevertheless a "class action regime emerging in New Zealand". This is by virtue of High Court Rule 4.24[130] which "provides that one or more persons may sue on behalf of, or for the benefit of, all persons 'with the same interest in the subject matter of a proceeding' either with the consent of the represented parties or with court approval".[131] A party can sue or be sued on behalf of other parties with the same interest, or, as directed by the court[132]. Theron confirms this as still being the case in a later article in 2016[133] as do Jenny Stevens and Sophie East[134] who say that despite having no "specific class action procedural rules or statutes, representative actions are commonly referred to. They say that "… the bringing of several high profile legal actions which have proceeded as class actions in all but strict legal name" has "resulted in a body of case law, that taken together with existing procedural rules of court, provide a framework for class actions".

Stevens and East describe that the representative order will specify if an action is "opt in" or "opt out" and Section 6(5) of the Bill[135] also provides that: "(5) A class action must be conducted as either: (a) An opt in class action; or (b) An opt out class action" which on both counts seems to offer a pragmatic approach which can be varied from case to case.

---

[129] Liesle Theron – 'Class action litigation: a new frontier'(*New Zealand Law Society, Law Talk - Issue 840 – 28 April, 2014*) https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-840/class-action-litigation-a-new-frontier - accessed 4 January, 2015

[130] Judicature (High Court Rules) Amendment Act 2008 No. 90, Public Act 4.24 'Persons having same interest'

[131] Liesle Theron – 'Class action litigation: a new frontier'(*New Zealand Law Society, Law Talk - Issue 840 – 28 April, 2014*) https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-840/class-action-litigation-a-new-frontier - accessed 4 January, 2015 – P2

[132] John Shackleton and Gerald Joe – 'Class Actions and Litigation Funding' – (Simpson Grierson 2011). http://www.simpsongrierson.com/litigation-class-actions-litigation-funding/ accessed 12 October, 2012.

[133] Liesle Theron 'Class actions in New Zealand (2016) (Global Class Actions Exchange web site) http://globalclassactions.stanford.edu/content/class-actions-new-zealand - accessed 31 July, 2017

[134] Jenny Stevens and Sophie East 'Class/collective actions in New Zealand: overview' (Practical Law blog 1 November, 2016) https://uk.practicallaw.thomsonreuters.com/3-617-6671?transitionType =Default&contextData=(sc.Default)&firstPage=true&bhcp=1 – accessed 31 July, 2017

[135] Draft Class Action Bill - New Zealand - (Stanford University 2012) - http://globalclassactions.stanford.edu/sites/default/files/documents/ - accessed 9 November, 2012

SECTION 3 - THE CHANGING CLIMATE IN THE LEGAL PROFESSION AND THE ENGLISH LEGAL SYSTEM

Within and following the period of "extraordinary turmoil in the 1990's" as observed by Abel[136] and referred to above[137], there have been a plethora of major changes affecting the legal profession and legal and court procedures, many of which have an impact on the conduct of multi-party litigation and the way in which it is approached by those conducting it. Not least, many of the changes affect the risks and rewards to claimant lawyers and therefore have led to developments and changes in their strategic aims and their tactics in the way they conduct such cases.

The Introduction of Litigation Funding/No win No fee – One very significant change directly affecting group litigation, was the introduction of the concept of "no win no fee". It is especially relevant because in cases conducted on a "no win, no fee" basis, the claimant lawyer will have an extremely high incentive to win. Without a victory the lawyer not only receives no, or only a low, fee but may also have to have funded the collation of evidence perhaps including expensive expert testimony. Any temptation towards 'activation of public interest' may be particularly strong in such cases, if it may be thought to encourage a settlement in the claimants' favour. According to a Guardian article, Dutton, the SRA prosecutor in the Leigh Day case referred to above, had also seen costs as a potential driver for the actions of the law firm:

> "The tribunal was told that as early as 2008 Leigh Day knew that one of its clients, Khudur Al-Sweady, was a senior member of the Mahdi army and that he had threatened the firm's agent in Iraq, Abu Jamal. 'Leigh Day knew that if they could pursue the claims to a successful conclusion, then they would receive large costs and they could recoup their expenditure on foreign trips,' Dutton said."[138]

"No win no fee" originally described a "conditional fee" arrangement ("CFA") that could be made between a solicitor and client[139]. The intention of the CFA was to

---

[136] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004

[137] In Section 2 of Chapter 1 under Media Interest in Litigation

[138] Owen Bowcott 'Lawyers in cases against UK troops 'knew clients belonged to Iraqi militia'' (The Guardian 24 April, 2017) https://www.theguardian.com/uk-news/2017/apr/24/lawyers-leigh-day-cases-against-uk-troops-allegedly-knew-clients-belonged-iraq-militia-mahdi-army - accessed 28 June, 2017

[139] It is important to distinguish the CFA from the Contingent Fee arrangement which has been in use in the USA; under contingent fee arrangements in the USA, the lawyer's fee will be paid as a percentage from damages awarded, no fee being payable if that lawyer's client is unsuccessful. Quite apart from the perception that such arrangements in the US caused inflation of damages awards, the contingent fee system's existence in the US is in a court environment under which a losing litigant is not at risk of paying the other party's litigation costs. A type of contingent fee arrangement based on a "Damages Based Agreement" has been be introduced in England following the "Jackson Report" 'Review of Civil Litigation Costs: Final Report' – December, 2009. Lord

provide an alternative means of access to justice, notably without the element of means testing that applied to legal aid. It was introduced under the Courts and Legal Services Act, 1990 and permitted solicitors to agree with their litigant clients that all, or a specified part, of their fees would only be payable if that client was successful in the litigation[140]. Additionally, if the case is successful the solicitor is, subject to the terms of the agreement, permitted to charge a success fee in addition to normal levels of fee. The success fee can be as high as 100% of the normal fee[141]. Both the regular fees and the success fee element, under the Access to Justice Act 1999, were recoverable from a losing litigant under a costs award; however, since 1 April 2013[142], the 'success fee' has no longer been payable by the losing side; if one is charged it will be paid by the winning party, typically out of damages recovered if the claimant is successful[143]. The introduction of the CFA has had a marked effect on litigation, and may still improve access to justice to those of the MINELAs[144] which had effectively been excluded from any access to justice unless they were prepared to take significant costs risk; it also lent itself to the funding of group litigation, often in combination with After the Event ("ATE") insurance policies.

The CFA was also of particular significance to the funding of multi-party litigation because of a number of difficulties encountered concerning legal aid in such litigation, including for example the necessity for equal treatment between legally aided and non-legally aided litigants which was addressed in the Opren case[145]. This

---

Jackson – ISBN 9780117064041 - http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf - accessed 29 April, 2012

[140] Select Committee on Constitutional Affairs - Third Report. (14 February, 2006). http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/75405.htm - accessed 21 March, 2014

[141] Ministry of Justice, 'Civil Justice Reforms - Main changes' (updated Friday 7 November, 2014) http://www.justice.gov.uk/civil-justice-reforms/main-changes - accessed 8 November, 2014

[142] S44 Legal Aid, Sentencing and Punishment of Offenders Act, 2012

[143] Ministry of Justice, 'Civil Justice Reforms - Main changes' – (updated Friday 7 November, 2014) http://www.justice.gov.uk/civil-justice-reforms/main-changes - accessed 8 November, 2014

[144] Middle Income Not Eligible for Legal Aid Services – those middle income earners whose income placed them substantially above the level of eligibility for legal aid, but who could not possibly afford to fund the costs of litigation. Per Lord Thomas of Gresford in a Committee Stage speech referring to S43 of the Legal Aid Sentencing and Punishment of Offenders Bill stating that the government's intention under what became LASPO was to return to give effect to the Courts and Legal Services Act, 1990 "When the 1990 Act, led on in this House by the noble and learned Lord, Lord Mackay, was originally enacted by the Conservative Government to provide relief for the MINELAs - middle income not eligible for legal aid - it was expressly provided by Section 58 that the costs payable by a losing defendant to a successful claimant should not include the success fee payable under a CFA." This had been changed by the Labour government by an amendment in 1999 - Access to Justice Action Group, House of Lords Debate - Committee - 6th Day. (December, 2012). <http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2012/01/HL-debate-LASPO-30-1.pdf> - accessed 21 March 2014

[145] Davies v Eli Lilley – [1987] 3 All ER 94

and other issues are discussed in more detail below in Section 4 under "Legal Aid and multi-party litigation".
The CFA system was subject to changes which had their origins in the 2010 Report of Lord Justice Jackson[146] including under the Legal Aid, Sentencing and Punishment of Offenders Act, 2012 (LASPO)[147]. Those changes[148] included the reversal of the position under the Access to Justice Act 1999[149], whereby civil legal aid was available for any matter not specifically excluded[150]. The Act took some types of case out of the scope for legal aid funding and provided that cases would not be eligible for funding unless of a type specified in the Act. The Act made various provisions in respect of civil litigation funding and costs, taking forward the recommendations of the Jackson Review and the Government's response to that review including:

(a) the success fee under a CFA no longer payable by the losing party[151];

(b) the success fee remained at up to 100% but was limited to 25% for personal injury cases;

(c) the introduction of damages based agreements ("DBAs") which permit a solicitor and client to agree that legal fees can be payable from an agreed percentage of damages awarded to a successful litigant[152] (a system a little closer to but by no means the same as the US "contingent fee"

---

[146] Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' Consultation Paper (CP 12/10 - CM 7967 November, 2010). http://www.official-documents.gov.uk/document/cm79/7967/7967.pdf ISBN 9780101796729 - accessed 3 February, 2014

[147] Legal Aid, Sentencing and Punishment of Offenders Act, 2012

[148] Summarised in the Civil Justice Reforms – Main Changes web site - Ministry of Justice, 'Civil Justice Reforms - Main changes' – (updated Friday 7 November, 2014) http://www.justice.gov.uk/civil-justice-reforms/main-changes - accessed 8 November, 2014

[149] Access to Justice Act, 1999 c. 22

[150] Legal aid was made available for the cases specified in Schedule 1 to the Act and was removed for almost all types of claim excluding claims where personal safety, human rights or the home are at risk; specifically legal aid was made unavailable for clinical negligence or private family law (except where domestic violence or child abuse are present) and debt cases (unless the home is at immediate risk). There were provided exceptions for legal aid in obstetric cases a funding scheme for "exceptional" cases (S10 LASPO), where an exceptional case determination has been made by the Director of legal Aid Casework (a civil servant designated by the Lord Chancellor under S4(1) LASPO).

[151] S58A(6) of the Courts and Legal Services Act, 1990 is now repealed.

[152] With payments to lawyers from damages capped at 25% of damages (excluding damages for future care and loss) in personal injury cases, 35% in employment tribunal cases, (as before) and 35% in all other cases.

system) - however, hybrid DBAs (i.e. using them in conjunction with other types of funding) were (and still are) not permitted[153];

(d) ATE insurance premiums[154] were no longer recoverable from a losing defendant[155] (litigants therefore have to pay some element of their own costs (from damages or elsewhere) thus providing an incentive for them to exercise some control over the spending of their lawyers[156] -"This is intended to give individual CFA Claimants a financial interest in controlling the costs incurred on their behalf"[157]);

(e) introduction of Qualified One way Costs Shifting "QOCS"[158]; and

(f) a 10% increase in damages, to compensate for the changes in costs recovery.

SECTION 4 - FUNDING OF LITIGATION AND CHANGES FOLLOWING LASPO

Funding Options in English civil Litigation[159] - The question of funding options in litigation has a direct impact on group litigation. All litigation requires funding of

---

[153] Ministry of Justice, 'Civil Justice Reforms - Main changes' – (updated Friday 7 November, 2014) http://www.justice.gov.uk/civil-justice-reforms/main-changes - accessed 8 November, 2014

[154] For ATE insurance taken out after 1 April 2013.

[155]Repeal of S29 Access to Justice Act 1999 under LASPO S46(2) – http://www.legislation.gov.uk/ukpga/2012/10/section/46/prospective -accessed 26 January, 2014

[156] Having rejected the Lords' proposals that success fees and ATE premiums would still be recoverable in employment related respiratory disease cases (http:www.theyworkfor you.com/lords - Amendment 137A (accessed 06 July, 2012)), the Government proposed a compromise that the provisions not come into force with respect to mesothelioma cases until a review and publication of a report on the likely effect on those cases had been conducted; the review findings were not accepted by the Select Committee so for the time being success fees and ATE premiums are still recoverable in mesothelioma cases – Lesley Attu 'ATE premiums remain recoverable for mesothelioma claims for the time being' (2014) Legal Futures Publishing Ltd, http://www.legalfutures.co.uk/associate-news/ate-premiums-remain-recoverable-mesothelioma-claims-time - accessed 6 January 2015

[157] Ministry of Justice, 'Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's recommendations – The Government response', Policy Paper (Cm 8041 29 March 2011) ISBN 9780101804127, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf - accessed 22 May, 2014

[158] Qualified One Way Cost Shifting - in personal injury cases to compensate for the ATE premium not being recoverable; this limits the costs that a losing claimant may have to pay to a defendant but the victorious claimant will still be able to recover costs from a losing defendant. Ministry of Justice, 'Civil Justice Reforms - Personal Injury Claims' 2014 - http://www.justice.gov.uk/civil-justice-reforms/personal-injury-claims - accessed 30 January, 2015

[159] The information in this section was confirmed by reference to Macfarlanes "Litigation In Brief" publication; Geoffrey Steward (2011). Litigation In-Brief, Conditional Fee Agreements and litigation

some kind and in group litigation that requirement can be considerable, partly because of the numbers of claimants involved and partly because of the requirement to collate wide ranging evidence, some of which may be sourced from expensive disclosure exercises and some may be highly expensive expert evidence. As observed above, the funding method(s) applied in a particular case, will have a direct impact on the approach taken by the claimant lawyer; the funding and cost aspects of the case, in combination with the business model of the lawyer concerned may become substantial factors driving the claimant lawyer to go all out for settlement as early as possible and may therefore become powerful drivers in the claimant lawyers' recourse to media in order both to maximise participation in the group litigation and to exert as much pressure as possible on the corporate defendant by attacking its reputation. Whilst aspects of funding and costs are highly significant from the claimant perspective, the costs rules in the English litigation system make the available options and issues every bit as significant for defendants and will, particularly if insurers are not involved, impact even the thinking of a corporate defendant, which in terms of available funds to fight large claims, may or may not have "deep pockets".

The risk regarding the cost of litigation in England is not limited to the, often considerable, cost of the claimant and defendant each preparing and presenting their own cases but under the English system the litigants, both claimant and defendant, have to take account of the very real risk, if unsuccessful in the case, of having to pay the litigation costs of the other party; for a defendant this can now be exacerbated by the introduction of QOCS.

A basic description of the various options available for funding litigation in England and Wales is relevant to this thesis because of the relevance of funding to the business models and incentives for claimant lawyers, so a brief summary is set out below. Some of the available options are less relevant to this thesis so for those only a brief reference is included.

Self-funding – Self funding is the most obvious of the available options and in many instances that will be the route taken by the corporate defendant unless insurers are involved. Of course that can mean substantial outlay and risk in defending claims; self-funding claimants would need to start to lay out funds right from the beginning of the process, so self-funding for claimants in group litigation is seldom relevant; either the claimants will be impecunious and/or the cost of the litigation will far outweigh the amount of compensation available to each individual.

Legal Aid - Legal Aid used to be available for a wide variety of cases but its scope and availability in civil cases has diminished. Since its inception in 1949[160], the Legal Aid scheme has undergone a number of changes. These changes were conveniently summarised in the Government proposals for legal aid reform presented to

insurance. Macfarlanes LLP. http://www.macfarlanes.com /media/320447/conditional-fee_agreements_and_litigation_insurance.pdf - accessed 6 July, 2012

[160] Legal Aid and Advice Act, 1949

Parliament in November, 2010[161]. The Access to Justice Act, 1999 had seen the first major contraction in the scope of Legal Aid with the removal of most personal injury cases and boundary disputes. This had been the time of a de facto extension of the role of the conditional fee agreement which is much used in multi-party litigation. The background to the 1999 Act according to Paterson's summary had been the:

> "… ever increasing criminal legal aid bill which looked even more alarming when (1) high cost cases were transferred from the responsibility of the courts and (2) the Human Rights Act was presaged…"[162]

The plan in response by the Lord Chancellor's Department ("LCD") (which Paterson describes as having been driven through "despite a bruising fight with the Law Society[163]), and the cap on legal aid expenditure had, (as Paterson says was confirmed by Lord Irvine), meant that the "civil legal aid budget had lost out to criminal legal aid and human rights cases."[164] Lord Irvine had confirmed that this had been the intention and that "the only money left for civil legal aid is what is left over out of the budget after the requirements of criminal legal aid have been met"[165]. The LCD "decided to take money claims (primarily personal injury cases) out of legal aid"[166] which had in part been the result of lobbying of the LCD by insurance companies in London "on the grounds that too many bogus claimants were receiving legal aid in personal injury cases"[167]. As Paterson points out, to make this reduction in the scope of legal aid work, required the boosting of the uses of CFAs and recourse to ATE Insurance.[168]

The 2010 Government proposals, referred to above and the Government's response[169] arose at a time of deep and serious questioning as to the efficacy of the Legal Aid scheme, its reach, its actual impact on the issue of access to justice and,

---

[161] Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' - Consultation Paper CP 12/10 - CM 7967 (November, 2010). http://www.official-documents.gov.uk/document/cm79/7967/7967.pdf - accessed 3 February, 2014

[162] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P89

[163] Ibid

[164] Ibid

[165] Ibid P90

[166] Ibid

[167] Ibid P92

[168] Ibid P91

[169] Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response' (June, 2011) - www.justice.gov.uk/.../legal-aid-reform-government-response.pdf - accessed 19 January, 2013 – now availbale at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf - accessed 20 June, 2017

very prominently, its cost. As arguments and input on these issues have developed over time, further changes were introduced with the provisions of LASPO[170] to the extent that Legal Aid is even less likely to be relevant for most group litigation cases.

Legal Aid and multi-party litigation – As noted in Section 3 of this Chapter, there have been particular issues experienced with legal aid in multi-party litigation and none was less graphic than in the Opren Arthritis drug case. Opren (or Benoxaprofen) was an anti-arthritic drug produced by Eli Lilly, a multi-national drug company; it was intended for a largely elderly market. It had failed to get a licence in the US but six weeks later had received a licence in the UK. It was said to have "mild and transient side effects". However, some 2,000 Opren users suffered severe and lasting bouts of photosensitivity; other more serious side effects including some deaths were also reported. The main legal action involved 1,500 plaintiffs. A ruling in 1987 effectively meant that the 500 of the plaintiffs who were not legally aided might have had to withdraw but with the help of a multimillionaire and a media campaign, a settlement was reached at the end of that year[171]. The judgment relating to legal aid was appealed and upheld by the Court of Appeal[172]. In the judgment some of the particular issues of the case were summarised. Those included under (c) 'The availability of legal aid', the fact that older claimants:

> "… are more likely to have disposal (sic) capital or income which will take them outside the scope of the legal aid scheme, or if this does not happen, will lead to their having to make a significant contribution to their own costs [or to those of the defendant]"[173].

By contrast, he noted that "in the Thalidomide case every major claimant, being a child, was legally aided, mostly with a nil contribution" so the issue had not arisen.

The issue regarding legal aid had arisen because Section 7(6) of the Legal Aid Act 1974[174] provided that:

---

[170] Discussed above in Section 3 of Chapter 1.

[171] Summary from Guy Dehn 'Opren – Problems, Solutions, and More Problems' (Journal of Consumer Policy 12: 397-414, 1989 – © Kluwer Academic Publishers) https://doi.org/10.1007/BF00412144 - accessed 13 January, 2019

[172] Davies v Eli Lilley – [1987] 3 All ER 94

[173] Davies v Eli Lilley – [1987] 3 All ER 94 – Judgment of Sir John Donaldson MR at P96

[174] Section 7(6).— Scope and general conditions of legal aid. Except as expressly provided by this Part of this Act by regulations made under it,[…]
(b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liability of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised. - https://0-login-westlaw-co-uk.catalogue.libraries.london.ac.uk/maf/wluk/app/document?src=doc&linktype=ref&context=20&crumb-action=replace&docguid=IF5F3EFA0956B11E2A062A25E269041DB – accessed 17 January, 2019

> "… the fact that a person is receiving legal aid 'shall not affect … the principle on which the discretion of any court or tribunal is normally exercised.' No doubt the intention was that legally-assisted parties should not be treated as second-class citizens, but the subsection also prevents them from being treated differently from other citizens … Using them to fight lead cases just because they were legally assisted would breach this statutory rule."[175]

The judgment continued with a summary of the "wholly novel order" which the judge (Hirst J) had made consequent upon the provisions of Section 7(6) of the Act:

> "… as from 8 June, 1987, where particular plaintiffs incurred costs either personally or thought the legal aid fund in pursuing lead actions, or thereby became liable to pay costs to the defendants, every other plaintiff should contribute rateably on a per capita basis."[176]

As observed by Dehn[177], "No previous group claim had been subject to the rigorous application of the costs rules" and the effect in this case was serious for those 500 non-assisted litigants. It meant that:

> "Inevitably in some cases their individual costs liability might be greater than the compensation they stood to receive if they won the case. This had enormous significance for those claimants who had had to put their homes at risk to join the legal action."[178]

Day et al[179] note that:

> "The … practice of trying to select solely legally aided lead cases to pursue novel litigation was effectively prevented as a result of the … judgment in the Opren litigation"

and they note that it therefore became the practice to include "in an initial order setting up group litigation a provision for the plaintiffs to share costs pro rata". This was very relevant to the "reasonableness" test under the Legal Aid Act, 1988[180] and Day et al point out that uniquely to multi-party litigation, so far as the reasonableness test is concerned the required cost/benefit analysis must "(a) be

---

[175] Davies v Eli Lilley – [1987] 3 All ER 94 – Judgment of Sir John Donaldson MR at P98

[176] Ibid

[177] Guy Dehn 'Opren – Problems, Solutions, and More Problems' (Journal of Consumer Policy 12: 397-414, 1989 – © Kluwer Academic Publishers) https://doi.org/10.1007/BF00412144 - accessed 13 January, 2019 - P404

[178] Ibid

[179] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651 – P73

[180] S15(3) Legal Aid Act, 1988

analysed globally; and (b) encompass the possibility of a cost-sharing order and a multi-party contract."[181] The Legal Aid Board according to Day et al would have required to be informed of the number of privately funded clients who were sharing in the benefit of any generic work carried out and would also have required an undertaking from solicitors that they would notify the Board of the existence of any private clients.[182]

Additionally to the reasonableness test creating particular issues for multi-party litigation, Day et al pointed to issues with the Merits test which required that it had to be demonstrated that the case had a reasonable chance of success. The issue they pointed to was that in some cases without the granting of legal aid, very little evidence may be available at an early stage; this was particularly so[183] for what they called "creeping causation"[184] cases, which some group cases may be described as. This would involve cases where for example the plaintiffs' action may concern an issue where scientists' knowledge of exactly what the cause of a particular condition may was still extremely limited.

Nonetheless there did exist from 1994 a Multi-Party Action Committee of the Legal Aid Board which oversaw a tender process (for the selection of competing law firms) for multi-party cases, and which dealt with cases including "those in respect of insulin, Creutzfeldt-Jakob's disease, baby Ribena, vibration white finger, MMR, tobacco-related diseases and Gulf War syndrome"[185]; the Benzodiazepine cases are also referred to[186]. The Civil Legal Aid (General) Regulations 1989 reg 152(3) defined a multi-party action as "an action or actions in which ten or more assisted persons have causes of action which involve common issues of fact and law arising out of the same cause or event."[187]

Insurance - Insurance for litigation comes in various guises but principally under the categories of After the Event ("ATE") insurance, which is highly relevant for group litigations, and Before the Event ("BTE") insurance.

1. **ATE insurance** - ATE insurance covers the liability of the party for the costs of litigation if it is unsuccessful in a civil claim. Cover usually extends to the other party's legal costs and the insured party's disbursements but it can cover the insured party's legal costs as well. As the title implies, this cover

[181] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651 – P74

[182] Ibid – Pp73-74

[183] Ibid – P 67

[184] Ibid P195

[185] Ibid P64

[186] Ibid P78

[187] Ibid P 64

can be made available after the occurrence of the event that gives rise to the litigation. If the insured party is successful, the other party will pay the insured party's legal costs (plus any success fee) and for cases started prior to LASPO coming into force, the ATE insurance premium as well. The insured party, if unsuccessful, may be at risk regarding the ATE premium but some ATE policies also provide a "self-insured" premium which would cover the cost of the ATE insurance premium itself. The premiums are often "staged" meaning that they will increase as the litigation progresses. This means that if for example there is a settlement prior to court proceedings, the premium will be considerably lower than if the proceedings had gone to full trial. The advantage of ATE cover is that it can provide virtually risk free litigation but disadvantages include the fact that it will generally only be available if the case involves a monetary claim and is perceived by insurers as strong from the outset. In addition, the level and payment of the premium can themselves become issues in the proceedings which can add to litigation or can prove to be an obstacle to settlement. The level of premium for ATE cover is typically in the region of 30% of the expected amount of costs at risk[188]. This can vary with lower levels applying (perhaps 10%) if the case is a personal injury case subject to QOCS because of the very much reduced level of risk for the insurer

2. **BTE insurance** - BTE insurance covers the costs of litigation which is unspecified at the time of taking out of the policy in order to cover unidentified cases that may arise in the future. On a domestic level it is commonly taken out as an add-on to household insurance policies or to motor policies. On a commercial level it is very suitable to be taken out by smaller commercial entities which can afford a regular small premium payment but which could not face the substantially higher "one-off" cost of a litigated dispute. BTE cover would not normally be available for the defence of group litigation cases and in the form of stand-alone policies would not include issues like product liability and environmental liabilities which could often be the subject of group litigation; those liabilities would be covered by entirely separate insurances.

Claims Aggregation - In claims aggregation, a claimant's rights are assigned to a funder who gathers assignments and then proceeds with the litigation standing in the shoes of the assignors. This opportunity and development is made possible in part due to evolution in the concepts of maintenance and champerty[189]; such

[188] Premium level information for ATE cover and BTE cover was obtained in phone interviews with two underwriters from a leading provider of litigation costs insurance on 15 April, 2015.

[189] "Maintenance" and "champerty" were the common law offences and torts of "the promotion or support of litigation by a third party who has no legitimate interest in the proceedings (maintenance) and the support of litigation by a third party in return for a share of the proceeds (champerty)" (from Oxford Dictionary of Law,4th edn 1997 OUP ISBN 0-19-280066-3). These crimes and torts were abolished by statute in 1967 (Criminal Law Act, 1967 S13) and although at that time a champertous agreement could still be treated as contrary to public policy, there is now under LASPO official sanction for a controlled form of fees from a share of damages under the new system for DBAs.

changes are not unique to the UK and have likewise occurred in other common law based jurisdictions including Australia, and the USA.

Third party funding – In third party funding a third party will meet the cost of a party's litigation in exchange for a share of the proceeds of success of the litigation. This carries the advantage of all the interim expenses being met as they arise as well as there being no issue regarding a premium as would be required for insurance. It can also be arranged that the funder would pay all or part of the litigation costs of the other party if the case was unsuccessful. This market is relatively new but is growing; however, such financing is only going to be available if the case is attractive to the funder. Joshua Rozenberg summarised succinctly the approach of Harbour and other litigation funders:

> "Funders of this kind make profits for their investors by taking a share in the proceeds of successful claims. Harbour won't touch personal injury, divorce or defamation cases. It's not interested in claims worth less than £10m. And although it will not fund a case unless its legal advisers think the claim has a strong prospect of success, the funder recognises that some of the cases it backs will fail."[190]

Third party funding is highly relevant to group litigation and it is noteworthy that the second case[191] brought under the amended S47B of the Competition Act 1998[192] in 2016 was financed by a subsidiary of Burford Capital which was to provide up to £36 million with a "payback in the event of success [of]… the greater of £135m or 30% of the proceeds of the case up to £1bn, plus 20% of the proceeds over £1bn"[193] it being reported, in the same article, that the court specifically stated that "the government in promoting the legislation[194] clearly envisaged that many collective actions would be dependent on third party funding."

---

[190] Joshua Rozenberg 'Is crowdfunded litigation the future of justice? (The Guardian 25 May, 2015) https://www.theguardian.com/commentisfree/2015/may/25/crowdfunded-litigation-future-justice-crowdjustice - accessed 4 August, 2017

[191] Walter Hugh Merricks CBE v Mastercard Incorporated and Others, CAT - Case No. 1266/7/7/16

[192] See below, Chapter 2 Section 1, Aspects of Collective Actions, paragraph 1 Regulatory procedures and Representative Claims - the Consumer Rights Act, 2015 which entered into force in October, 2015 in Schedule 8, amended sections 47A and 47B of the Competition Act, 1998, requiring a collective proceedings order to specify whether the proceedings are to be opt-in or opt-out.

[193] Michael Cross, M. 'News Focus: Playing the consumer card' (The Law Society Gazette 31 July, 2017) https://www.lawgazette.co.uk/news/news-focus/news-focus-playing-the-consumer-card/5062288.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

[194] The Consumer Rights Act, 2015.

Other litigation funding options include litigation buy out[195], loans[196], crowdfunding[197] and charity[198], trade unions, professional associations, legal expenses insurance including from motoring organisations and landlords' insurance cover [199].

As noted at the beginning of Section 4, funding is relevant to group litigation because of the link to the choice of cases and the economics of running large and very complex cases. Of all the options available, the CFA is still likely to be the most relevant for most multi-party actions along with ATE cover.

SECTION 5 - CHANGES AFFECTING LEGAL PROFESSIONAL PRACTICE

As in large part this thesis considers how claimant lawyers in multi-party actions approach a particular aspect of the conduct of their cases (i.e. relationships with and their use of the media), it is necessary to introduce the current legal professional environment and the current regulatory position under which the legal profession is required to work as well as the professional ethical position as viewed by their regulatory authorities. An evolution has occurred in the legal profession in the context of social and political changes and developments, the dictates of the

---

[195] Another variation of insurance. Under such an arrangement, the litigating party will take out insurance to cover liability for damages and costs in excess of a specified amount. This enables the exposure to legal costs to be capped and provides an element of certainty. However, the premium is most likely to be payable up front and if there is a claim on the policy, the insurer will have the option to take over the litigation.

[196] For example Loans for litigation are also being offered by "ulp" "ranging from £50,000 up to £1,000,000 for meritorious commercial legal disputes against credit-worthy opponents, provided that: 1. The amount of damages claimed comfortably exceeds the amount of finance required and 2. [the litigant borrower is] able to put up adequate security."

[197] Crowdfunding is the latest addition to the possibilities for funding litigation. There are many websites to be found offering crowdfunding platforms for a variety of projects and individuals can run their own. CrowdJustice ("Crowd fund public interest law - makes the law available to everyone" https://www.crowdjustice.com/ - accessed 4 August, 2017) According to an article by Joshua Rozenberg it "…is a legal crowdfunder, the first of its kind in the UK. It selects public interest cases, publicises them on its website, and invites the public to fund them. What's different is that the funders are donors rather than investors." Joshua Rozenberg 'Is crowdfunded litigation the future of justice? (The Guardian 25 May, 2015) https://www.theguardian.com/commentisfree/2015/may/25/crowdfunded-litigation-future-justice-crowdjustice - accessed 4 August, 2017

[198] For example the Access to Justice Foundation is a charity that according to its website (http://www.atjf.org.uk/ - accessed 4 August, 2017) has the aim "to improve access to justice for the most vulnerable in society" which they do by "by raising funds and distributing them to organisations that support those who need legal help but cannot afford it".

[199] The Which? website (http://www.which.co.uk/money/insurance/legal-expenses-insurance/guides - accessed 4 August, 2017) offers an explanation of the types of legal expenses insurance ("LEI") available and compares various different LEI offerings

current challenging economic environment and developments in communication brought about by access to the internet.

Significant changes include the Legal Services Act, 2007, the approach to litigation following the Woolf Report[200], the whole question of the approach to the cost of litigation following the Jackson Report and issues relating to the funding of litigation (both of which have been introduced above).

The changes in priorities and business practice of lawyers brought about by the regulatory changes also need to be considered. Alternative Business Structures ("ABSs") have been introduced under Part 5 of the Legal Services Act, 2007 and in particular Schedule 13[201] making provision for different types of ownership of legal businesses. This may potentially impact the way legal practices are operated and in turn may affect the financing of practices and thereby the priorities of those working in them; as a result this could have an impact on the way they run cases.

In addition to the direct effect on the funding of cases, the evolution of litigation funding will also impact on the identity of potential claimants who are able to bring cases as claimants. Some will have been affected negatively by the reduction in the availability of legal aid and some positively by the introduction of DBAs and the new types of funding that are becoming available, perhaps to the extent even of reducing the numbers of those referred to as MINELAs[202].

Changes have also been taking place in the regulations under which the legal profession works and in particular in the way that regulation is now approached.

The Legal Services Act, 2007[203] sets out eight regulatory objectives in Section 1(1)[204]

---

[200] The Woolf Report

[201] Legal Services Act, 2007

[202] Middle Income Not Eligible for Legal Aid Services – See above, footnote 166

[203] Legal Services Act, 2007

[204] The eight Regulatory Objectives (from http://www.legalservicesboard.org.uk/regulatory_objectives.pdf – accessed 27 January, 2014) are:

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

and five professional principles in Section 1(2)[205]. Section 1(2) provides that the services covered in the sub-section are those carried on by "authorised persons"[206] and, notably, including those which "do not involve the carrying on of activities which are reserved legal activities[207]". It is noteworthy that in the Regulatory Objectives, the public interest (as distinct from the interests of clients or the duty

---

(h) promoting and maintaining adherence to the professional principles.

[205] The five "professional principles" are:

(a) that authorised persons should act with independence and integrity,

(b) that authorised persons should maintain proper standards of work,

(c) that authorised persons should act in the best interests of their clients,

(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and

(e) that the affairs of clients should be kept confidential.

[206] Defined by Section 1(4) of the Legal Services Act 2007 as meaning "authorised persons in relation to activities which are reserved legal activities".

[207] Legal Services Act 2007, Section 1(2). Reserved legal activities are defined in Section 12(1) of the Legal Services Act, 2007 as:

(a) the exercise of a right of audience;

(b) the conduct of litigation;

(c) reserved instrument activities; (dealing with land or property under specific legal provisions)

(d) probate activities;

(e) notarial activities;

(f) the administration of oaths.

What constitutes each of the above activities is provided in Schedule 2 to the Act.

Section 12(3) of the Act defines "legal activity" as:

(a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and

(b) any other activity which consists of one or both of the following—

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;

(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

to the court) is now included as an objective as is the promotion of access to justice. Pursuing the theme of public interest, the Act also provides, in Section 8 for the establishment of a Consumer Panel consisting, as provided by Section 8(2), of "such consumers, or persons representing the interests of consumers, as the Board may appoint"[208]. The responsibility is devolved to Approved Regulators[209]. These provisions, objectives and principles are a clear development of the trend to extend the legal obligations of lawyers beyond simply obligations to their clients.[210]

In turn, the SRA[211], in its Code of Conduct sets out 10 Mandatory Principles[212]. Continuing the theme of the development in the contract between lawyers and the public at large, the 6th principle, (that solicitors should "behave in a way that maintains the trust the public places in [them] and in the provision of legal services") is interesting in its reference to "the public" in addition to the 4th principle to act in the best interest of clients.

In the Legal Services Board's Introduction and summary to the eight regulatory

---

[208] The "Board" is the Legal Services Board established under Section 2 of the Act with the duty under Section 3 of promoting the regulatory objectives (Legal Services Board, 2007) http://www.legalservicesboard.org.uk/ regulatory_objectives.pdf – accessed 27 January, 2014

[209] Law Society, Solicitors Regulatory Authority ("SRA"), Bar Council and its Bar Standards Board ("BSB")

[210] http://www.legalservicesboard.org.uk/ regulatory_objectives.pdf – accessed 27 January, 2014

[211] Solicitors Regulation Authority – See above, Section 1

[212] SRA Handbook - Code of Conduct - Introduction to the SRA Code of Conduct, (Solicitors Regulation Authority 2007) http://www.sra.org.uk/solicitors/handbook/code/part1/content.page.– accessed 2 February, 2014

Addressed to those which it regulates, under its 10 principles, the SRA requires that they must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow [their] independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to [their] clients;
6. behave in a way that maintains the trust the public places in [them] and in the provision of legal services;
7. comply with [their] legal and regulatory obligations and deal with [their] regulators and ombudsmen in an open, timely and co-operative manner;
8. run [their] business or carry out [their] role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run [their] business or carry out [their] role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

objectives[213], the section on RO1 Protecting and promoting the public interest[214] gives some guidance on what the Board sees as the public interest:

> "The public interest includes our collective stake as citizens in the rule of law and in society achieving the appropriate balance of rights and responsibilities. It is not static but will always be based upon deserved public confidence in the legal system. That is because the legal system is key to the resolution of disputes, the proper maintenance of legal relationships and process – the rule of law, and indeed to democracy itself. Without public confidence, these structures would be rendered redundant."

The document continues by describing the duty under RO1 as being "to protect and promote – to actively place the public interest higher than sectional interests of particular consumer or professional interests.[215] The section concludes:

> "We intend that, over time, public and consumer confidence in the legal sector will rise, whether as measured by looking at complaints handling, faith in lawyers, or trust in regulation. The Legal Services Consumer Panel[216] will be important in holding the regulatory framework to account for the consumer interest".[217]

The fact that these changes have an intended impact on the legal profession has been noted but they also affect the way in which the legal profession fits into the society of which it is part and which it exists to serve. Some changes will also have had an impact on the attention that media pays to the judicial process; but perhaps more importantly they will have had an impact on the business of lawyers and, with the reduction of availability and scope of legal aid and changes and developments in fee and cost structures, on the way that lawyers run their businesses.

Whilst the legal profession retains certain aspects of professionalism that distinguish it from other forms of commercial activity, it is nonetheless becoming more and more commercial in its operations. Paterson[218] who looks at criticisms of the legal profession in the light of the rise of commercialism, recognising the reality that

---

[213] Legal Services Board - Regulatory Objectives (2007) http://www.legalservicesboard.org.uk /news_publications/ publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014

[214] Legal Services Board - Regulatory Objectives - paragraph 4 – P3

[215] Legal Services Board - Regulatory Objectives paragraph 5 – P 3

[216] As provided for under Section 8(2) of the Legal Services Act, 2007 – see also above

[217] Legal Services Board - Regulatory Objectives (2007) http://www.legalservicesboard.org.uk /news_publications/ publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014 paragraph 9 – P 4

[218] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers (Cambridge University Press 2010) - ISBN 9781107012530

"lawyers in large city law firms are really little different from ordinary business persons" asks whether professionalism and the difference between lawyers and plumbers[219] "all boil[s] down to the greater self-conceit of the lawyers"[220]. He concludes that there is, however, a difference in that lawyers are:

> "…expected to adhere to the core professional values of independence, loyalty, confidentiality, upholding the rule of law and their duties to the court – plumbers are not".[221]

To those duties could be added reference to the wider duties and responsibilities now expected of the legal profession under constantly evolving codes of professional conduct both for solicitors[222] and the bar[223] and new duties under anti-terrorism and anti-money-laundering legislation[224].

The changes in funding inevitably change the risk profile of large cases. With CFAs and DBAs in particular, no longer is it the case that the lawyer is personally disinterested in the financial outcome. The financial outcome of cases has a very real impact on the lawyers and will create commercial business opportunities and dangers for them which may involve taking substantial risk in running cases, if not in actually funding them. One result of the changes may therefore be that, notwithstanding the characteristics of professionalism that continue to distinguish the lawyer from the plain commercial entrepreneur, the law firms that pursue claims in group litigation have, in part at least, changed their approach into more commercial entities with many of the same operational traits and fiscal motives as the corporate defendants that they may pursue.

---

[219] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers (Cambridge University Press 2010) - ISBN 9781107012530 – P11 After all he notes, "Both have a college training, both are required to pass tests both are highly paid, both invest in continuing professional development and both are needed to sort out society's dirty work" – the original comparison between the lawyer and the plumber was made by Professor William Twining – see below, Section 4 of Chapter 2 (Lawyers and Society)

[220] Alan Paterson – P 12

[221] Alan Paterson – P 13

[222] SRA Handbook – SRA Code of Conduct 2011 Version 12, 31 October 2014 http://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 11 November, 2014

[223] Bar Standards Board - Handbook - (Including in Part 2, 9th Edition of BSB Code of Conduct). <https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf> accessed 26 February 2015)

[224] The Money Laundering Regulations, 2007 – SI 2007 No, 2157 – Regulation 3 contains specific regulations (including reporting obligations) applying to independent legal professionals which affect even their obligations of confidentiality and questions of legal privilege.

SECTION 6 - ACTIVATION OF MEDIA BY THE LEGAL PROFESSION

The issue of pre-trial publicity and the involvement of the legal profession in media coverage has already been introduced in Section 1, as has the concept of litigation in general and group litigation in particular being of interest to the media. The fact that "multi-party actions attract a great deal of media attention" is the starting point for advice given by Day, Balan and McCool in their book Multi-Party Actions[225] as to how and why claimant lawyers can use the media in the course of conducting litigation.
Media coverage of group litigation has a tendency to be simplistic and sensationalist and provides the opportunity for the public to form conclusions in the absence of proven facts or established liability. That they have a propensity to form conclusions very quickly on limited facts is illustrated by the references to the Charlie Gard and Alfie Evans cases and the comments of Francis J in his final judgment in the Gard case[226]. This has also been commented on in a US context along with evidence that the public, on the basis of "no facts whatever are prepared to assume the guilt of a corporation simply because they have been accused"[227].

The combination of the attraction to media in all its forms, including newspapers, TV, radio and now social media, with the propensity of the public to form conclusions without the benefit of evidence and facts can be used by claimant lawyers alongside their prosecution of claims in group litigation to great effect, including in putting pressure on corporate defendants. This issue is discussed in more detail in Sections 5 and 6 of Chapter 2[228] and the fact that claimant lawyers indeed do activate and use the media in this way is discussed in depth in Chapters 4 and 5. Similarly, in Chapters 4 and 5 the impact of such activation on the reputations of corporate defendants is discussed as is the potential effect on their approach to group litigation regarding issues such as early settlement. There is a point at which claimant solicitors for example aiming to attract more claimants, might be tempted to suggest that success is already assured and a case is already proven with liability established and they may feel certain that it can be proved but lawyers have a duty to be more careful about what they say in these circumstances.

---

[225] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[226] See Section 1 footnote 2

[227] Richard S Levick and Larry Smith 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526 – Introduction Pxviii

[228] Media and the Judicial Process and Activation of the Media by the Legal Profession

SECTION 7 - ACCESS TO JUSTICE

A Fundamental Tenet - Access to justice is regarded as one of the fundamental tenets of our society with its origin in the common law and now being enshrined in the ECHR[229]. As will be discussed in more detail and established in Section 1 of Chapter 2[230], there is little doubt that a corporation as a legal person has the equivalent rights of a natural person under the ECHR and as such therefore has a right of access to justice; "Companies indisputably enjoy Convention protection …"[231] and Article 6 of the ECHR guarantees the right of a fair trial[232].

The concept of access to justice features significantly in the eight regulatory objectives published by the Legal Services Board. In its Introduction and Summary of its eight "Regulatory Objectives"[233] it specifies that the objectives are not set out in any hierarchy, saying "indeed any attempt to weight or rank them would be doomed to failure by the significant overlap and interplay between them."[234] The fact therefore that Improving Access to Justice appears as RO3 is not of consequence. That notwithstanding, the first paragraph of the section on RO3 begins "The access to justice duty is a strong one."[235]

Remaining comments in the RO3[236] section include a view that access to justice encompasses all channels of delivery (face-to-face, telephone or internet) and services such as those on the web that are not tailored specifically to individuals. Significantly from the perspective of this thesis, paragraph 20 emphasises that "Access to justice is relevant to all consumers – individuals, groups, companies and organisations – from the smallest to the largest" and that it is not to be restricted by "income, scale or importance to the client as it brings a sense of proportionality and fairness to all legal relationships, disputes and proceedings. Thus access to justice matters for small and large business alike, just as it does for the most vulnerable consumer."[237]

---

[229] Referred to in Section 1 above - http://www.echr.coe.int/Documents/Convention_ENG.pdf - accessed 7th October, 2014

[230] Access to Justice, ECHR and the Corporation

[231] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 - Pvii, Preface

[232] Article 6 ECHR - - http://www.echr.coe.int/Documents/Convention_ENG.pdf - accessed 7th October, 2014

[233] Legal Services Board - Regulatory Objectives (2007) http://www.legalservicesboard.org.uk /news_publications/ publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014

[234] Ibid – paragraph 3 - P2

[235] Ibid – paragraph 16 – P 5

[236] Ibid - paragraphs 19 to 25 – Pp 6-8

[237] Ibid – paragraph 20

The concept of the company as a legal person in its own right in English law has its origins in the House of Lords 1897 decision in Salomon v Salomon[238]. "A registered company obtains its own separate personality on incorporation by complying with the formal requirement of the Companies Act"[239]. This is extended by the rule in Foss v Harbottle[240] a decision as to who was the "proper plaintiff" establishing a general rule that the company itself was the proper plaintiff in proceedings concerning its rights[241]. Whilst seen as focussing on minority and shareholder standing as an issue, it is nevertheless one of the corner stones in the establishment of the rights of the company before the courts. This in turn leads to the status as "victim" before the courts. We have already looked at the rights of the company under the ECHR and it is clear that those who would have standing as a "victim" to bring proceedings in the ECHR are victims for the purposes of the Human Rights Act[242]; Section 2 of the HRA provides that "the Courts will have to have regard to the Strasbourg case law when deciding who is and who is not a "victim" [and] … the Strasbourg case law leaves no doubt that the corporate entity is capable of being a "victim".

The Potential for Unfairness and Prejudice to the Right of Access to Justice -

The attraction of Group Litigation to the media where the subject matter may be of wide public interest, (sometimes a topical issue or touching issues that attract moral, social or political comment), will bring a defendant corporation to prominence in the media in any case. Combined with activation of the media by or on behalf of claimants, this can create a major PR issue for the corporate defendant and opens up a second and more difficult front in the litigation for them. This second front is more difficult because it is a free medium which, aside from defamation, sub-judice and contempt of court rules, is not set in any framework of rules and procedures as to what can be said by whom or as to cross examination of witnesses or the right of the defendant to be heard in response to the allegations being made. Even the opportunity for response by the defendant corporation is limited. As was seen with the Al Sweady cases, the media can publish some very powerful material and themselves remain unchecked by any form of prior restraint or subsequent censure, and without the need on their part to prove or show proof for what they have said.

There are many reasons why claimant lawyers may wish to deliberately draw the attention of the media to a case aside from the deliberate creation of pressure on

---

[238] [1897] AC 22

[239] Alan Dignam and David Allen 'Company Law and the Human Rights Act 1998' (Butterworths 2000) ISBN 9781845927608 – P175

[240] (1843) 2 Hare 461

[241] Dignam and Allen 'Company Law and the Human Rights Act 1998' (Butterworths 2000) ISBN 9781845927608 – P176

[242] Human Rights Act, 1998

the defendant. It may make other potential claimants aware of the case, or attract and alert those who may have relevant factual evidence or who may be capable of providing expert testimony. It may therefore be in the interests of the claimants and their lawyers to create a highly visible media profile. In addition publicity may help with finding funding of one description or another and/or ATE insurance cover. Or it may be that publicity is desired by claimant lawyers in order to assist in developing their reputation for dealing with that type of case and as practitioners experienced in group litigation. However, none of those reasons requires the element of unproven allegations to be added to what appears in the media and certainly not those that are not even framed as allegations, such as those referred to in Section 1 of this Chapter; but the inclusion of unproven allegations will certainly enhance the exertion of pressure on the defendant. A comparison with the position under the American Bar Association ("ABA") rules for lawyers in the US provides an interesting rule set out later in this chapter. For the corporate defendant such publicity and media attention, whatever its motivation, will in some measure apply pressure to them. Such media pressure can be seen clearly to have had recent effect in the Iraqi prisoners' case in the UK[243], and in the accusations against the Duke of York, President Clinton and Alan Dershowitz in the USA[244]. In both these cases the lawyers concerned with putting the Complainants' cases have been accused of misconduct for the manner in which this has been carried out, including use of the media; as pointed out by retired district court judge Nancy Gertner,

> "This is a filing in which the naming of Professor Dershowitz, Prince Andrew, former President Clinton and others is entirely gratuitous. They are not sued as party defendants; the defendant is the United States. Putting these kinds of inflammatory allegations in a court filing all but guarantees that the allegations will be publicized, and with impunity."[245]

For many journalists, say Day et al "the David against Goliath fight is what brought them into their profession"[246], but for the defendant, publicity could be extremely damaging to its reputation. Irrespective of whether or not they can be said to deserve such damaging attention, it must be questioned whether such attention is

---

[243] Larisa Brown, Ian Drury (Daily Mail) and Tom McTague and Amanda Williams (Mail Online) 'Shame of the lawyers: £31million inquiry finds their claims of torture by UK troops were "lies" http://www.dailymail.co.uk/news/article-2877320/Allegations-murder-torture-against-British-soldiers-Iraqi-detainees-deliberate-lies-rules-war-crimes-inquiry.html - accessed 6 June, 2017

[244] BBC (unattributed) 'New legal bid in Andrew sex claim case' (BBC 7th January, 2015) http://www.bbc.co.uk/news/uk-30692699 - accessed 19 January, 2015

[245] See e.g. Nancy Gertner, 'In Search of Balance In Dershowitz v. Cassell (Above The Law, 9 January, 2105) http://abovethelaw.com/2015/01/in-search-of-balance-in-dershowitz-v-cassell/ - accessed 7 June, 2017

[246] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651 – P89

appropriate at a stage when no allegation has been proved and perhaps even before any evidence in support of the allegations has been collated and put to the defendant. The adverse effect, actual or potential, of media attention could act on an individual or a corporate defendant and may be an influence on the way that defendant approaches the litigation. The media may in any case focus on a particular case and the issues it raises but for a claimant lawyer to activate such attention as a strategic element in its case raises different issues. Day et al are quite clear: "The media can play a part in encouraging the defendants to come to a decision ... that it is better to have an early settlement than have continued adverse publicity."[247]

In the normal course, English court proceedings are conducted in public from the moment of the serving of a claim at the outset and the media may therefore focus attention on a case long before it reaches a court for decision on the merits. Further, in order to serve the purposes of the claimant lawyers suggested above, the attention of the media will need to be harnessed as early as possible and maybe even before the actual serving of a claim. That means that media comment and information about the case would be public long before any evidence was presented and tested in the course of a regulated court procedure.

The presentation of evidence in a formal court procedure necessarily involves all the protections given by the court environment as to how evidence is given, by whom and when. This grants the party against which it is given the opportunity to test it in the same controlled environment and to counter with evidence of its own. None of those protections are present in a media context and information in the media may or may not be accurate, balanced or clear, there being no obligation on the media to publish any or all of such information as may be provided in rebuttal of allegations by a defendant corporation. If the information and comment in the media is indeed only or mainly "on the side of the claimants" it could be very damaging indeed to the reputation of the corporate defendant and it could remain in the media focus for a sustained period and if online, potentially indefinitely.

An adverse effect on a corporation will result in adverse effects on all those connected with it, be they shareholders, investors, insurers (institutional or private), lenders, business counterparties, employees, agents, contractors, in fact a whole range of different stakeholders in the corporation and its business. Damage to a public company's reputation could also have a negative impact on its share price, which could have a serious knock-on effect on investors, public, private or institutional. For example, shares in a top FTSE 50 company may be held by institutional investors who safeguard and develop the pension security for a large proportion of the population. Bad news about (say) British Petroleum is not simply an attack on a corporate entity (rightly or wrongly, justified or not), it will also have immediate effects on others whose future is guaranteed by the investment system.

Concurrently, and equally applicable to privately held companies which do not have the same sensitivity regarding shareholders and share prices, it could affect the corporation's banks whose credit committees and shareholders will develop their own views based on what they see in the press as to whether or not the bank should

[247] Ibid - P92

be doing business with a company which has become a defendant and therefore the focus of media attention and hostility in group litigation. The corporation's lines of credit and thereby its business future could therefore be under threat. Similar concerns may apply to the minds of insurers, suppliers and commercial counterparties.

In addition, such adverse media attention could affect the corporation's employees who may face daily challenges from family and friends over the issues at stake; this could have a negative impact on staff morale and could also impact the corporation's ability to recruit and retain staff. Ultimately it could lead to boycotts and a general decrease in sales and levels of business. Public authorities who find themselves as defendants may also suffer reputational damage in the same way, perhaps causing huge political fallout. There have been many GLOs where public authorities have been the defendant, for example The Iraqi Civilian Employees GLO against the Ministry of Defence, the Manchester Children's Homes Group Litigation against the local authority running the homes in question[248] and many cases against the NHS.

The reputational damage could be such that the corporate defendant might seek to do anything in its power to limit the reputational damage rather than focussing on the merits of the case and concentrating on its defence. Even with a strong case on either or both of liability or causation, to run a full blown trial in the face of a fierce media campaign could be so damaging as to negate even a successful outcome. It is therefore possible that media attention could have the effect of forcing the corporate defendant to enter into a settlement that it would not otherwise have contemplated or on terms or at a time that it would not otherwise have contemplated.

As an impact of media coverage this might be disturbing, but where the media attention is actively encouraged by, or orchestrated by, a claimant lawyer with intent to force an early settlement, this could amount to a form of "settlement blackmail"[249] involving at least a measure of unfairness and possibly an effective denial of access to justice for the corporate defendant. This would raise multiple further issues, both professional and social. Much of the attention and effort associated with issues of access to justice is to afford the weaker litigant access to the legal process and the ability to pursue a claim. However, once the weaker litigant is a claimant in a multi-party group litigation along with substantial numbers of other such weaker claimants, and all with the media taking their part against a corporate defendant, the dynamic is changed and one has to appraise again the balance between the parties.

---

[248] Group litigation orders - Register. (2014). Retrieved from http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders – last accessed 19 March, 2019

[249] The expression "Settlement Blackmail" is taken from the article by Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28. It is often associated with the costs of fighting claims such that the pressing of a claim may result in a defendant being prepared to settle because the costs and risks associated with fighting the case outweigh the costs of settlement.

SECTION 8 – RESTRICTIONS AND CONTROLS ON MEDIA ACTIVITY

Restrictions on media activity related to litigation - In looking at the issue of reputational damage caused by media attention in litigation the controls, limitations and restrictions that exist in regard to the media and in regard to the way in which the legal profession relates to it should be introduced. Those restrictions are found in the concepts of contempt of court, sub-judice and defamation as well as in the professional ethics and rules for solicitors and the bar and for journalists.

1. **Contempt of Court** - The concept of contempt of court was established at common law as "an act or omission calculated to interfere with the administration of justice"[250]. The Contempt of Court Act 1981[251] makes it an offence of strict liability if, under S2(2), a publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". However, there will be no offence "in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith"[252]. Section 2(2) creates a twin burden on the prosecution of proving both 'substantial risk' and 'serious prejudice' which Sue Stapely observes, in combination with S4(1) gives "a considerable latitude to the news media in reporting the background to a sensational case"[253]. She also holds the view that the "seriousness of the risk and the degree of prejudice will hinge … on the nature of the tribunal which is to try the issue" in question, with jurors "assumed to be the most susceptible to media influence". However, she says, in cases where trial is by a judge alone, which the vast majority of civil cases would be, "Publicity would need to be trenchant and intemperate before contempt proceedings would be likely to succeed." This seems to be a rational view and clearly it would mean that the pressure on a corporate defendant is granted a further opportunity for growth. An additional defence is provided by s 5 of the Act which provides that a "publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion."[254] This therefore requires proof of bad faith as well as any risk of prejudice being more than incidental. Thus as Stapely points out:

> "No contempt is committed by contemporaneous publishing in good faith

---

[250] Contempt of Court and Reporting Restrictions: Legal Guidance: (The Crown Prosecution Service 2014) http://www.cps.gov.uk/legal/a_to_c/contempt_of_court/ - accessed 2 October, 2015

[251] Contempt of Court Act, 1981

[252] Contempt of Court Act, 1981 S4(1)

[253] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X - P 34

[254] Contempt of Court Act, 1981

> of a fair and accurate report of court proceedings, however prejudicial that report may be to a party involved in the case."[255]

Coffey makes a similar observation from the US perspective and points to the deliberate use of this by attorneys:

> "Courthouse files largely immunize their contents from the laws of defamation, so reporters rely overwhelmingly upon court papers and hearings. As a result, press-savvy lawyers craft court papers that not only nourish procedural requirements but also feed the press."[256]

2. **Sub-judice** – literally meaning "under the law"; this is often cited as a reason for not disclosing information or not commenting on allegations. It does not have the same test for strict liability under the Contempt of Court Act, 1981.[257] However, its application does correspond to the period referred to in s 2(3) of the Act[258] when proceedings are "active" during which strict liability applies. In civil cases proceedings become active when the case is set down for trial, or if there are interlocutory applications prior to trial, when a hearing date is set and in both cases will remain active until the proceedings (full trial or interlocutory) are concluded.[259] Activity in and of itself is a condition for contempt of court with regard to media publications but it is not a prohibition on publication; "Stories can be written, even about active cases, as long as they do not then pose a substantial risk of serious prejudice"[260] which brings back the dual test that the prosecution must pass.

3. **Defamation** - Defamation is a creature of common law, originally a creation of the ecclesiastical courts, then as a criminal offence with the Star Chamber permitting civil action for defamation when it banned duelling[261]. Fox's Libel Act in 1792 confirmed the right of juries to decide whether words complained of were actually defamatory[262] but this was removed by the Defamation Act,

---

[255] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X – P 41

[256] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100 – P299

[257] Mark Hanna and Mike Dodd 'McNae's Essential Law for Journalists' (21st edn OUP 2012) ISBN 9780199608690 – P441

[258] Contempt of Court Act, 1981 S2(3)

[259] Contempt of Court Act, 1981 Sch. 1, paras 12 and 13

[260] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 - P426

[261] Robertson and Nicol – P95

[262] Libel Act 1792 S1

2013[263]. A defamatory meaning is accepted as one that will have the effect of "lowering the claimant in the eyes of right-thinking people generally"; "injuring the claimant's reputation by exposing him to hatred, contempt or ridicule" and "tending to make the claimant be shunned and avoided"[264]. There is a defence of truth[265] with the burden on the defendant in defamation proceedings to prove truth, but a statement will not be defamatory just because it is untrue; it must also lower the victim in the eyes of right thinking people[266].

There are also defences of "public interest" and "honest opinion" (previously "fair comment"). The public interest defence originates from the Reynolds case[267] which provided a defence for matters deemed to be in the public interest if the "research [was] careful, the treatment fair, and the defamatory statements of fact honestly believed to be true"[268]. This placed a burden on the defendant publisher as to acting fairly and reasonably and in reliance on authoritative sources, but that was changed after the Jameel[269] case which moved "closer to a 'fault' standard applicable in other torts"[270] such that "if the information is of public importance, then the fact that it contains relevant but defamatory allegations against prominent people, will not permit them to recover libel damages"[271].

Regarding the defence of "honest opinion", referred to above, reference is made to that defence providing an opportunity for a media campaign to be maintained as long as there are ongoing proceedings in court; the media is able to report on the proceedings, with either the publication itself or whoever is activating the media, picking whichever aspect is most beneficial for its campaign and by definition therefore damaging to the corporate defendant; this thereby creates repeated opportunities to repeat as yet unproven

---

[263] Defamation Act, 2013

[264] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P105

[265] Previously "justification" until the Defamation Act, 2013 S2(1)

[266] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P105

[267] Reynolds v Times Newspapers – [2001] 2 A.C. 127

[268] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P98

[269] Jameel & Another v Wall Street Journal Europe (No. 2) [2007] 1 AC 359

[270] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P100

[271] Ibid - P98

allegations. Adam Tudor in an article in The Times[272], associated with the "Plebgate" trial"[273] discusses the defence of "honest opinion" and other changes brought about by the Defamation Act 2013[274]. The effect on companies following the 2013 Defamation Act is now exacerbated by the need for defamation claimants to show "serious harm" where previously damage was assumed if the libel was demonstrated. "Serious harm" for companies under section 1(2) of the Act requires them to show damage likely to cause "serious financial loss[275]. He goes on to discuss publications on Twitter, Facebook and other social media sites which he says "provide an all-too–easy forum for publishing serious libels". He refers to the fact that "law enforcement agencies and courts are … increasingly willing to use powers under the Protection from Harassment Act 1997[276], the Malicious Communications Act 1988[277] and the Communications Act 2003[278]", however, the extent to which corporations, as distinct from individuals, will benefit from such willingness is yet to be seen and is by no means assured.

Even though the option of a defamation suit has been somewhat curtailed for companies, it is worth noting in the context of group litigation and media campaigns that the following cannot bring an action in defamation:[279] local authorities[280] (the House of Lords warning of the "chilling effect" of defamation if public bodies could sue their critics, it being of "the highest public importance" that "any governmental body should be open to public

---

[272] Adam Tudor 'Plebgate — how new libel laws have changed the defamation landscape' (The Times 26 November, 2014) accessed 4 December, 2014

[273] Andrew Mitchell MP, after a string of victories in which he demonstrated that there was a police conspiracy against him, five officers had resigned and one had gone to prison and the Metropolitan Police Commissioner had apologised to him in person (McSmith, 2015), nevertheless lost his libel action against the Sun newspaper when the judge found that "on the balance of probabilities…..[Mitchell] did speak the words attributed to him, or so close to them as to amount to the same, the politically toxic word 'pleb' " Karen McVeigh 'Andrew Mitchell loses Plebgate libel trial' (The Guardian 27 November, 2014) http://www.theguardian.com/politics/2014/nov/27/pleb-andrew-mitchell-loses-libel-case - accessed 22 December, 2015

[274] Defamation Act, 2013

[275] Section 1(2) Defamation Act 2013 "For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

[276] Protection from Harassment Act, 1997

[277] Malicious Communications Act, 1998

[278] Communications Act, 2003

[279] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – Pp 116 and 117

[280] Derbyshire County Council v Times Newspapers [1993] A.C. 534

criticism"[281]); state corporations[282] (being "subject to ministerial control" and therefore a "governmental" body[283]); political parties[284] (because "even if they exercise no "governmental" power the "free market place of ideas" in a democracy requires all parties … to be subject to uninhibited public criticism[285]); and trade unions[286] and most unincorporated associations ("most criticisms … will reflect upon individual officers, who will usually be financially supported by their union in efforts to vindicate their own reputations"[287]).

Regulation for lawyers - With the move to the more "outcome" focus of regulation, the current code of conduct of the SRA[288] has no specific regulation on communications with the media in relation to litigation. Clearly issues such as client confidentiality and legal professional privilege are relevant but they are obligations owed to the client so if the client agrees, they can be waived. Up to the 2007 version of the Solicitors' Code of Conduct, Guidance Rule 11 dealt with "Statements to the Media" requiring solicitors to exercise [their] professional judgement as to whether it was appropriate to make a statement to the media about [their] client's case" and if making a statement "to consider (a) whether it is in the client's best interests to do so; (b) whether the client has consented to this course of action; and (c) the legal position and, for example whether anything [they] say might be in contempt of court." Guidance Note 21 specifically warned that a solicitor could be in contempt of court if making a statement to the press "which is calculated to interfere with the fair trial of a case which has not been concluded".[289] No such admonitions now exist for solicitors[290]; a search of the Law Society web site similarly revealed no

---

[281] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 - P116

[282] British Coal Corp v National Union of Mineworkers, unreported, 28 June, 1996

[283] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P116

[284] Goldsmith v Bhoyrul [1997] 4 All E.R. 268

[285] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P117

[286] EETPU v Times Newspapers [1980] Q.B. 585

[287] Geoffrey Robertson and Andrew Nicol 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210 – P117

[288] SRA Handbook – SRA Code of Conduct 2011 Version 19, 1 October, 2017 https://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 14 January, 2018

[289] SRA Handbook - Code of Conduct 2007 - Rule 11 - Litigation and Advocacy - Guidance Notes 11 and 21. (2007). Retrieved from http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule11.page - accessed 25 February, 2015

[290] As is confirmed by the SRA charge in the Al Sweady case being under Rule 1.02 (You must act with integrity) rather than any specific rule on communication with the media.

practice note on the subject[291]. The solicitor's contact with the media is therefore a matter for the standards of behaviour expected of a member of the profession and that will be up to the individual to consider in each case in the light of generality of the current Code of Conduct. Similarly, the provisions of the old Code of Conduct for the Bar[292] have been replaced by more general guidelines. The prohibition on media comment was removed prior to the introduction of the new Handbook[293] in April 2013 and the guidance given then is still current. The old Rules 709.1 and 709.2 which had contained the original prohibition, were retained until the new Handbook's publication not specifically on media relationships but on publicity generally; they admonished barristers not to name clients without consent or to engage in publicity that may "be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute". The 2013 guidance builds on the section in the Bar Standards Board ("BSB") Handbook[294] and confirms the BSB's belief that barristers should be free to comment but reminds of the obligations regarding ethical obligations, in particular (a) acting in the client's best interests (b) not permitting counsel's independence to be compromised (c) not behaving in a way that may diminish the trust and confidence placed by the public [note, not the client] in the profession, and (d) preserving client confidentiality[295]. It also refers to the issues of contempt of court, defamation and malicious falsehood of which barristers should be aware when considering comment to the media. The Bar Council further elaborates in the more detailed document on the ethical concerns and matters relevant to the giving of personal opinion to the media[296]. This guidance reminds counsel that they have no duty to express personal opinions, lists some important "suggested considerations" and notes some "practical aspects" on the relevant issues. The guidance on expressing personal opinion and on media comment remain current alongside the

[291] https://www.lawsociety.org.uk/search/?q=practice+notes&ctype=practice+note&p=20 – accessed 14 January, 2018

[292] Bar Standards Board - Code of Conduct - 8th Edition (2004) <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/> - accessed 3 November 2015

[293] Bar Standards Board - Handbook - (Including 9th Edition of Code of Conduct). <https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf> accessed 26 February 2015

[294] Media Comment - Guidance – 'Expressing Personal Opinion to/in the Media' (Ethics Committee - Bar Council October, 2014) http://www.barcouncil.org.uk/media/313498/media_comment.pdf - gC22 in Section C2 Ethics - accessed 14 January, 2018

[295] Bar Standards Board – Guidance on Media Comment https://www.barstandardsboard.org.uk /code-guidance/media-comment-guidance-april-2013> accessed 14 January, 2018

[296]Media Comment - Guidance – 'Expressing Personal Opinion to/in the Media' (Ethics Committee - Bar Council October, 2014) http://www.barcouncil.org.uk/media/313498/media_comment.pdf - - accessed 14 January, 2018

latest version of the BSB Handbook, last revised in November, 2017.[297]

By contrast with the position of English solicitors and barristers, the American Bar Association ("ABA") in its Model Rules of Professional Conduct[298], Rule 3.6, provides very specific rules as to what a "lawyer who is participating or who has participated in the investigation or litigation of a matter" can and cannot say. Rule 3.6(a) states that such a lawyer:

> "…shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

Rule 3.6 (b) then provides that notwithstanding paragraph (a) such a lawyer may state among other things, the claim and identity of the person involved (unless prohibited by law), information in public records, that an investigation of a matter is in progress and may make a request for assistance in obtaining evidence and information. However, a recent article[299] reports that the ABA Ethics Committee has warned attorneys not to "make public comment on clients in social or print media, including blogs and Twitter, without client authorisation even when the information is already in the public domain". The article states that, in addition to Rule 3.6, the Ethics Committee referred to Rule 1.6 on client confidentiality and Rule 3.5 on impartiality/decorum of tribunal.

It does seem that as far as the legal position in England is concerned there is "considerable latitude to the news media in reporting the background to a sensational case"[300] despite the presence of a range of restrictions which can have an impact on the behaviour of the media. The recent example of the case concerning Sir Cliff Richard, while focussed on privacy, is a stark example where, even in a case where a remedy was eventually available, no restriction prevented either the publication or the particularly aggressive and no doubt extraordinarily distressing way in which it was done[301].

---

[297] BSB Handbook, Third Edition, updated November, 2017 https://www.barstandardsboard.org.uk/media/1901336/bsb_handbook_version_3.1_november_2017.pdf – accessed 14 January, 2018

[298] American Bar Association – Model Rules of Professional Conduct – August 2005 - https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html - accessed 26 June, 2017

[299] The Global Legal Post (unattributed) 'ABA Ethics Committee warns lawyers about commenting publicly on clients' (The Global Legal Post 6 April, 2018) http://www.globallegalpost.com/big-stories/aba-ethics-committee-warns-lawyers-about-commenting-publicly-on-clients-4305962/?utm_campaign=D1_06_04_18&utm_medium=email&utm_source=newsletter_d1 – accessed 8 April, 2018

[300] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X – P54

[301] Sir Cliff Richard sued the BBC over its live TV coverage of a police raid on his home following allegations made to the police regarding sexual assault; there was no arrest or charge as a result of

Media Ethics - In terms of media ethics, both the National Union of Journalists ("NUJ") and the Society of Professional Journalists ("SPJ") publish codes. Neither of them specifically refers to reporting of litigation or civil court proceedings. The SPJ Code of Ethics[302] does contain as one of the admonitions under the heading "Minimize Harm" to:

> "Balance a suspect's right to a fair trial with the public's right to know. Consider the implications of identifying criminal suspects before they face legal charges".

Admonitions under the heading "Seek Truth and Report it" include:

> "Provide context. Take special care not to misrepresent or oversimplify in promoting, previewing of summarizing a story"; and
>
> "Diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing."

The elements of "oversimplification" and allowing "subjects … to respond" will become relevant later in view of comments that stories often are over simplified and corporate defendants in collective actions are very often given only a very short time to respond to stories that have in some cases taken days or even weeks to prepare.

The NUJ Code of Conduct[303] contains an admonition that a journalist "Strives to ensure that information disseminated is honestly conveyed, accurate and fair." This concept too will be the subject of comment later with regard to the accuracy and fairness of reports involving corporate defendants in collective actions and it may be that the concept of fairness is "honoured in the breach" rather than assiduously followed[304].

---

the allegations - PressGazette (unattributed) 26 July, 2018 https://www.pressgazette.co.uk/bbc-lawyers-will-ask-permission-to-appeal-sir-cliff-richard-privacy-ruling-in-high-court-over-police-raid-footage/ - accessed 28 July, 2018

[302] Society of Professional Journalists – SPJ Code of Ethics – September, 2014 - http://www.spj.org/ethicscode.asp - accessed 25 July, 2017

[303] National Union of Journalists – NUJ Code of Conduct 2011 – https://www.nuj.org.uk/about/nuj-code/ - accessed 25 July, 2017

[304] Bacquet referred to this issue in her thesis (P106), citing the foreword to 'Eye On the Media' by David Bar-Illan (a former Jerusalem Post editor and later Communications Director under Prime Minister Binyamin Netanyahu) as warning that: "Journalists have, of course a perfect right to their own view, regardless of how ludicrous and fiction-based it is. ... But they do not have a right to serve this cause by distorting and hiding facts. In short, they do not have to be personally objective - no-one is; but it is their professional duty to be fair." She went on to say that: "It is this lack of fairness in reporting, both at home and abroad, that antagonises both parties in the conflict, exacerbates hatred and contributes to creating a culture of war."

Social Media - Turning to social media, both Twitter and Facebook have rules and policies governing their use, however, neither has specific or direct reference to comment or reporting on court proceedings. It should also be noted that unlike other media, Twitter and Facebook themselves are not the publishers; the contributors and commentators are themselves the publishers and therefore have any liability that accrues to them as such[305]. Twitter publishes the Twitter Rules[306] which are lengthy and detailed but which concentrate more on freedom of expression rather than protection of reputation. The rules include provisions on "Defending and respecting the rights of people using our service", a "Hateful conduct policy" but under the "Parody, newsfeed, commentary, and fan account policy" the specific statement is made:

> "Our users are solely responsible for the content they publish and are often in the best position to resolve disputes amongst themselves. Because of these principles, we do not actively monitor users' content, and we do not edit or remove user content except in response to a Terms of Service violation or valid legal process."[307]

Facebook publishes both a "Statement of Rights and Responsibilities" ("Terms you agree to when you use Facebook")[308] and "Community Standards" ("What isn't allowed and how to report abuse")[309]. In the former under "2. Sharing your Content and Information" in point 4 it makes clear that the user is the publisher ("When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of [sic] Facebook, to

---

[305] At least, that is the case as of now. On 17th January, 2018, Twitter, Face Book and Google (You Tube) were required to attend "to give testimony to the Senate Committee on Commerce, Science and Transportation for extremist content. … the three companies are required to give evidence on the steps they are taking to combat the spread of extremist propaganda over the internet … in a hearing titled 'Terrorism and Social Media: Is Big Tech Doing Enough?' " Alex Hearn 'Facebook, Google and Twitter to testify in Congress over extremist content' (The Guardian 10 January, 2018) https:// www.theguardian.com/technology/2018/jan/10/facebook-google-twitter-testify-congress-extremist-content-russian-election-interference-information (accessed 17 January, 2018) – It must at least be a possibility that such hearings and related enquiries may at some point result in recognition of the three as publishers with publisher responsibilities but that stage has not been reached as yet.

[306] The Twitter Rules - https://support.twitter.com/articles/18311 - accessed 3 December, 2017

[307] The Twitter Rules - "Parody, newsfeed, commentary, and fan account policy" https://support.twitter.com/articles/106373 - accessed 3 December, 2017

[308] Facebook – Statement of Rights and Responsibilities - https://en-gb.facebook.com/legal/terms - accessed 3 December, 2017

[309] Facebook – Community Standards - https://en-gb.facebook.com/policies - accessed 3 December, 2017

access and use that information, and to associate it with you") although it says nothing about the associated responsibilities or liabilities; in the latter under the Bullying and Harassment section is stated "We allow you to speak freely on matters and people of public interest, but remove content that appears to purposefully target private individuals with the intention of degrading or shaming them" so, again concentrating on the rights of expression but here with reasonable limitations regarding private individuals.

Perhaps not surprisingly, there is no mention in either set of rules of balance or right of reply and no protections at all that may be specifically applicable to corporations.

SECTION 9 - OVERVIEW

Following this introductory Chapter, Chapter 2 will comprise a review of literature, in six sections. The first section will deal with access to justice, the second access to justice and collective actions, the third the impact of developments regarding legal costs on access to justice, the fourth the changing face of civil justice during the period in which group litigation has been significantly developing, the fifth, in as much as it is available, literature relevant to the interaction of media and the judicial process and the sixth the activation of media by the legal profession.

Chapter 3 will explain the Methodology for the research, conducted on the basis of qualitative research by semi-structured interview of subjects who were mainly practising lawyers (including solicitors, barristers and in-house lawyers involved in both the claimant and defence side of group litigation). In addition to the lawyers, the respondents included PR professionals, journalists and a judge.

In Chapter 4 there will be a discussion of the results from the research and the material derived and in Chapter 5, will be the final presentation of a conclusion to the research to the extent that conclusions can be drawn from it.

CHAPTER 2

LITERATURE REVIEW

This literature review sets the scene for the research undertaken as set out in Chapter 3, and the observations and conclusions of Chapters 4 and 5. There is a paucity of literature looking at the specific issue of the impact of activated media on corporate defendants. Most of the literature correctly identifies the position of the "have nots" and how the "haves" tend to come out ahead in litigation. There is also background literature relevant to activated media and its effects. The practice of activation of media by claimant lawyers is looked at against the current environment in which such cases are conducted. This includes the economic drivers and incentives for the lawyers involved and these arise in part from issues such as the current litigation costs regime and how it has developed in recent times. Also included are issues relating to the current regulatory regime and its recent changes as well as changes and developments relating to professional practice of the law. All of these changes also present a very different view of lawyers and society compared with the position in the 1980s and '90s. The literature review also addresses access to justice, including aspects relating to multi-party litigation and corporations. With this background views and comments in the literature on aspects of the use of media by lawyers in litigation can be considered.

Section 1 begins with aspects of access to justice; Section 2, looks at access to justice and collective actions and Section 3, the impact of developments relating to costs on access to justice. Section 4 will look at the changing face of civil justice from the 1990's, developing some of the themes from Chapter 1 including further aspects of access to justice and the changes and developments which have occurred regarding the practice of law and litigation. Section 5 will look at literature relevant to the interaction of media and litigation and Section 6 will look at activation of the media including media campaigning in regard to group litigation.

SECTION 1 - ACCESS TO JUSTICE

Access to Justice – General Concept – To look at the impact on access to justice for a corporation it is first necessary to look at some of the literature on the concept in general. Access to justice has been described as a "somewhat nebulous concept"[1] upon which Alan Paterson has observed that "[h]undreds of books,

[1] "In general the phrase 'Access to Justice' has a well-accepted, rather vague meaning and denotes something which is clearly, like the rule of law, a good thing and impossible to argue you are against. The strength and weakness of the phrase is in its nebulousness." Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – referring to Roger Smith, "Justice", ILAG Newsletter, March/April 2010

articles and reports"[2] have been written. As observed in Section 1 of Chapter1, the subject is generally approached on the basis of access to legal services and legal remedies for individual claimants whose access is limited by lack of funds, or by a cultural, social or other disadvantage and on the way in which the judicial process and system works in regard to such parties. This was the position taken by Lord Woolf in his Report[3], including his description of the civil justice system as "too expensive, too slow and too complex"[4]. Sainsbury and Genn in Essays on Access to Justice[5] took up this theme observing that the "unacceptable consequence" of that is that ordinary citizens are "effectively denied access to justice". Dehn, again in Essays on Access to Justice describing access to justice similarly refers to one aspect being "the access of an individual claimant or respondent"[6]. Both these essays concentrate on individual people as claimants (as distinct from corporations) and they deal with the issue of concern as to access to justice of claimants who may be effectively barred from entry and thereby from participation in the judicial process. In that respect they are typical of many other such articles[7].

As already stated, the intention of this thesis is to concentrate on corporations rather than individuals and how the corporations' access to justice may be affected as a result of decisions which may be forced on their management in order to protect the corporation from damage to reputation and image resulting from activated media. This is therefore not an issue of access to justice in the sense more generally written about.

However, it is appropriate to look at access to justice as a general concept before discussing specifically its applicability to and availability for corporations.

A Vital Concept – The significance of access to justice is referred to very clearly in the literature. As noted in the Introduction, Alan Paterson states unequivocally, "Access to Justice is vital to a functioning democracy and the rule of law"[8]. Whilst the phrase 'Access to Justice' he says can be traced back to the nineteenth century, as a concept it is a comparative newcomer to the political firmament,

---

[2] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P 60

[3] The Woolf Report

[4] Ibid - P4

[5] Roy Sainsbury and Hazel Genn, 'Access to Justice: Lessons from Tribunals' (1995) - "Essays on Access to Justice" ' in Zuckerman A. and Cranston R. (eds) 'Reform of Civil Procedure' Oxford University Press, Oxford, Pp. 413-30. OUP. http://php.york.ac.uk/inst/spru/pubs/758/ - accessed 3 February 2014 - P416

[7] In Section 1 of Chapter 1 reference was made to Appendix 3 which lists as examples the first 20 articles found by searching Westlaw with the key words 'access to justice' on a particular date.

[8] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P 120

coming into frequent usage only in the 1970's[9]. He notes also many strands in the debate including the enhancement of state-sanctioned dispute resolution processes and issues like the availability of legal aid and the challenge of providing adequate legal services to those who cannot afford them in a way that is affordable to the taxpayer and the providers"[10]. He also notes newer aspects in the debate including the question as to whether geography has anything to do with access to justice whether there may be a role for public education and whether simplification of the law could solve significant access to justice problems?[11]

The relevance of costs to the access to justice issue was exemplified in the Jackson Report in that Jackson had specifically been asked by the Master of the Rolls to carry out his review of the rules and principles governing the costs of civil litigation with a view to making recommendations "in order to promote access to justice at proportionate cost."[12]

Lord Neuberger[13] asserted that access to justice is vital for the protection and preservation of the rule of law.[14] The provision by the state of effective mechanisms for citizens to access the courts was necessary so that citizens can be equal before the law and thus make their legal rights "a true reality"[15].

---

[9] Ibid – P 60 … and since the 70's he says "… there has been no holding it" In addition to the "books, articles and reports" he referred to, he notes "a swathe of initiatives from lawyer associations, politicians, governments, charities and NGO's around the world". As noted in the Introduction, he also referred to Roger Smith, noting in 2010 "In general the phrase 'Access to Justice' has a well-accepted, rather vague meaning and denotes something which is clearly, like the rule of law, a good thing and impossible to argue you are against. The strength and weakness of the phrase is in its nebulousness." - referring to Roger Smith, "Justice", ILAG Newsletter, March/April 2010

[10] Ibid - P61

[11] Ibid – P 61 - referring to T Wright et al., The Common Law of Contracts: Are Broad Principles Better than Detailed Rules? An empirical Investigation, Texas Wesleyan Law Review, 11 (2005), 399-420

[12] Adrian Zuckerman 'Lord Justice Jackson's review of civil Litigation Costs - Preliminary Report' (2009) Civil Justice Quarterly 28(4) – P435

[13] As President of the Supreme Court delivering the first Harbour Litigation Funding Annual Lecture 'From Barretry, Maintenance and Champerty to Litigation Funding' - Harbour Litigation Funding, First Annual Lecture, Gray's Inn - (8 May 2013) https://issuu.com/harbourlf/docs/harbour_first_lecture/11 - accessed 15 August, 2013 - Paragraph 9, P 4

[14] He referred to Adam Smith regarding the provision of "accessible" courts being the means of upholding the rule of law "… the State has to provide fair and clear laws equally applicable to all, a legal system readily available to all, and an effective and efficient court structure readily accessible to all. It must in other words, secure the rule of law." Adam Smith – Inquiry into the Nature and Causes of the Wealth of Nations (1776) – ISBN 0-85229-163-9

[15] Lord Neuberger 'From Barretry, Maintenance and Champerty to Litigation Funding' - Harbour Litigation Funding, First Annual Lecture, Gray's Inn - (8 May 2013)

"Access to justice" he declared "is of the essence in a civilised society"[16] and without it, there is potential ultimately for society to fail. He later enlarged on the theme [17] saying that access to justice should be regarded as a practical rather than a hypothetical requirement and warning that if democratic societies such as the UK continue to under resource legal services they face the risk that if the rule of law is first taken for granted, it is next ignored, "and is then lost, and only then does everyone realise how absolutely fundamental it was to society." This is of great relevance now and the impact of the reduction in availability and scope of civil legal aid is discussed later in Section 3.

Access to Justice and the Interests of Claimant and Defendant - The balance of power between claimants and defendants is very much an issue for this thesis because of the impression generally and in the literature that where corporate defendants are concerned, the balance, because of their economic power, is very much in their favour; however, it will be argued that in terms of media attention and reputational issues, the situation may well be the other way round. In addition it has been argued in the literature (see Section 2 below) that multi-party litigation itself has the effect of changing the balance of power between claimant and defendant. Claire McIvor, while examining the effects of the Jackson reforms[18] on access to justice in personal injury cases, looked at the issue of access to justice in terms of what it meant for both claimants and defendants.

She asserts that legal representation is synonymous with access to justice itself because average claimants are one-time litigants "lacking the necessary skills and confidence required to argue a case."[19] Her comments are clearly addressed to the situation of the individual claimant but corporate defendants too can be one time litigants and some of them may also face in litigation the risks and challenges of lack of skill and confidence. She continues by observing that the average claimant will expect to access the machinery of justice "without the risk of incurring significant expense"[20] because of a "generally held view that the justice system is a public service, available to all citizens"[21], a view she says especially held where the claimant is a tax payer. However, corporations are tax payers too and it would perhaps be surprising if they had the same expectation.

---

https://issuu.com/harbourlf/docs/harbour_first_lecture/11 - accessed 15 August, 2013 - Paragraph 47, P20

[16] Lord Neuberger - Paragraph 55 – P 23

[17] Lord Neuberger 'Welcome Address to Australian Bar Association Biennial Conference' 3 July, 2017 https://www.supremecourt.uk/docs/speech-170703.pdf - accessed 6 July, 2017

[18] The Jackson Report

[19] Ibid – P415

[20] Ibid – P415

[21] Ibid – P415

Whilst McIvor acknowledges that the defendant will be most concerned to have the opportunity to "respond to the allegations of wrongdoing put forward by the claimant"[22] she does so by reference to the "procedural aspects of the process", in other words a stage in the court process under court control. However, the defendant will be at least as concerned, if not more so, about sensational but often vague and undetailed allegations as they may appear in the media long before any such opportunity for response is afforded by a court process. To such allegations there may very well not be any real opportunity for a defendant to respond and that afforded by the court could well be far too late, at a stage when serious or perhaps irreparable reputational damage has already been done.

She further alleges that the defendant will be less concerned with having access to an official legal forum and legal advice and assistance because usually the defendant will be an insurance company with subrogated rights of their clients[23]; thus in circumstances where a case is seen as substantively sound, such a defendant or in her scenario, its insurer, would prefer to negotiate directly with claimants. Why McIvor makes the assumption that the defendant will "usually" be an insurance company is not clear. In this thesis, the focus on the corporate defendant necessarily includes those which are not insurance companies and those which are not represented or supported or assisted by them as well as those which are commercial entities or public bodies conducting their own cases either on a self-insured basis or prior to the involvement of insurers. However much the defendant will be concerned with having access to an official legal forum it will be equally concerned not to have issues tried in the media before they even reach the official legal forum and it is this concern that will be uppermost where the corporate defendant may be forced towards settlement prior to having any opportunity to defend itself in the proper controlled official forum of the court.

McIvor stresses that we have in England a "fault-based legal system of putting the claimant back into the position had the wrong not occurred" under which a losing defendant would expect to have liability for costs of the claimant but would wish to see those costs "as low as possible[24]. It should perhaps be considered that the requirement for access to justice for a defendant will also apply where they may wish to contest causation or quantum, as distinct from solely the issue of liability. She makes a firm point about "equality before the law" adding that "It goes without saying that the rich and powerful should … not be able to gain any advantage by deploying extra resources into tactical costs manoeuvres".[25] Whilst noting that costs are a vital factor in looking at access to justice, she does acknowledge that other than economic power there are "other aspects and considerations of which risk to reputation is one". Having noted risk to reputation however, she does not clarify that it is a potential area for claimants to gain an advantage by deploying extra resources in the form of media coverage that would effectively be cost free for

[22] Ibid – P415

[23] Ibid – P415

[24] Ibid – P416

[25] Ibid – P416

them; in that sense that may render the "rich and powerful" even more vulnerable than an impecunious claimant and especially so in the case of them having to face claims from a large group of impecunious claimants.

For a more detailed discussion of literature relating to the issue of the balance of power between claimant and defendant see Section 2 below.

ECHR Article 6 - "a fair and public hearing" - As noted in Section 7 of Chapter 1, it is clear that access to justice is a fundamental tenet of the society in which we live. Having its origins in the common law it is now enshrined in statute pursuant to the ECHR[26]. Article 6(1) ECHR "Right to a Fair Trial" provides that "In determination of his civil rights and obligations … everyone is entitled to a fair and public hearing[27].

Article 6(1) ECHR[28] continues:

> "… judgment shall be pronounced publicly but the press and public may be excluded from all or part of a trial in the interests of … morals [etc]…..or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Access to Justice, ECHR and the Corporation - In concentrating on the corporate defendant, it should be noted that while corporations are legal entities rather than individuals, they are made up of individual people at all levels, are owned among others by individual people and by pension funds upon which individual people rely; they are in addition providers of goods and services that individual people require, of employment and of the contribution that they make to the economy and society at large. However, they are legal entities as opposed to individuals so as a preliminary to that discussion, it is necessary to establish whether the corporate defendant as a legal rather than an individual entity enjoys rights to access to justice. The literature is helpful in this regard.

That the ECHR applies equally to the corporate litigant as it does to the individual seems to be clear from the literature. Marius Emberland states unequivocally "Companies indisputably enjoy Convention protection…"[29]. Emberland explains that "the 'everyone', which appears frequently in the Convention provisions, can crucially also be applied to corporate entities…". As the most important of "several cogent reasons" for so stating he refers to the first sentence of its Article 34 which states that the ECtHR:

---

[26] http://www.echr.coe.int/Documents/Convention_ENG.pdf - accessed 7th October, 2014

[27] The ECHR came into effect on 3 September, 1953 and was given direct effect in English law some 50 years later under the Human Rights Act 1998

[28] European Convention of Human Rights and Fundamental Freedoms, 1950

[29] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 - Pvii, Preface

> "…may receive application from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."

The ECtHR has never doubted that a company is a 'non-governmental organisation' within the meaning of Art 34 and that the Convention's system of private litigation therefore is open for corporate persons"[30]. "Corporate claims" Emberland says[31] make up a large part of the fundamental rights litigation brought before the European Court of Justice[32]. Corporate defendants therefore have as much right to a "fair and public hearing" as the individual claimants and would be included in the "Everyone" in the Article 13 provision for "effective remedy"[33].

Perhaps appropriately for this thesis, Sunday Times v UK (Series A No. 30)[34] was the ECtHR's first encounter with a corporate applicant[35]. The case involved an injunction on the grounds of contempt of court regarding publication of an article relating to the Thalidomide litigation as discussed in Section 2 of Chapter 1[36]. The ECHR contains no definition of "company" or "corporation"[37]; Rule 36(1) of the Rules of Court[38] of the ECtHR states that:

---

[30] Ibid - Pvii, Preface – P4, Introduction – in a footnote to that section, Emberland explains that whilst the term 'non-governmental organisation' appears to connote a meaning akin to its understanding in the UN context, primarily referring to not-for-profit organisations such as human rights NGOs, the Convention drafting history shows, however, that the Convention was always intended to include all corporate persons. The preliminary draft prepared by the European Movement's legal committee in May 1948 spoke in Art 7(a) of a right of petition for 'any natural or corporate person'.

[31] Ibid - Pvii, Preface – Pp 1-2 Introduction

[32] Hereafter the "European Court"

[33] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy…" Article 13 ECHR - http://www.echr.coe.int/Documents/Convention_ENG.pdf - accessed 7th October, 2014.

[34] (1979-1980) 2 EHRR 245 – 26 April, 1979
http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015 – discussed above in Section 2 of Chapter 1 with regard to the issue of the tension between Articles 6 and 10 ECHR

[35] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 - Pvii, Preface – P 4 footnote 21

[36] Under "Articles 6 and 10 ECHR"

[37] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 – P vii, Preface – P 10

[38] European Court of Human Rights - Rules of Court (Council of Europe. July 2014)
http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf - accessed 3 August, 2015

> "Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention themselves or through a representative",

with the effect that a company is free, via the individuals or organs properly authorised to act on its behalf, to submit an application to the Court in which it alleges that its rights or freedoms under the ECHR have been violated by the authorities of one or more of the ECHR member states[39]. There are contrary views in the literature, for example that "the idea of a company having human rights is in itself an oxymoron. 'A company, unlike a human person, has 'no soul to be damned, and no body to be kicked'. Human rights are for human beings not for non-human persons"[40] but such comments "fail to take into account the Convention's quality not merely as a treaty for the protection of 'human rights' but additionally of 'fundamental freedoms'[41]. The concept of a corporation being eligible as an applicant for relief under the ECHR seems to have presented no difficulty for the Commission when deciding on admissibility. There were three applicants, Times Newspapers Ltd, the publishers, the Sunday Times "a printing product owned and published by the first applicant" and the editor of the Sunday Times in his personal capacity was the third applicant. The Commission stated categorically:

> "Times Newspapers Ltd is a legal person under English law, a company with corporate capacity and limited liability, created by registration under the relevant statute. As such it falls clearly within one of the categories of petitioners set out in Art. 25[42] of the Convention as a 'non-governmental organisation'. Furthermore it was the party in the domestic proceedings concerned in the present case and the injunction granted by the House of Lords expressly applies to it. It follows that the first applicant may clearly claim to be a victim of a breach of Art. 10 of the Convention notwithstanding the fact that it possesses legal and not natural personality."[43]

---

[39] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 - Pvii, Preface – Pp 14/15

[40] Ibid – P 27 referring to K Ewing 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, 93.

[41] Ibid Preface – P 27

[42] Art 25 was re-numbered as Art 34 with substantively the same wording under Protocol 11 to the Convention - Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Council of Europe, Treaty Office (November, 1994) http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm - accessed 14 March 2014

[43] European Commission of Human Rights 1975 http://hudoc.echr.coe.int/webservices/content/pdf.001-75068?TID=eovrdcvotg – accessed 15 March 2015 – cf also Decisions on the admissibility of Applications No. 2690/65, T.V. Televizier v. The Netherlands, Yearbook 9 p.512 and No. 5178/71, De Geilustreerde Pers N.V. v. The Netherlands, Collection of Decisions 44 p 131

It seems clear therefore and can be assumed for the purposes of this thesis that corporations do indeed enjoy rights of access to justice in the same way as their human counterparts.

SECTION 2 - ACCESS TO JUSTICE AND THE BALANCE OF POWER BETWEEN CLAIMANT AND DEFENDANT

The Balance Of Power - In her introduction ("Introduction: What is Civil Justice For) to "Judging Civil Justice", Hazel Genn speaks of the dynamics of dispute resolution varying "significantly in relation to the distribution of power and resources within litigation"[44]. She points to factors including "who can most easily afford the cost of pursuing or defending; "who can most easily afford to wait for a resolution"; and observes that:

> "what an individual claimant suing an insurance company might want from the civil justice system is likely to look very different from what a social tenant seeking to resist possession from his landlord might want"[45].

Similarly, Marc Galanter in his article "Why the "Haves" come out ahead"[46] suggested, instead of starting to look at the legal system at the "rules end" to see what effect they had on the parties, that he would look at the "different kind of parties" and the effect these differences might have on the way the system works".[47] He divided the parties broadly into "one shotters" ("OS") who "have only occasional recourse to the courts" and "repeat players" ("RP") who "are engaged in many similar litigations over time"[48]. The RP he said would anticipate repeated litigation and would have "low stakes in the outcome of any one case" and which would have the resources to pursue its long term interests. The OS, on the other hand, would have claims "too large (relative to his size) or too small (relative to the cost of remedies) to be managed routinely and rationally"[49]. In terms of litigation the RPs would have advance intelligence, having done it many times before, and then can structure the next transaction and build a record; they can develop expertise and have ready access to specialists; they enjoy economies of scale and have low start-up costs for any case; they can develop relationships with the forum and will "establish and maintain credibility as a combatant", whereas with no "bargaining reputation to maintain, the OS has more difficulty in convincingly

---

[44] Hazel Genn 'Judging civil justice'– The Hamlyn Lectures 2008 (Cambridge University Press 2010) ISBN 978-0-521-13439-2 – P7

[45] Ibid

[46] Marc Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (Volume 9:1 Law and Society Review, 1974)

[47] Ibid P3

[48] Ibid

[49] Ibid P4

committing himself to bargaining"[50]. There is, he said, a general difference in approach between the two types in terms of what he described as playing "for the rules" in that for the OS there was no great interest in what may happen in a similar case in the future, whereas for the RP "anything that will favourably influence the outcomes of future cases is a worthwhile result"[51]. His thesis, not unnaturally from the above was that the RP is always going to do better in litigation than the OS; he was not referring simply to any inequality of arms, but a situational difference that lent itself to the success of the RP in terms of utilising and to an extent setting the rules of the game.

In terms of RPs, Galanter was including insurance companies, the police and creditors, and he pointed out that in terms of cases featuring RPs v OSs it was the RPs who built the transactions to fit the rules; OSs, he said, "do not ordinarily plan the underlying transaction"[52]. Cases featuring OSs v RPs he said were the rather infrequent cases except in cases of personal injury cases which he said were "distinctive in that free entry into the arena is provided by the contingent fee.[53]" It is, however, into this category that the multi-party actions might fit and although we have no contingent fee as such, we do have the CFA, the ATE insurance and to an extent, the DBA. It may be that in a multi-party action the corporate defendant may be seen as the RP and the claimant as the OS. However, as will be discussed later, corporate defendants can be OSs too.

Can the claimants be RPs? Not perhaps on their own, but when lawyers are introduced the dynamic may change again. Galanter says "Lawyers themselves are RPs"[54] and goes on to ask if therefore their presence "equalize[s] the parties, dispelling the advantage of the RP client? Or does the existence of lawyers amplify the advantage of the RP client?"[55] The RP could after all "buy more legal services in bulk (by retainer)" and at higher rates and would get services of better quality with greater continuity, better record keeping more anticipatory or preventive work, more specialized experience, specialized skill, and more control over counsel[56]. He goes on to discuss whether specialisation of the lawyer can compensate for the OS but concludes that "most specializations cater to the needs of particular kinds of RPs"[57]. He further observes that those who specialise in OS services tend to make up the "lower echelons of the profession", to practice "alone rather than in large firms, and to possess low prestige within the profession"; he concludes "on the

[50] Ibid P5

[51] Ibid P6

[52] Ibid P16

[53] Ibid P17

[54] Ibid P21

[55] Ibid

[56] Ibid

[57] Ibid P23

whole the difference in professional standing is massive"[58]. He observed that the "episodic and isolated nature of the relationship with particular OS clients tends to elicit a stereotyped and uncreative brand of legal services"[59] It is submitted that with large specialist claimant law firms on the scene in the UK, such as Slater & Gordon, that is not necessarily so. However, on that issue from his perspective he maintained that although the "existence of a specialized bar on the OS side should overcome the gap in expertise, allow some economies of scale, provide for bargaining commitment and personal familiarity", this was "short of overcoming the fundamental strategic advantages of RPs - their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy"[60].

He also looked at the question of "passivity" and "overload" in the institutions handling claims pointing to the fact that all parties are treated as if they had equal resource and skills and observing that overload causes delay for the OS thereby "discounting the value of recovery … raising costs (of keeping the case alive) and … placing a high value on clearing dockets, discouraging full-dress adjudication in favour of bargaining…"[61].

In his article, Galanter focussed on unitary actions rather than multi party actions but he did make interesting reference to class actions in terms of organization of OSs and in terms of public interest law. He discussed the organization of "have not" parties "into coherent groups that have the ability to act in a coordinated fashion, play long-run strategies, benefit from high-grade strategies and so forth"[62]. He had in mind organizations like trade unions, tenant unions, environmental action groups, performing rights associations and so on. He saw class actions, (multi-party actions) as similarly affecting the odds and changing them in favour of the OS; class actions he said, were:

> "… a device to raise the stake for an RP, reducing his strategic position to that of an OS by making the stakes more than he can afford to play the odds on, while moving the claimants into the position in which they enjoy the RP advantages without having to undergo the outlay for organizing."

He refers to Simon[63] (who he describes as an "outspoken critic of class actions") as observing that:

---

[58] Ibid

[59] Ibid P 24

[60] Ibid P25

[61] Ibid P28

[62] Ibid P50

[63] William Simon (1972) "Class Actions—Useful Tool or Engine of Destruction," 55 *Federal Rules Decisions* 375.

> "When a firm with assets of, say, a billion dollars is sued in a class action with a class of several million and a potential liability of, say $2 billion, it faces the possibility of destruction … The potential exposure in broad class actions frequently exceeds the net worth of the defendants, and corporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have"[64].

Later in the article, in discussing the impact of rule changes, Galanter included class actions in the category of the "most powerful fulcrum for change" in that class actions bring about changes that:

> "… relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the costs of opponents"[65].

He notes finally that:

> "The intensity of the opposition to class action legislation and autonomous reform-oriented legal services' such as California Rural Legal Assistance indicates the "haves" own estimation of the relative strategic impact of the several levels."[66]

He thereby confirms recognition of the class action, or multi-party litigation, as a game changer in its own right in terms of the relative positions of the parties to the litigation.

Bargaining Power - Genn described personal injury litigation in her book "Hard Bargaining" as being:

> "… characterized by a peculiar imbalance between the opposing sides. Plaintiffs have varied backgrounds and histories, no experience of personal injury litigation, and ill-formed expectations of the outcome of their action."[67]

Defendants, on the other hand "… have common characteristics, endless experience of personal injury litigation, and clear expectations of the outcome of claims."[68] The effects of "these and the many associated imbalances between the parties pervade

---

[64] Marc Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (Volume 9:1 Law and Society Review, 1974) – P 52

[65] Ibid P59

[66] Ibid

[67] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P8

[68] Ibid

the system of negotiation and settlement of personal injury actions."[69]

It should be noted again here that the disadvantages faced by individual litigants, particularly in unitary actions (or indeed where class actions/group litigation is used were it not for the systems of class actions and group litigation) are in a position of a power imbalance. This is not disputed and is fully recognised. This thesis is concerned, however, about the way in which some claimant lawyers attempt to redress the balance, without paying careful attention to the fairness of the information given, and therefore in an incorrect and unacceptable way in terms of case management.

Genn looks at the process of negotiated settlements in personal injury actions. In terms of context, she notes that

> "… without the threat of proceedings there is little incentive for an insurance company to entertain a claim for damages and without the reference points provided by the legal rules, negotiations would have little meaning"[70].

Further and of particular note in the context of this thesis, she observes with reference to settlements that:

> "Because claims are settled without any court formalities, there is no official source of information about the claims settlement process. No records of settlements are publicly available, nor are there any official statistics relating to the volume of claims pursued and compromised, the level of settlement, or the costs involved in achieving settlements."[71]

She refers to the classic configuration in personal injury cases of on the one side the plaintiff, an OS (per Galanter), "who will usually be bringing his or her first and only claim"[72] and on the other side a defendant "who will almost invariably be [an RP] insurance company or possibly a self-insuring institution"[73]. However, she notes that "… there may be exceptions to this classic configuration: for example, where the plaintiff's claim is part of a class action…"[74] and she acknowledges, like Galanter that " in these situations the balance of power between the parties would be different".[75]

---

[69] Ibid

[70] Ibid P11

[71] Ibid P13

[72] Ibid P34

[73] Ibid

[74] Ibid

[75] Ibid

Like Galanter with his OS, Genn characterises the plaintiff in the "majority of claims … as having limited resources of his own, little experience of legal matters, and ill-formed expectations of the outcome of his claim in terms of the chances of success or the amount of money at stake." It is worth noting Genn's impression of the opponent, typically an insurance company with "long experience of the claims industry, *theoretically* unlimited funds, and clear expectations of what will represent a 'good result' of a claim"[76]. However, as will be discussed later, not only does the defendant in a multi-party action take on characteristics as an OS as Galanter observes but an insurance company is not in any case typical of the defendants in multi-party litigation. That is not to say that there are no RPs as defendants in multi-party litigation and the NHS and HMRC are perhaps examples of those.

Under-Settlement – Conflict of Interest? – The "OS v RP" dynamic is not the only area of potential imbalance between a litigants. Andrew Boon in his book "Lawyers' Ethics"[77] notes that there are suggestions that some of the miners' claims were "under settled" (he referred to an article by J Dean in the Law Society Gazette[78]). He asserts that one of the most common reasons was that diagnoses were not challenged; solicitors, he said "could maximise their incomes by processing large numbers of claims rather than fighting the arguable ones. Firms handling thousands of claims achieved widely different average levels of compensation".[79] One national personal injury firm he said, have an average settlement rate at over £9,000 while others have levels as low as £2,375, leading to the conclusion of an estimate that over 50,000 miners might have had 'under-settled claims'.[80]

Pressure applied by Defendants – In discussing the conclusion that "delay and cost pressures push the parties toward settlement rather than trial", Genn argues that "neither uncertainty nor delay are entirely inevitable, immutable features of personal injury litigation."[81] She reached the conclusion that while

> "to some extent they are the result of procedural rules as well as legal rules … Uncertainty, delay, and cost pressure can also be consciously manufactured or exacerbated by the strategies of defendants who are themselves relatively

---

[76] Ibid (emphasis from the publication)

[77] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1

[78] J Dean, 'Controversy Continues over Miners' Claims' [2009] Law Society Gazette 30 July, 2009 – www.lawgazette.co.uk/news/news-focus-miners-compensation (which appears to be no longer accessible)

[79] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P352

[80] Ibid Pp 352-353

[81] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P123

> insulated from the effects of these pressures."[82]

As Boon points out, such tactics can result in court sanctions such as the wasted costs order which "compensate[s] a party for work done or expenses incurred unnecessarily by the conduct of the opposing lawyer"[83] provided that the court is satisfied that "these costs are the result of 'any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such representative'[84] "[85]. In addition, Genn points out that it is the plaintiff's/claimant's lawyer who is in a position to "counteract delaying tactics, to reduce the level of uncertainty about his client's chances of winning in court, and to reduce fear of costs"; she notes that the opportunities for so doing are often lost

> "… as a result of lack of case preparation, lack of time, and an orientation to claims management which stresses negotiation and settlement as an *alternative* to litigation, rather than as the *product* of preparing for litigation."[86]

Genn notes too that:

> "… it has been argued that the inability of plaintiff's solicitors to control closely the progress of claims and the activities of defendants derives, in part, from the financing of personal injury litigation and the rewards available to them."[87]

This particular aspect of personal injury litigation will not be pursued here but it is a theme, in regard to multi-party actions which will recur later in the thesis.

---

[82] Ibid

[83] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P210

[84] Senior Courts Act ss51(6) and (7) – s51(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(7) In subsection (6), "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.
https://www.legislation.gov.uk/ukpga/1981/54/section/51 - accessed 27 January, 2019

[85] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P211

[86] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P123 (emphasis from the publication)

[87] Ibid

SECTION 3 - ACCESS TO JUSTICE AND COLLECTIVE ACTIONS

Group litigation - Group litigation was a major feature of Lord Woolf's Final Report on Access to Justice[88] and it is worth noting his approach and some of his comments from that report. He had looked at multi party actions as part of his examination of aspects of access to justice and, as noted in Chapter 1, he had proposed the introduction of what became our case management system under the Group Litigation Order. The introduction of the GLO in the Woolf Report and his three fundamental objectives in so doing was introduced in Chapter 1[89]. Prior to that, there had been much written on the topic of the need for the introduction of a method of dealing with multi-party litigation. In the judgment of one of the proceedings in the Opren case[90] it was observed that the concept of the 'class action' was "as yet unknown to the English Courts" and it was noted that:

> "Clearly this is something which should be looked at … to [see] whether it has anything to offer… Meanwhile, the courts must be as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically".

After the settlement of some of the claims in that case, the National Consumer Council Commented:

> "The legal system in this country has developed around the basis of individual rights. Today in a mass production society, its rules do not easily lend themselves to resolving problems which affect large numbers of consumers."[91]

Balen noted that there was then no formal court procedure in England designed "expressly to deal with multi-party litigation, noting as the fundamental difficulty that "court procedures designed to deal with individual cases do not recognise group actions".[92] He noted that to "seek to try each individual's claim separately with all issues alive is clearly impracticable and undesirable"[93] and questioned how, if liability is disputed could the individual claimant's case be presented and examined without huge cost being expended and duplicated. He noted that English judges

---

[88] The Woolf Report

[89] Section 2 of Chapter 1 – under "Group Litigation/Collective Actions"

[90] Davies v Eli Lilly & Co [1987] 3 All ER 94 - Judgment of Sir John Donaldson MR at P96

[91] National Consumer Council, 'Group Actions Learning from Opren' (January, 1989) – from Paul Balen 'Group actions, aims, aspirations and alternatives: a historical global perspective' Journal of Personal Injury Law 1995, Nov, 196-211

[92] Paul Balen 'Group actions, aims, aspirations and alternatives: a historical global perspective' Journal of Personal Injury Law 1995, Nov, 196-211 – P 200

[93] Ibid

claim to have "a broad and flexible power to adopt new procedures which will promote the ends of justice"[94] as had also been noted in Opren (above) but asserted that "the interests of justice in reality require the rules available for the conduct of group actions to be clearly ascertainable prior to or at the commencement of any claim"[95]. The then current system with the rules being put in place as the case progressed he said "can lead to unnecessary expense … and a sense of grievance on the part of those claimants who have not anticipated the particular administrative framework chosen by the judge for the conduct of that particular case. He noted that "the burdens placed on the judicial system by multi-party actions may well leave some cases virtually untriable by traditional means"[96]. The effect therefore was a lack of access to justice for large numbers of claimants.

The Civil Litigation Committee of the Law Society set up a group actions working party in February 1994 and Day et al commented that it recognised that without changes to the then present system, group actions would not survive[97]. The aim, they said, was to reduce cost by practical measures that involved no change to primary legislation[98]. Among the benefits sought were the importance of practitioners joining forces, the establishment of routine practices and directions and the saving of time and money. There was a need to limit the right of claimants to instruct the solicitor of their choice which had been one of the reasons behind the "immense costs paid out by the Legal Aid Board in the Benzodiazepine cases"[99]. In those cases, there had been much criticism of the Board "in allowing 2,000 law firms to spend over £30 million on thousands of cases"[100] in litigation which had subsequently collapsed. The Working Party looked at a number of areas which had become issues in multi-party litigation including restriction of rights of the defendant to investigate individual claims, the case management role of the judge which was very much focussed on by Lord Woolf in his Report and case management issues including a recommended (though not an absolute) minimum of 10 cases for a group action, lead solicitors and registers of claimants and cut-off dates for joining a claimant cohort. Other practical issues were considered that also pointed to the need for some sort of particular regulation of multi-party litigation. These included payments into court where an extension of the 21 day decision period on whether to accept a payment was required because "cost sharing principles make it difficult

---

[94] Ibid - P 201 – (Referring to Steyn J in Chzranowska v Glaxo Laboratories Ltd, The Times, 16 March, 1990)

[95] Ibid

[96] Ibid – P 202

[97] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651 – P287

[98] Ibid

[99] Ibid Pp 288 and 289

[100] Ibid P78

for plaintiff's advisers to give quick answers on the costs position"[101]; issues connected with advertising so that claimants would be aware of claims and would be able to join them were also considered as were issues on costs and funding. Fundamentally, the main purpose of all the considerations was to ensure that plaintiffs had the ability to bring "complex group actions through the courts"[102].

Hodges later noted one of the reasons for a lack of litigation across Europe where such systems as the GLO were not in place, "… and hence [a lack of] redress …" was that "many claims were individually small amounts, and were not cost effective to bring."[103] He also noted the wish, in providing a new system, to avoid the "highly undesirable adverse effects" of the US system including excessive litigation, excessive transactional costs, inconsistent duplication between decision made by public regulators and by courts inadequate delivery of compensation to consumer claimants with small claims and excessive pressure on defendants to settle.[104]

The driving force of all these points and comments was to provide for claimants access to a system for claims that may be, as Lord Woolf had noted, those where "… individual loss is so small that it makes an individual action economically unviable …"[105].
The Woolf Report looked at the then existing system of multi-party actions and concluded that it was a type of litigation "causing particular problems for the system of civil justice"[106]. Per the submission of the National Consumer Council "...our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."[107] However, as noted in Section 2 of Chapter 1 the non-GLO approach is still available for multi-party actions and, as will be noted later in Chapter 4, is still very much in use.

The Woolf Report identified a lack of specific rules of court for multi-party actions and the need for "a new approach both in relation to court procedures and legal aid"[108] with the objectives of: (a) providing access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable; (b) providing expeditious, effective and proportionate methods of resolving cases, where individual damages

---

[101] Ibid P 291-2

[102] Ibid P 294

[103] Christopher Hodges 'Collective Redress in Europe: the new model' Civil Justice Quarterly 2010, 29(3), 370-395 – P371

[104] Ibid – P372

[105] The Woolf Report - Section IV, Chapter 17 para 2

[106] The Woolf Report - Section IV, Chapter 17 para 1.

[107] Ibid - Section IV, Chapter 17 para 1

[108] Ibid - Section IV, Chapter 17 para 2

are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner. [109]

However, the introduction of class actions was not simply about increasing cost-effectiveness and efficiency. It was also about attempting to address the power imbalance between individuals and corporate defendants which has been discussed above, particularly in regard to the Thalidomide and Steel and Morris cases. This was commented on by Susan Gibbons in her article assessing the success of the GLO against Lord Woolf's own three fundamental criteria. Gibbons pointed to these particular benefits of the GLO's introduction. She pointed out that the GLO may "enhance procedural equality of arms" and that "by grouping together and pooling their resources", individual claimants could enjoy some of the advantages of the corporate, commercial or government defendants including "… substantial resources, economies of scale, ready access to knowledge, information and expertise, and power.[110]" This she said may be "coupled with a sense of solidarity, greater publicity and negotiating pressure, [and] possible public funding"[111]. This very much coincides with the observations of both Galanter and Genn referred to in Section 2 of Chapter 2 under the heading "Bargaining Power" in observing that part of the reason for and benefit of class actions/group litigations is to assist "one shot" (OS) litigants who would not otherwise have the resources to take on wealthy and powerful opponents.

Other Aspects of the Woolf Report - The report was clearly not just about group litigation and had as its focus issues of Case Management, Procedure and Evidence, Special Areas (including e.g. Medical Negligence, Housing, and Multi-Party actions). In it, Woolf made recommendations on the introductions of new Rules of Court which became the new Civil Procedure Rules.

On the issue of access to justice, the focus was on process in order to facilitate access rather than on issues that relate to the granting of access, any actual "right" to access or, significantly for this thesis, issues that act as a hindrance or potentially act to deny access or which make actually using a right to access to justice counter-productive for the litigant. Significantly he introduced the concept of "the overriding objective ... to deal with cases justly"[112]. This is of particular relevance to this thesis and is commented upon further in Sections 4 and 5 of Chapter 5.

---

[109] Ibid - Section IV, Chapter 17 para 2

[110] Susan Gibbons 'Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis' Civil Justice Quarterly, Vol 27, Issue 2 © Sweet & Maxwell 2008 – P212

[111] Ibid

[112] Ibid - Section I Overview paragraph 8

One of the aims of the recommendations and new rules was to "make it more difficult for wealthier parties to gain a tactical advantage over their opponents by additional expenditure"[113] but, as commented on previously, the power of wealth in potentially creating at least a tactical advantage for a litigant in terms of legal process may be reversed when looking at the power of the claimant as exercised through the media. In addition to the possibility that any advantage of wealth available to a corporate defendant in a highly publicised group litigation is far outweighed by actual reputational damage or a very real fear of reputational damage in the media, it may also be that activation of the media by claimant lawyers has effects that run counter to the "overriding objective".

As far as the position of corporate entities was concerned, apart from the recognition that "An efficient and cost-effective justice system is also of vital importance to the commercial, financial and industrial life of this country"[114], and the recommendation regarding the representation of companies in court[115], the report was silent on the position of corporate entities.

Further Aspects of Multi-Party Litigation - In its examination of the problems with Multi-Party litigation, the Woolf Report identified two major issues which, it is argued, remain even after the introduction of the Group Litigation Order:

1. That "the complexity and intractability of the intrinsic subject matter can generate major discovery exercises and escalating use of experts to an even greater extent than in ordinary litigation"[116]; and

2. Defendants "may suffer from the adverse publicity resulting from the number of potential claimants"[117].

The latter point seems to have been a prescient remark as far as this thesis is concerned but it appears in isolation without further comment or observation. It only partly relates to the issue as well, being limited to the publicity arising purely from the number of claimants and no other factors. However, it clearly acknowledges that multi-party actions are in and of themselves attractive to media.

The Woolf Report concentrated on aspects of legal aid and the prohibitive cost of larger actions but from the point of view of the claimant; the proposals of the Woolf Report for management of multi-party actions, including the early identification of such actions and the need for the exercise of court control and the appointment of

---

[113] Ibid - Section I Overview paragraph 9 – "Parties of limited means.." sub-paragraph (c)

[114] Ibid - Section I Overview paragraph 5

[115] Clarifying the position of employees and recommending that the court should "normally exercise its discretion in favour of allowing an employee...to take any steps...which a litigant in person could take." The Woolf Report - Section VI Chapter 21 paragraphs 153 et seq.

[116] Ibid - Section IV, Chapter 17 para 8

[117] Ibid - Section IV, Chapter 17 para 11

a single managing judge from as early a stage as possible to ensure that such actions are "expeditiously and economically progressed"[118] are arguably as beneficial for defendants as for claimants but the defendant position was not argued there per se.

Where the Woolf Report does anticipate issues that are highly relevant to this thesis is in regard to the issues of "Lawyers and Multi-Party actions"[119]. The Woolf Report recognises[120] that lawyers may take the initiative in Multi-Party actions on the basis that a typical client may often be "…poorly informed, or ignorant of particular facts" such that it would be "only be the lawyer who recognises the potential for claiming". His point was that improvement of access to justice means giving the opportunity to "…those ignorant of their legal rights, or unable because of the cost to pursue them" to pursue their rights and "…If this requires lawyer initiative, then so be it."

Whilst such an approach is of undoubted benefit to what might be referred to as "disadvantaged" claimants and quite properly provides or enhances access to justice for them, it also gives rise to issues of lawyer led claims, which, is a very relevant factor in looking at the commercial approach now taken by claimant lawyers. It seems clear that lawyers running their businesses commercially will not pursue cases that, whilst requiring commercial and financial risk, do not promise significant reward. As a result of the changes in litigation funding and in regulation of lawyers which had not yet occurred at the time of the Woolf Reforms, the group litigation reforms may be said not to result in an increase of access to justice across the board for disadvantaged claimants but more for claimants whose cases happen to provide an attractive risk/reward balance for the entrepreneurial lawyer. Even then, the question of whether the case is taken on will depend very much on the costs regime in place and factors affecting litigation funding.

In addition, Lord Woolf recognised that if lawyers take "…the initiative in multi-party actions, there are potential conflicts between their interests and those of group members...". He noted that there was a greater opportunity for "self-interested behaviour" by lawyers in group litigation than in unitary actions. He recognised in particular that this may:

> "…include bringing claims known to be unfounded for harassing purposes and genuine but limited value claims, knowing in both cases that defendants will feel impelled to settle on terms advantageous to the lawyer though possibly of little benefit to the group members"[121].

He did not comment on why the defendant may feel "impelled" to settle but this thesis will submit that one very strong reason may be the risk of reputational damage that Woolf himself had alluded to. A settlement on terms "advantageous to the lawyer", irrespective of the question of benefit to group members would surely, it

[118] Ibid - Section IV, Chapter 17 para 32

[119] Ibid - Section IV, Chapter 17 paras 70- 74

[120] Ibid - Section IV, Chapter 17 para 70

[121] Ibid - Section IV, Chapter 17 para 71

is argued, possibly be to the serious prejudice of the corporate defendant, its shareholders and stakeholders.

Prompt Dismissal, the Individual and the ECHR - Of particular note is the observation in the Woolf Report[122] that "Among the strongest disincentives to meritless or frivolous multi-party litigation will be prompt dismissal by the courts." Lord Woolf maintained that court control from the outset would ensure "…early determination of the merits". In terms of management he admonished courts to "…be prepared to visit sanctions on lawyers who do not live up to the standards of professional behaviour expected." "

However, looking at Article 6 of the ECHR "Right to a fair trial"[123], and at Hodges' article "From class actions to collective redress: a revolution in approach to compensation"[124] it is apparent that the view suggested above was optimistic.

Three issues are observed. One is that the Article 6 insistence on a "trial" may run counter to Woolf's objective in effectively limiting the courts' capacity for such "prompt dismissal" and may also limit the availability of "early determination of the merits". The second is as Hodges observes that each and every person has the right to a fair trial under Article 6. Hodges sees various civil law jurisdictions struggling to reconcile collective procedures with the Article 6 requirement that everyone is entitled to a fair and public hearing and he also observes that "… similar provisions are enshrined in some European national Constitutions [as well] "…. yet any collective procedure involves claimants surrendering individual autonomy and rights".[125] In practice, as Hodges observes, "not all can be heard" and so these issues remain as yet unresolved. A third issue is that whilst the court may have control of the proceedings from the outset, there is no control over the use of media and as already observed this may effectively pre-date the stage of full court control over the legal process. If media activation is used to bring pressure on a corporate defendant, leading the defendant to seek an early settlement in order to protect or limit damage to its reputation, a case may not progress beyond the very initial stages and the issue of prompt dismissal, irrespective of the Article 6 considerations, may never arise because the court will never effectively be seized of the case.

It is important to note that the entitlement for everyone to a "fair and public hearing" may prevent the court control that Woolf so strongly espouses from being able to dismiss cases in their early stages even where they appear to be unmeritorious. This entitlement may allow an action to be started and maintained while strong media pressure could be applied to a corporate defendant. This is notwithstanding that the case against that defendant has not been researched and

---

[122] Ibid - Section IV, Chapter 17 para 73

[123] See above - ECHR Article 6 - "a fair and public hearing"

[124] Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28, 41–66

[125] Ibid – p45

articulated to the level required for any proper forensic examination of the merits. It has already been noted that for as long as there are proceedings, the defence of honest opinion is available so it follows that for as long as there are proceedings, the corporate defendant may have exposure to media pressure.

Aspects of Collective Actions - Part of the discussion on access to justice and collective actions ought to refer to literature on the issues of regulatory procedures and the concept of opt in and opt out; not least because one area where the predominantly opt in system in use in England is about to change is in relation to regulatory claims relating to unfair competition; but also because the numbers of claimants are a major factor in the business model of claimant lawyers aiming to take cases as collective actions.

1. **Regulatory procedure and Representative Claims** - In consumer protection cases there is both a breach of regulation and a resultant loss to claimants. They are typically cases, as Woolf had envisaged for some group litigation, where "…individual loss is so small that it makes individual action economically unviable…"[126]. In his article 'From class actions to collective redress: a revolution in approach to compensation' Christopher Hodges notes that in those cases "amounts of compensation are ... small for individuals but can give rise to large total sums for wrongdoers…" but that "… removal of illicit gains and market rectification are more important than individual rectification"[127].

   For such claims there are possibilities other than collective court procedures namely regulatory procedures and representative claims.

   In such cases it is not simply a question of compensation for claimants, "enforcement, prevention, rectification and competition are all relevant" although Hodges argues that the "first two are the most important".[128] So, distinct from a group litigation or class action in which claimants collectively in one form or another claim against a defendant, in consumer cases, claims can involve public authorities, regulatory bodies and consumers' associations as well.

   Regulatory action can be available as a method of compensating claimants as an alternative to court proceedings but not all commentators regard it as efficacious. The Civil Justice Council has argued that private enforcement is to be preferred to state funded regulatory intervention because of the differing primary aims of private enforcement and regulation. That argument was made on the basis that regulators have no experience regarding issues of compensation and do not have the resources and that in any case courts provide a more efficient and economical way of addressing compensation; they also

[126] The Woolf Report - Section IV, Chapter 17 para 2(a)

[127] Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28 – P45

[128] Ibid – P45

pointed out that "… regulators may be unable to deliver full compensation because of differences between the criminal and civil standards of proof"[129]. Hodges however, dismisses these arguments as unconvincing. He argues, based on an OFT assessment of consumer detriment,[130] that there is "a strong indication that consumers used public authorities, ombudsmen or business complaint schemes where these were available" and that "there is little indication that consumers would regard lawyers and courts as good value for money" for obtaining redress in such claims. This has led to some debate regarding "opt in" and "opt out" multi-party litigation.

2. **"Opt out" in Group Litigation** - It has already been noted in Section 1 of Chapter 1 that the GLO is an "opt in" proceeding. Similarly in Section 3 of Chapter 1 it was noted that the introduction of the CFA has the effect of changing the commercial imperatives for the claimant lawyer; it was observed that as a consequence, the temptation for claimant solicitors towards 'activation of public interest' in order to enhance the chances of success of an action may be particularly strong[131]. Factors in running multi-party claims with the opt in system include critical mass of claimants and therefore publicising the claim to attract as many clients as possible to the claim. This naturally provides in some measure a legitimacy to media activation by claimant lawyers but only as far as the basic facts of the claim including the parties involved and the nature of the claim and not including the making of unproven allegations and their presentation as facts.

   There is a debate as to whether the UK should adopt an opt out proceeding and for background it is worth looking at some of the issues. Professor Rachel Mulheron, in her research paper, "Reform of Collective Redress in England and Wales" asserted that there was "overwhelming evidence of the need for an opt out court collective rule" as an additional mechanism for collective redress[132]. Hodges is critical that the report did not address "the risk of abuse that arises in opt out procedures", such as those in the US[133]. In her Summary of

---

[129] Ibid – P65

[130] Ibid - Hodges refers to: Consumer Detriment: Assessing the frequency and impact of consumer problems with goods and services (Office of Fair Trading, April 2008) OFT992 - http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/reports/consumer_protection/oft992.pdf - accessed 10 June, 2017

[131] Other factors influencing this temptation are discussed below in Section 3 of this Chapter

[132] Rachael Mulheron, Research Paper for the Civil Justice Council of England and Wales: 'Reform of Collective Redress in England and Wales: A perspective of Need' (Civil Justice Council, February 2008) https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents /CJC/Publications/Other+papers/reform-of-collective-redress.pdf - accessed 10 June, 2017– Executive Summary P vii

[133] He further argued that "… such risks could not be avoided either by an initial certification procedure (which is present in the very jurisdictions where complaints from business about this system are heard (the USA, Australia and Canada)) nor by a requirement for judicial approval of settlements, (on the basis that it is unlikely that a court would not approve a settlement where the

Findings[134], Mulheron concluded that "… a regime that is opt out; generic (capable of handling a wide array of disputes that manifest common grievances); and permissive of an ideological representative claimant" could fill a gap in the English system of collective redress. She suggested that the supporting factors for her argument included a rate of participation in group actions that was "typically low, with many opt in rates below 30% and opt in not suiting the action for reasons that included "the sheer task of identifying all group members at the outset". It is not clear why she regarded that task as even necessary however; there are many collective actions that do not include all those entitled to claim for one reason or another; there is in fact no rule that says that there must only be one collective action on one set of facts, although consolidation would be an obvious course to follow, and there is no legal reason other than limitation why those not participating in a collective action may not also pursue their own actions. There are suggestions that judges may not take kindly to those not opting in (see below) but Article 6 ECHR would suggest that they should still be entitled to make their claims. However, she also included as supporting arguments "a number of procedural problems including "frontloading[135], a skewed cost benefit analysis, the test case versus generic issue dilemma, the operation of limitation periods [and] the judicial attitude towards those who do not opt in".[136]

One of the arguments put forward by Mulheron in Section 16B of the report[137], was the relative paucity of pharmaceutical actions that have succeeded in

---

defendant desired the deal on the basis that it was cheaper to pay than to fight a bad case." Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28 – P58

[134] Rachael Mulheron, Research Paper for the Civil Justice Council of England and Wales: 'Reform of Collective Redress in England and Wales: A perspective of Need' (Civil Justice Council, February 2008) https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents /CJC/Publications/Other+papers/reform-of-collective-redress.pdf - accessed 10 June, 2017– Executive Summary P ix

[135] "…whether sufficient commonality could be found among the claimants' claims may only be safely determined after **each** of the claimant group members has prepared and served 'particulars or their claim'[under CPR part 7 or 8] – P26 (emphasis from the report);

[136] In regard to the "opt in"/"opt out" issue and the concept of claims aggregation, it is interesting to note that in reference to the Sprint Communications case in the US, Morabito and Waye underscore that, unlike in "opt out" class action regimes, the litigation will only bind those "that have affirmatively and voluntarily assigned their claims to the aggregators". The "free ride" for claimants under the US "opt out" system is removed because those who do exercise their autonomy by selling to an aggregator are called on, under the terms of funding, fee and retainer agreements, to contribute to costs, thus effectively creating an "opt in" regime. - Sprint Communications C v APCC Services Inc 128 S Ct 2531 (2008) (Sup Ct US) - Vince Morabito, and Vicki Waye (2009). The Dawning of the Age of the Litigation Entrepreneur. *Civil Justice Quarterly*, *28*(3), 389–443 at P 426 - http://papers.ssrn.com/abstract=2083972 – accessed 10 March, 2014

[137] Actions Brought Elsewhere Re Global Products/Services with No Equivalent Litigation in England and Wales – P 113

England and Wales compared with the US and Canada. However, Hodges counters that one reason for that is that the systems in the US and Canada encourage settlement of cases with lower merits, whereas in England they are not facilitated; he pointed out that almost all such collective actions brought in England had collapsed, the most recent example being the MMR vaccine case[138]. Mulheron[139] made clear that her recommendation was not necessarily a new collective redress mechanism but one that could be supplemental to the existing procedure and she stressed that it would be essential that such a supplementary regime should be set up in a measured and balanced fashion with 'brakes', and with in-built requirements to provide procedural fairness to both claimants and defendants, one of which criteria "*must*[140] be a 'superiority' analysis". Her argument was that an opt out collective redress action should only be permitted by the court if it was indeed the preferred way to decide that dispute in that way.

Since Hodges' 2009 article and following Mulheron's report, for the first time an opt out collective action regime has been introduced in England. As alluded to above, it is in the regulatory area, for competition law claims and is under the Consumer Rights Act, 2015 which entered into force in October, 2015. In Schedule 8[141], the Act, amending sections 47A and 47B of the Competition Act, 1998, requires a collective proceedings order to specify whether the proceedings are to be opt-in[142] or opt-out[143]. In regard to the perceived "excesses" in opt out proceedings, the Consumer Rights Act included provision that the Competition Appeal Tribunal ("CAT") may not award exemplary damages [144] that DBAs will not be enforceable[145] and that costs rules apply, as

---

[138] Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28 – P56

[139] Rachael Mulheron 'Reform of Collective Redress in England and Wales: A perspective of Need' (Civil Justice Council, February 2008) – Summary of findings - https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents /CJC/Publications/Other+papers/reform-of-collective-redress.pdf - accessed 10 June, 2017– P157

[140] Emphasis from the report

[141] Schedule 8 Section 5(1)(7)(c)

[142] Schedule 8 Section 5(1)(10)

[143] Schedule 8 Section 5(1)(11) - " 'Opt-out collective proceedings' are collective proceedings which are brought on behalf of each class member except — (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and (b) any class member who — (i) is not domiciled in the United Kingdom at a time specified, and (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

[144] Schedule 8 Section 6(1)

[145] Schedule 8 Section 6(8)

elsewhere in the court system[146]. The second of the claims brought under the new procedure (Walter Merricks CBE v Mastercard Inc and Others) illustrates just how far an opt out procedure could be taken[147].

There is some talk now of the possibility also of an opt out regime in connection with GDPR[148]. Andrew Little recently remarked on commentators speculating that in relation to "data security breaches that may affect a large number of individuals … a collective action regime may be rolled out or extended to cover data protection, whereby all affected individuals are automatically part of the 'class' … unless they choose to opt out."[149]

SECTION 4 – ACCESS TO JUSTICE, COSTS AND FUNDING

The issues of costs and funding have already been raised and discussed in Chapter 1 but the literature contains some interesting and relevant comment and argument.

In general it is important and relevant to look at the costs regime and the impact it has on the conduct of cases. Not only will costs be a major factor in the decision of the defendant corporation as to whether and if so when to settle but, together with funding issues, it will also be a major contributor to the decision by a claimant lawyer whether and how to pursue a particular collective action in the first place. The costs regime will also be highly relevant to the way both the claimant and defendant law firm run their businesses, when and to what extent they will be prepared to incur costs for example in expert witnesses and scientific evidence, the

[146] Schedule 8 Section 12

[147] That case was brought by Merricks seeking a collective proceedings order under the amended s47B of the Competition Act 1998 to represent "46 million people who were alleged to have suffered the consequences of 'multilateral interchange fees' charged to banks and merchants." The amount of the claim was reported as "£14bn claimed in damages; £36m provision for legal costs – and a funding contract potentially running into billions". The application was dismissed by the CAT, the tribunal essentially accepting "Mastercard's argument that, even if loss had been suffered and could be estimated across the whole class of claimants, there was no way of ensuring that a class member would receive compensation for any actual loss", a decision which leans clearly towards a compensation of claimants approach rather than regulation of Defendants; however, an appeal is apparently being considered - Michael Cross 'News Focus: Playing the consumer card' (The Law Society Gazette 31 July, 2017) - https://www.lawgazette.co.uk/news/news-focus/news-focus-playing-the-consumer-card/5062288.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

[148] The General Data Protection Regulation – Regulation (EU) 2016/679 Of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

[149] Andrew Little -'The Road to GDPR – litigation challenges ahead' (Lexology 12 December, 2017) https://www.lexology.com/library/detail.aspx?g=8c3d939a-2eaa-491a-8447-93ca910d9a6c accessed 13 December, 2017

return they will make on the case and what the cost/benefit will be to their respective clients. Hand in hand with the costs issue is that of funding, the reduction of legal aid and the emergence of the conditional fee and damages based agreements.

Legal Aid and the CFA - Historically, many of the claims now brought under GLOs would have been brought under the Legal Aid Scheme, but the literature covers the fact that that has been subject to a series of fundamental changes over time, beginning from the introduction of the conditional fee agreement (the "CFA").

Legal aid had its beginnings "in the salaried legal services made available to members of the armed forces during the Second World War to assist them with marital breakdown"[150]. This then "led to the Rushcliffe and Cameron committees recommending the introduction of a peace-time legal aid scheme available to a large section of the population."[151] In fact "Rushcliffe intended legal aid to be available to those on middle incomes as well as the poor, and expected almost half the civil funding would go to the salaried provision of advice work and divorce."[152] This would have had interesting consequences and perhaps the class of MINELAs may never have emerged. However, Paterson recounts that the Law Society "fearful that middle-class privately paying clients would disappear to be the clients of a salaried National Legal Service, persuaded the Lord Chancellor's Department to limit the extension of legal aid to people whose income did not exceed £750 a year, and in the 1950's eased the government away from the notion of a salaried profession on the grounds that it would be too expensive and too difficult to recruit"[153].

Lord Irvine asserted that by the 1990's the legal aid system was failing notwithstanding the fact that the combined Civil and Criminal legal aid budget in 1999 was still some £1.9bn[154] and it remained at a level of well over £2bn through to 2012 and was at level £1.7bn in 2013-14[155] made up of £0.9bn on criminal legal aid and £0.8bn on civil legal aid. In his statement in the House of Lords as Lord Chancellor when proposing the introduction of the CFA he spoke of the legal aid

---

[150] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P64

[151] Ibid – P64

[152] Ibid – P65

[153] Ibid – P 65

[154] 'House of Commons – Select Committee on Constitutional Affairs – Fourth Report' – 16 July, 2004 - https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/391/39104.htm - accessed 12 January, 2019

[155] 'Ministry of Justice – Legal Aid Statistics in England and Wales – Legal Aid Agency 2012-2014 – 24 June 2014' - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf - accessed 12 January, 2019

system failing everybody [156] including those not eligible for legal aid, those eligible for legal aid and the tax payer as well.

He proposed conditional fee agreements, in order "to allow the majority of people in England and Wales to secure access to justice" in all except family and criminal cases.[157] CFAs would offer a new way for people to bring cases, the lawyers sharing the risk of litigation with the client by agreeing to work without a fee if the case is lost and being entitled to claim a success fee (of up to 100% but more usually about 50%). He wanted to include those who were not so well off but were just above the limits for legal aid and who could not contemplate the "open-ended commitment of meeting lawyers' bills."

Lord Irvine announced that the Government proposed to remove most personal injury actions from the scope of legal aid and further that it regarded certain other types of claim as no longer suitable for legal aid and cited as examples disputes related to business, inheritance, partnerships, trusts and boundary disputes between neighbouring landowners.

In his article, "Access to Justice – Balancing the Risks"[158], Barton argues that in any case Legal aid is unfair and that CFAs in combination with ATE, exacerbate the imbalance in costs incidence between claimant and defendant and lead to the pursuance of weak and speculative cases.

That legal aid is unfair he attributes to the factors as noted by Lord Irvine that "most people are not eligible" thereby providing benefit to only "an eligible minority"; he also considered that it "lacks independence", because, he argued, it is granted on the advice of the applicant's lawyer, thus creating "a clear conflict of interest" that may encourage "over optimistic advice, to put it kindly, or speculative litigation, putting it less kindly"[159]. Further, it "lacks fairness" because successful defendants cannot recover legal costs. He argues that this puts the claimants in a "no-lose position" and the defendant in a "no-win position". He surmised that it may

---

[156] "At present the legal aid system is failing us all. It is failing the many millions of people on modest incomes who do not qualify for legal aid and who simply cannot contemplate going to law because of the potential legal costs if they lose. It is failing people on legal aid, because the Government cannot direct money to those who need it most and to those cases where there is a public interest in seeing justice done. Finally it is failing the taxpayer who year on year is being asked to pay more and more, and yet can rarely get help from legal aid when it is actually needed." Statement by Lord Irvine of Lairg on improving access to justice - HL Debate 4th March, 1998 - http://hansard.millbanksystems.com/lords/1998/mar/04/legal-aid - accessed 23 October, 2012

[157] Ibid

[158] Anthony Barton 'Access to Justice: Balancing the Risks' (Adam Smith Institute 2010) http://www.adamsmith.org/sites/default/files/resources/access-to-justice.pdf - accessed 28 May, 2014

[159] It should be noted that although the claimant's lawyer was making the argument for legal aid, it was at that time the Legal Aid Board which made the decision - see below.

therefore be cheaper for a defendant to settle a claim regardless of merit, to avoid irrecoverable legal costs – a practice known as legal aid blackmail".[160]

CFAs were originally introduced says Barton for MINELAs to plug the gap which resulted in those who could afford to pay tax being effectively priced out of civil justice. However, he points out that "The level of the success fee, the choice of insurance product and the price of the insurance premium are determined by the claimant" with no opportunity for input from the defendant who will ultimately meet the bill if unsuccessful at trial, or indeed, if settling the claim. Even if the claimant is unsuccessful, "The ATE insurance premium is in practice not met by the unsuccessful claimant – it is either self-insured or waived when a claim fails".[161]

Barton summarised his criticisms of legal aid as having the following "fundamental flaws" in addition to the foregoing: it creates perverse incentives for over-optimistic advice; demand led open ended funding promotes risk free speculative litigation, funding decisions are privileged and confidential so there is no public scrutiny of spending, added to which the "salami-slicing" approach to overall legal aid cost control does not address the fundamental flaws in the system.[162] Whilst Barton's comments on overall legal aid cost control may have some basis, it is however important to note with regard to the references to "over optimistic advice" and "demand led open ended funding" with "no public scrutiny" that there is and always has been an approval process for the granting of legal aid. For one thing it is very tightly means tested and then it has to be processed via a solicitor who has to advise the client on and be confident of the merits of the case prior to submission to the (then) Legal Services Commission for approval, again, as was referred to in Section 4 of Chapter 1, on the basis of the "Merits Test"[163] which appears in Section 15 of the Legal Aid Act, 1988 along with the Reasonableness Test[164]. The whole is then subject to the usual controls on public spending, budgets and votes under Parliamentary oversight. His point that the majority of people were not eligible for legal aid is hard to dispute, hence the presence of the large group referred to as MINELAs and that it fuelled speculative cases is illustrated by way of example by the MMR claims the basis of which was later discredited[165].

---

[160] Ibid - Legal Aid – P2

[161]Anthony Barton 'Access to Justice: Balancing the Risks' (Adam Smith Institute 2010) http://www.adamsmith.org/sites/default/files/resources/access-to-justice.pdf - accessed 28 May, 2014 - Conditional Fee Agreements – P3

[162] Ibid P3

[163] Ministry of Justice 'Step by Step Guide to Legal Aid' (n.d.) http://www.justice.gov.uk/legal-aid - accessed 18 January, 2013

[164] Legal Aid Act, 1988 – Merits Test S15(2), Reasonableness Test S15(3)

[165] Brian Deer 'Andrew Wakefield - the fraud investigation (MMR)' http://briandeer.com/mmr/lancet-summary.htm - accessed 13 January, 2015

Both legal aid and CFAs can lead to speculative and unmeritorious cases being brought. Post Jackson, this balance has to some extent been redressed, but in part, in personal injury cases, this is offset by a 10% rise in damages awards. However, Jackson has commented that he believes that CFAs "incentivise inefficient working" whereas DBAs (see below) "incentivise efficient working"; he was also of the view that the CFA regime was "an instrument of injustice" and "on occasion, oppression" where one party might litigate at massive cost risk, while the other proceeded at no or minimal costs risk.[166].

The Jackson Reforms and the DBA - Following on from the theme of Legal Aid and the CFA it is logical to look at literature regarding the DBA[167]. The introduction of the DBA was referred to in Section 3 of Chapter 1 but it should be noted that it has not really taken off. One of the reasons may be the non-availability of the hybrid DBA/CFA which the government chose, against Jackson's wishes, to prohibit. Jackson himself has commented[168] that the DBA was a reform "implemented but never used". Observing that "almost no-one ever enters into a DBA" he attributes two main reasons, one of which related to fears over technical arguments being raised by the other side[169], the other that solicitors and clients wish to enter "no win – low fee" DBAs (which would appear to be an eminently sensible development given that both CFAs and DBAs are available) but that there is a fear that they would be outside the scope of the applicable regulations. He went on to discuss the faults in those regulations noting that a review by the Civil Justice Council was underway at the request of the MOJ but noting that the MOJ had specifically excluded from the working group's brief the question whether to introduce "hybrid" DBAs. The stated reason was that the Government "considers such arrangements could encourage litigation behaviour based on a low risk/high returns approach". He respectfully disagreed with that and listed eight very cogent reasons as to why it was in the public interest to permit hybrid DBAs. Those reasons were too detailed to be analysed here, but among them he noted that DBAs were ideally suited for commercial cases where documentation was very heavy and where lawyers who may not wish to risk working for no fee might risk working for some level of fee. Another of his points was that none of the "injustice" and "oppression" that it was noted above[170] that he remarked in regard to CFAs were present in hybrid DBAs.

The Jackson reforms have been the cause of much comment and some controversy with some, like Barton arguing that they would open the floodgates to litigation and conversely McIvor arguing that they would reduce access to justice.

---

[166] Lord Justice Jackson 'Fixing and funding the costs of civil litigation' C.J.Q. 2015, 34(3), 260-266

[167] Damages based agreements, providing for legal fees to be payable from an agreed percentage of damages awarded to a successful litigant - introduced under changes[167] included the reversal of the position under the Access to Justice Act 1999 – see Section 3 of Chapter 1

[168] Lord Justice Jackson 'Fixing and funding the costs of civil litigation' C.J.Q. 2015, 34(3), 260-266

[169] In Chapter 5 of the Jackson report he had recommended that the indemnity principle be abrogated which he said would cause some of those problems to melt away.

[170] In the preceding section "Legal Aid and the CFA"

Whilst Barton noted the Jackson Proposals regarding ATE premiums and success fees being paid from damages and not by the losing defendant as part of a costs award, he was not satisfied that this would lead to a desirable result because it was achieved by the introduction of "one-way cost shifting"[171]. His view is that QOCS goes beyond addressing the problems of excessive ATE premiums; "it changes the whole economic balance of civil litigation".[172]

Conversely, Claire McIvor concluded[173] that the reforms, if implemented (which under LASPO and other measures they have been), far from "opening the floodgates" as Barton saw it, the reforms would adversely impact access to justice because they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance. She saw the recommendations as restricting access to justice for personal injury claimants by making it harder for them to find a lawyer willing to take on their case". This would result from the impression, McIvor said, that the imposition of limits on what lawyers can charge would lead them to turn away cases more on the basis of economic risk than substantive validity.

However, as discussed above, with legal practices run as entrepreneurial business enterprises, this is bound to happen in any case; solicitors will not take cases where the business case does not "add up" or where the risks do not balance in favour of potential significant reward.

McIvor also maintains her position on the requirement for "full compensation" observing that those who do obtain representation will be worse off because they will receive less than "full compensation" as a result of having to pay costs out of their damages. She argued therefore that taking costs from damages awards "offends against the principle of full compensation which lies at the heart of English tort law."[174]

Now after LASPO, some clearer messages have emerged. In its report 'Access Denied: LASPO four years on: Law Society Review'[175], the Law Society concludes that LASPO has had a negative impact across a variety of areas, restricting access to justice and

---

[171] See Chapter 1 Section 3 - The Changing Climate in the Legal Profession and the English Legal System and Section 4 - Funding of Litigation and changes following LASPO

[172] Anthony Barton 'Access to Justice: Balancing the Risks' (Adam Smith Institute 2010) http://www.adamsmith.org/sites/default/files/resources/access-to-justice.pdf - accessed 28 May, 2014

[173] Writing on a detailed study of the Jackson Report by McIvor with 10 other independent academics - Clare McIvor, 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) Civil Justice Quarterly, 30(4), Pp 411–428

[174] Ibid - P422

[175] 'Access Denied: LASPO four years on: Law Society Review' (The Law Society June, 2017) http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/ - accessed 3 August, 2017

creating additional pressures on the justice system and the wider state". Whilst the report was critical of LASPO, in reality it was seriously and most critical of the severe reduction in the availability of legal aid. A Law Society Gazette[176] article summarised the report as calling for a root and branch overhaul of civil legal aid provision to help repair the damage inflicted by "deep cuts four years ago" and urges the government to "get on with the post-imlementation review of LASPO" that had been set in train earlier that year (2017), which was aborted because of the general election. It goes on to report the finding that the removal "of lawyers from the justice process" has "proved a 'false economy' by deterring people from seeking early advice and shunting problems elswhere". The report, made twenty five recommendations, most of which focussed on funding and legal aid to improve access to justice[177], noting that the cuts in legal aid had led to "Soaring numbers of litigants in person" who are now creating a substantial burden on the courts, and that the lack of early advice can result in minor problems escalating quickly.[178] The then Law Society President, Robert Bourns added to the debate observing that there had been reports that tenants of Grenfell Tower[179] were unable to access legal aid to challenge safety concerns because of the cuts; he said that "if that is the case then we may have a very stark example of what limiting legal aid can mean."[180]

Additionally, the Bach Commission in its final report[181] addresses access to justice from the perspective of the individual and recommends new legislation in the form of a "Right to Justice Act"; this seems unnecessary given that the right to justice is manifestly already enshrined in the law, not least in the ECHR. However, aside from the suggested title of the legislation, the measures recommended actually address issues created by the reduced availability and scope of legal aid.

---

[176] The Law Society Gazette (unattributed) 'Access Denied: Law Society's 25-point plan to salvage civil justice' (The Law Society Gazette 29 June, 2017) https://www.lawgazette.co.uk/law/access-denied-law-societys-25-point-plan-to-salvage-civil-justice/5061772.article?utm_source =dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

[177] There is perhaps some irony in that it was the Law Society that in the 1950's persuaded the government away from the introduction of a salaried national legal service - See above Section 3 of Chapter 2 under "Legal Aid and the CFA"

[178] 'Access Denied: LASPO four years on: Law Society Review'- P24

[179] The Grenfell Tower fire occurred on 14 June, 2017 at the 24-storey Grenfell Tower block of public housing flats in North Kensington, Royal Borough of Kensington and Chelsea, West London. It caused at least 80 deaths and over 70 injuries (source – Wikipedia) https://en.wikipedia.org/wiki/Grenfell_Tower_fire - accessed 3 August, 2017

[180] Paul Rogerson 'News Focus: LASPO four years on' (The Law Society Gazette 3 July, 2017) https://www.lawgazette.co.uk/news-focus/news-focus-laspo-4-years-on-the-law-society-review/5061831.article - accessed 31 July, 2017

[181] Bach Commission – 'The Right to Justice – The final report of the Bach Commission – September, 2017' http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf - accessed 4 December, 2017

In October, 2017 the MOJ announced its review of LASPO from the point of view of both legal aid and litigation funding, both reviews scheduled to be completed by April, 2018[182]. However, the terms of reference for the review were only announced in March, 2018 and the Lord Chancellor is reported as admitting then that "the exercise is unlikely to be completed by the summer [of 2018] as promised"[183] and the date of completion is still now in doubt[184].

Insurance - Insurance in the guise of ATE is highly relevant to the issues of costs and access to justice under discussion but insurers also provide legal expenses insurance in other contexts, namely under "around 17 million motor policies and 15 million household policies" which offer BTE insurance cover[185].

In its press release of 10 December, 1997[186] the Association of British Insurers ("ABI") welcomed the then proposed changes to the Legal Aid system to "abolish legal aid for cases involving money or damages[187], replacing it with no win, no-fee agreements[188], backed by insurance". The ABI was ready to meet the new changes foreseeing that legal expenses insurance, through its diverse products, principally variants of BTE and ATE policies, "will become one of the main means of providing affordable access to justice … to provide as wide-ranging and affordable cover as possible".

---

[182] Millejan – 'LASPO to be reviewed' – (NLJ Vol 167 Issue 7768 29 October, 2017) https://www.newlawjournal.co.uk/content/lawyers-welcome-laspo-review - accessed 16 December, 2017

[183] Monidipa Fouzder – 'LASPO Review: MoJ issues terms of reference to gather evidence' (Law Society Gazette 8 March, 2018) https://www.lawgazette.co.uk/law/laspo-review-moj-issues-terms-of-reference-to-gather-evidence/5065176.article - accessed 27 March, 2018

[184] A further article suggests that in fact the MOJ will not be able to commit to releasing the report this year (2018) although "Lord chancellor David Gauke stressed that he does not want the review to slip into 2019" - Monidipa Fouzder – 'MoJ unable to commit to releasing LASPO report this year' (Law Society Gazette 18 April 2018) https://www.lawgazette.co.uk/law/laspo-review-unlikely-to-be-released-this-year/5065714.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 21 April, 2018

[185] 'Insurance Industry Ready To Meet The Challenge Of Changes To Legal Aid' Association of British Insurers, <www.abi.org.uk/Media/Releases/1997/12/Insurance Industry Ready To_Meet_The_Challenge_Of_Changes To Legal Aid.aspx> - accessed 6 August 2012

[186] Ibid – P3

[187] Effective under S6 and Schd. II of the Access to Justice Act, 1999.

[188] Conditional Fee Agreements were permitted and effectively introduced under s27 of the Access to Justice Act, 1999 by amendment to S58 (by the addition of S58A) of the Courts and Legal Services Act, 1990; Litigation Funding Agreements were permitted and effectively introduced under S28 of the Access to Justice Act, 1999 by amendment to S58 (by the addition of s58B) of the Courts and Legal Services Act, 1990.

Perceptions have changed since 1999 and in its paper "Tackling the Compensation Culture"[189], the ABI commented on the current compensation system, saying that it is "too slow, too expensive and fails too many genuine claimants who have a right to access fair, proper and timely compensation". The ABI put itself firmly behind the Jackson recommendations[190] asserting that they "safeguard access to justice for genuine claimants, ensuring that those who are entitled to compensation receive it quickly and at a proportionate cost."

Costs Shifting and Fixed Costs - In contrast to the costs shifting debate, in part brought to the fore by the introduction of QOCS, Zuckerman has argued that economic efficiency considerations should dictate the level of recoverable costs in every civil claim[191]. Zuckerman would advocate either the US no-cost shifting rule or the German system of fixed recoverable costs, with "the economics of the process taking clear priority over the substance of the legal claim"[192]. He does so on the basis that the English costs system has reached a point where costs are so high that "…facing a full adverse costs order is likely to be a disaster for most ordinary citizens", so much so that litigation by individuals "does not tend to happen these days unless a mechanism can be found to protect the claimant"[193] either legal aid or ATE cover. Zuckerman discusses the merits of fee capping, arguing that it is a mistake to adopt the position that Jackson takes that fixed costs have to be the result of "…a genuine attempt to estimate the actual (reasonable) costs of the winning party" on the grounds that such an estimation would inevitably be made by reference to current practice and current levels of costs[194] these being products of an already flawed system.

He had produced an earlier issues paper which was published by the Woolf Inquiry and referred to in the Woolf Report "discussing a number of mechanisms for controlling costs in advance, 'such as budget setting, fixed fees related to value, fixed fees related to procedural activity or a mixture of the two' "[195] which had

---

[189] 'Tackling the Compensation Culture: The Legal Aid, Sentencing and Punishment of Offenders Bill - Improving the system for all.' Association of British Insurers (September 2011) <www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Motor/Tackling the compensation culture - the legal aid sentencing and punishment of offenders bill.ashx> - accessed 6 August 2012

[190] The Jackson Report

[191] Clare McIvor, 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) Civil Justice Quarterly, 30(4) – P416 - referring to A Zuckerman, "Lord Justice Jackson's Review of Civil Litigation Costs – Preliminary Report (2009)" (2009) 28 Civil Justice Quarterly

[192] Ibid – P416

[193] Adrian Zuckerman 'Lord Justice Jackson's review of civil Litigation Costs - Preliminary Report' (2009) Civil Justice Quarterly 28(4) – P438

[194] Ibid – P441

[195] The Woolf Report – Paras 16 and 17

occasioned a general outcry from the legal profession which Zuckerman put down more to the perceived threat to vested interests than the interests of clients[196]. This runs counter to McIvor's argument that "for as long as the English tort system continues to be based … on the fault principle, economic considerations must play second fiddle to considerations of moral justice"[197]. This she explains by reference to the doctrine of corrective justice[198], rather than a concept of distributive justice[199], which would include considerations such as economic efficiency. While Zuckerman favours a much more pragmatic approach including an economist's view, McIvor argues that "moral justice theory rather than economic efficiency considerations must be allowed to drive both substance and procedure"[200] and that any compromises would have to be "… guided by the principle of the paramountcy of moral justice theory"[201].

This does not however, take account of the fact that the costs rules even in their new form, act as a severe deterrent to the seeking of legal redress for many ordinary people as clearly observed by Zuckerman, (that on the basis that the Jackson reforms have clearly not addressed the criticisms that he levels). In addition if corporate defendants are settling because of fear of reputational damage and/or on costs grounds, rather than in the face of a case against them with strong merits, this would lead to recompense from a defendant who may not actually be a wrongdoer to a complainant who has not necessarily been wronged, (or not in the manner or to the extent alleged), and then the concept of compensation on the premise of a fault-based system becomes highly distorted, if not entirely irrelevant[202].

---

[196] Adrian Zuckerman 'Lord Justice Jackson's review of civil Litigation Costs - Preliminary Report' (2009) Civil Justice Quarterly 28(4) – P445

[197] Clare McIvor, 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) Civil Justice Quarterly, 30(4) – P417

[198] Ernest Weinrib 'Corrective Justice in a Nutshell' (2002) The University of Toronto Law Journal, 52(4), 349 – http://www.jstor.org/discover/10.2307/825933?uid=3738032&uid=2&uid=4&sid=21103379404527 - accessed 3 February 2014 "Corrective justice is the idea that liability reflects the injustice inflicted by one person on another. This idea received its classic formulation in Aristotle's treatment of justice in *Nicomachean Ethics,* Book V, (2-5, 1130a14-1133b28)"

[199]Distributive Justice "a matter of the fair apportionment of the burdens and benefits of risky activities" a concept which "helps to explain and justify the existence of strict liability in tort, something which corrective justice conceptions have difficulty doing." Gregory Keating 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) Southern California Law Review, 74(193). http://papers.ssrn.com/abstract=269347 – accessed 3 February 2014

[200] Clare McIvor, 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) Civil Justice Quarterly, 30(4) - P417

[201] Ibid – P417

[202] Since his original report, on 31 July, 2017, Lord Jackson published his supplemental report on fixed recoverable costs: 'Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs' Lord Jackson (Judiciary of England and Wales 31 July, 2017) https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf - accessed 3 August, 2017 - however, having previously argued

There is voluminous literature on these and associated theoretical aspects but the theoretical context has been taken as a given in this thesis and will not be further explored. Important and interesting though such issues are, they are not being addressed within the focus of this thesis.

Costs Budgeting - The issue of costs management had been explored in Lord Jackson's Preliminary Report[203] and following that a pilot had been set up in Birmingham courts. In Chapter 40 of his Final Report[204], Jackson had concluded that the indications were that whilst none of the cases had then gone to trial, costs budgeting could "(a) assist the parties in making informed settlement decisions and (b) may help the settlement process". Costs budgeting was introduced widely for most cases under a value of £10 million from April 2013[205] Higgins and Zuckerman saw the call by Jackson for fixed recoverable costs for all claims up to £250,000[206] as an admission that costs budgeting was "never likely to be a workable means of avoiding disproportionate costs." However, Master Roberts, a year or so later in a detailed assessment of the efficacy of costs budgeting, concluded that it was "more likely to result in reasonable and proportionate costs and as a consequence access to justice, than fixed recoverable costs"[207]. He also referred to Jackson's own conclusion stated in his Supplemental Report[208] that "… improvements in costs

---

for a fixed costs regime to be introduced for the whole of the Fast Track (i.e. not just personal injury cases as was then the case) , the recommendation was limited to cases of up to £25,000 with the proposal for a grid of recoverable fees, and a new "intermediate track" with "streamlined procedures" for monetary relief cases of "modest complexity" and limiting parties to two experts each in cases up to a value of £100,000 with the trial to be completed within three days. It is therefore of limited relevance to this discussion.

[203] Lord Justice Jackson 'Review of Civil Litigation Costs - Preliminary Report' (May 2009) ISBN: 9780117064034 – TSO – In Chapter 48 Jackson referred to Zuckerman's issues paper as referred to by Lord Woolf in the Woolf Report (see above in this Chapter under Costs Shifting and Fixed Costs) and the fact that Woolf had quoted the reaction to budget setting from the legal profession as being that they would be "unworkable, unfair and likely to be abused by the creation of inflated budgets"; Jackson reported that whilst Woolf had therefore dismissed budgets in favour of a 'Case Management' rather than a 'Costs Management' approach he concluded that they were worthy of further examination.

[204] Lord Justice Jackson 'Review of Civil Litigation Costs - Final Report' (December 2009) ISBN: 9780117063761 - TSO

[205] For most Multi Track Claims, under CPR 3.12 and 3.13 - https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management - accessed 8 June, 2018

[206] Andrew Higgins and Adrian Zuckerman – Editorial 'Lord Justice Briggs' "SWOT" analysis underlines English law's trouble relationship with proportionate costs – C.J.Q. 2017, 36(1), 1-11 – referring to R Jackson "Fixed Costs – the Time Has Come" IPA Annual Lecture, 28 January, 2016

[207] Master Roberts 'Costs budgeting: a mid-term report' J.P.I. Law 2018, 1, 65-71

[208] https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf – p 97 Chapter 6 para 4.4 accessed 8 June, 2018

management, especially –in the last one-and-a-half years) have eliminated a need to develop [Fixed Recoverable Costs] on the scale canvassed in my lecture in January, 2016". Nevertheless, Higgins and Zuckerman's scepticism does seem to some extent justified by the evidence to which they refer of costs management conferring considerable "discretion on the court both in terms of approving budgets and departing from them" which doubtless would lead at least to uncertainty and as they say leading to an expectation of satellite litigation.

Online Solutions - Higgins and Zuckerman acknowledge that disproportionate cost is not the only reason for lack of access to the English civil justice system; they point to a "… large category of cases where the system is inaccessible because it requires litigants to engage in the irrational act of spending a pound or more to get a pound back."[209] They focus in their article on Lord Briggs' recommendation for the introduction of an online court which he made in his report of his Civil Court Structure Review[210], as a means of "delivering legal process at proportionate cost". The online court is currently reported as having a working title of the "Online Solutions Court" ("OCR")[211] intended for claims of up to £25,000 but with "ambitions to go further and wider if it is a success". The report was referring to a speech by the architect of the OCR, Lord Briggs, in which he said that the OCR "would help in instances where the level of dispute is not enough to warrant going through the current process". He continued that "many people who aim to bring small to moderate sized disputes are put off the current system either because of the cost or if they do not regard it as a sensible use of money". Lord Briggs said that "at 'every level' there was a need to make courts more accessible". He said that the court would have a three stage process comprising "triage to decide on the merits of a case, arbitration handled by an assigned case officer and a judicial decision if the case cannot be resolved any other way". In his report, he stated the aim as not being to exclude lawyers but whereas "traditional courts are only truly only accessible by, and intelligible to, lawyers" the OCR should be equally accessible to lawyers and litigants in person. However, this is not, certainly in its current form, likely to be relevant for multi-party actions and even if lawyers are not excluded completely, it is not going to be a provider of business for the solicitor on anything like the potential provided by the scale of multi-party litigation.

Access to Justice, Costs and Funding – Summary - In summary, the fact that litigation is very costly for both sides is clear; equally, legal aid today has been reduced in availability and scope even for the poorest in society. The alternatives of CFAs and DBAs are imperfect and complex and as currently implemented do not

---

[209] Andrew Higgins and Adrian Zuckerman – Editorial 'Lord Justice Briggs' "SWOT" analysis underlines English law's trouble relationship with proportionate costs – C.J.Q. 2017, 36(1), P9

[210] Lord Justice Briggs, 'Civil Court Structure Review: Final Report (July 2016)' - https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf - accessed 8 June, 2018

[211] Max Walters 'Online court to tackle 'disenfranchised class' (The Law Society Gazette 6 July), 2017 https://www.lawgazette.co.uk/law/online-court-to-tackle-disenfranchised-class/5061891.article - accessed 30 July, 2017

necessarily guarantee payment for claimant lawyers. The funding, payment and profitability aspects of litigation therefore become a major focus for claimant lawyers in addition to the actual legal work that they conduct. The temptation to use available means, which might include perhaps unethical behaviour such as presenting their case as somewhat stronger than the actual merits deserve, must therefore be all the more appealing.

SECTION 5 - CHANGES AFFECTING CIVIL JUSTICE AND LEGAL PROFESSIONAL PRACTICE

With regard to the changing face of civil justice, the literature describes the evolution as complex and far reaching; as noted by Abel the English legal profession experienced "extraordinary turmoil in the 1990's"[212] which confirms that at times such changes have been quite rapid. Changes have resulted from a mix of principles and compromises, some of which have been political, some social or philosophical. The changes have affected legal practice and the way legal businesses are conducted, the status of the legal profession and its relationship to society, the availability of funding for litigation and accessibility for litigants to legal remedies and of course aspects of legal costs.

The introduction of GLOs as part of those changes, provides a management system to give access to a legal remedy for large numbers of claimants each with possibly small claims; in one sense providing justice and redress and in another a business opportunity for lawyers. The changes and developments have created or exacerbated at various times issues of imbalances between claimants and defendants and have led to assertions as to disenfranchisement or disadvantage for claimants and inequality of arms between claimants and defendants. All these factors bear on the members of the legal profession who are involved on both sides of group litigation and have effects on what cases they take on and how they manage them. Notwithstanding the relative paucity of literature on access to justice with regard to corporations, there is much discussion in the literature on those aspects of change and development in legal practice that are relevant to those practitioners. As they are the practitioners whose views and experience form the foundation of the research for this thesis, a discussion of that literature is relevant to an understanding of the issues and their impact in the relevant area of legal practice.

Lawyers and Society - The major changes affecting the legal profession and legal and civil procedures have already been introduced. Alongside these changes, the literature describes changes and developments in the way the profession operates. One consequence of that is the emergence of professionals assuming much more the characteristics of entrepreneurial business people. This commercialism is highly relevant to the incentive for lawyers to use media as an adjunct to their conduct of group litigation cases. Simultaneously, or perhaps as a further consequence of those changes and developments, there have been changes in the way lawyers fit into and

[212] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004 – see above Chapter 1, Section 2 Background, 'Media interest in litigation' and below in this Section, 'Changes affecting legal professional practice'

relate to society. In commenting on the use of media by lawyers it is important to do so in the current context of lawyers in society.

In his lecture 'Lawyers and the Public Good: Democracy in Action', Alan Paterson observes that "The most sustained critique of today's profession … relates to the twin threats posed by consumerism and commercialism…"[213]. He observes that "profession" and "professionalism" "are social constructs whose meanings have varied over time, and inevitably reflect the social and economic context of the time".[214] Above, his comments on rising commercialism have been noted along with his reference to Twining's comparison between elements of the profession of lawyer and the trade of plumber[215]. He says, nevertheless, that to view the legal professional as synonymous with "altruistic or 'other related' professional attributes and values[216] … risks perpetuating the false dichotomy between being a profession and being a business."[217] Paterson accepts that "professionalism is a Janus-faced concept: with the profession and the professional required to manage the tension between self-interest and other related values, between benefits and obligations."[218] Paterson does not accept that professionalism can only comprise obligations, (i.e. expertise, access, service, public protection) but must also involve benefits, (i.e. status, reasonable rewards, restricted competition, autonomy) and there is clearly tension between the two parts.[219] Paterson talks of "neo-contractualism" (the contractualist model) rather than "social bargain" when looking at the relationship of the legal profession with society and sees that it clearly "evolves over time" and indeed he says that is "just what the compact has been doing over the last 30 years".[220] He sees the concept of professionalism surviving relatively unchanged from the 1930's to the 1980's then beginning to be "re-

---

[213] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P9

[214] Ibid – P10

[215] The original concept is from an inaugural lecture delivered as Professor of Jurisprudence at Queen's University of Belfast on 18 January, 1967 by Professor William Twining, an abbreviated version of which is published as an article entitled 'Pericles and the Plumber' in the Law Quarterly Review (LQR 83 1967, pp 396-426) – "The image of the lawyer as a plumber is a simple one. 'The Lawyer' is essentially someone who is master of certain specialised knowledge, 'the law' and certain technical skills. … At the other extreme is the image of the lawyers as Pericles-the law-giver, the enlightened policy-maker, the wise judge" (LQR 83 1967, at pp 397-398).

[216] Such he says as "expertise; access; services ethic; public protection: ethical codes and the core values, ombudsmen/complaints commissions, client security/guarantee fund/indemnity insurance." Ibid – P13

[217] Ibid – P14

[218] Ibid – P15

[219] Ibid – P16 and Table 2.1

[220] Ibid – P16

negotiated following de-regulation in the 1980's and 1990's".[221] This he says came about because of a concentration too much on the clients' needs and the extent to which they would be met, rather than focussing on the clients' expectations, the paternalism involved in such an approach being, he says, unacceptable in the late 20th century. He describes the re-negotiation taking the form of a strengthening of the "Obligations" referred to above, and a weakening of the "Benefits", because the impetus for change came from "an unlikely alliance between then Prime Minister Margaret Thatcher and the consumer movement".[222] He does not accept that this is the "demise of professionalism" itself but "only the end of an outdated view of professionalism".

Abel describes the 1990's as "the most tumultuous decade in centuries"[223] for lawyers - "the scrutiny launched by the Green Papers[224] threatened their income, status and autonomy, questioned the value of their work and unsettled the very meaning of their professional identity". Issues at stake were the power of the Bar Council and the Law Society, "cost control (of the legal aid budget) and populism (some voters disliked lawyers even more than [they disliked] Thatcher)". Changes affecting the legal profession had been gradual up to then but Lord Mackay's 1989 Green Papers leading to the Courts and Legal Services Act 1990 caused an "unprecedented rupture"[225], which was followed by Lord Irvine's effort to complete the transformation and radically restructure legal aid in the Access to Justice Act, 1999.

Abel confirms the view that this in itself attracted public attention "some of the public undoubtedly exulted to see lawyers brought low, resenting their wealth, status and power, convinced they obstructed rather than promoted justice". In turn this was naturally attractive to the media: "the media played to this gallery in the belief that lawyer-bashing made good copy. (Journalists and lawyers are often rivals for the mantle of protector of the public interest)"[226].

---

[221] Ibid – P17

[222] Ibid – P17

[223] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004 – Preface

[224] Lord Chancellor's Department, The Work and Organisation of the Legal Profession, Cm. 570 (1989) ("The Legal Profession Paper"); Contingency Fees, Cm. 571 (1989) ("The Contingency Fees Paper"); Conveyancing by Authorised Practitioners, Cm. 572 (1989) ("The Conveyancing Paper") – Source: Roger Smith 'Reports - The Green Papers and Legal Services' (Modern Law Review Volume 52, Issue 4, Version of Record online: 18 Jan 2011) – accessed 21 January, 2019

[225] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004 – P1

[226] Richard Abel, 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004 - Preface

The introduction of the ABS[227] was one of the most significant changes affecting the legal profession in creating the ability for lawyers to operate in new structures rather than in the long tradition of the conventional 'lawyer only' law firm. It is discussed in detail by Khiara and Jones in their article, "The Legal Services Act 2007: the final countdown". By the introduction of ABS, the Legal Services Act, 2007, created a more liberal environment for involvement in law firms by non-solicitors and facilitated the entrance of new participants, such as corporates, banks, insurers and others, into the legal services market.[228]

With the introduction of ABS, clearly different priorities can exist for law firms engaging in the conduct of multi-party claims; different financial structures will lead to different pressures on income and requirements for returns on investment. In addition it is possible that the introduction of ABS will further influence changes on the way lawyers conduct themselves, the way they fit into the society they serve and the way they are perceived by the public.

Prior to October, 2011, the Legal Services Act, 2007 had permitted transitional arrangements under which legal disciplinary practices ('LDPs') were permitted.[229] Under the new regime the role of the LDPs would be scaled back and firms with non-lawyer managers or owners would be required to become 'Licensed Bodies' and in each case the new regulatory regime[230] would apply equally[231].

In addition to commenting on the changes in structure manifesting themselves as changes in the way businesses are operated, Khiara and Jones also noted simultaneous effects of changes in the commercial environment that had a bearing on the entire business community and society generally including the legal services

---

[227] Alternative Business Structures – see Section 5 of Chapter 1

[228] Rachel Khiara and Mark Jones 'The Legal Services Act 2007: the final countdown' (2011) Journal of International Banking and Financial Law, 26.7, 410 http://scholar.google.co.uk/scholar?q=The +Legal+Services+Act+2007%3A+the+final+countdown+&btnG=&hl=en&as_sdt=0%2C5 – accessed 27 January, 2014 – P410

[229] These allowed different types of 'lawyers' (solicitors (including Registered European Lawyers and Registered Foreign Lawyers), barristers, legal executives, trade mark agents, patent attorneys, licensed conveyancers, costs draftsmen and notaries) to practice together through the same entity as well as with restricted non-lawyer participation) - Ibid – P410

[230] Legal Services Board - Regulatory Objectives (2007) http://www.legalservicesboard.org.uk /news_publications/ publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014

[231] Rachel Khiara and Mark Jones 'The Legal Services Act 2007: the final countdown' (2011) Journal of International Banking and Financial Law, 26.7, 410 http://scholar.google.co.uk/scholar?q=The +Legal+Services+Act+2007%3A+the+final+countdown+&btnG=&hl=en&as_sdt=0%2C5 – accessed 27 January, 2014 – P410

sector and its clients.[232] In this regard they identified firstly globalisation[233] and communication[234]; then consolidation[235]. They cite Slater & Gordon (a specialist personal injury firm) as the "most successful example of the consolidator approach in the legal sector" in being the first law firm to float[236] and thereafter acting as a consolidator in the personal injury sector, transforming itself from a small firm to a business "now employing 900 lawyers in 40 offices throughout Australia"[237]. Slater & Gordon were doing less well in 2015 with planned office closures in 2016 from losses in UK and Australian operations[238] and more closures in 2017[239] but as of now following their reorganisation they are very much still in operation.

Finally, they identify commoditisation[240]; to this they say there are only three logical

---

[232] Ibid – P411

[233] "The process enabling financial and investment markets to operate internationally, largely as a result of deregulation and improved communications" - Collins English Dictionary – Online (2013) http://www.collinsdictionary.com/dictionary/ english/globalization - accessed 16 June, 2013

[234] Specifically, the making available of the internet which, contributing to the increase in the ease of communication, gives the "ability to offer a global integrated service and respond to changing market demands" which in turn leads to the ability to outsource work and functions including to distant locations – Ibid P410

[235] Principally vertical "allowing a single business to control its entire product life cycle" and horizontal "the amalgamation of a number of businesses into one" - Ibid – P411

[236] Slater and Gordon is an Australia based company and first floated on the Melbourne Stock Exchange -Source: FT - https://markets.ft.com/data/equities/tearsheet/profile?s=SGH:ASX – accessed 21 January, 2018. There are now 2 UK law firms operating as PLCs – Gateley Plc was the first to list on AIM in 2015, followed by Gordon Dadds Group plc in August 2017; Keystone Law is said to be the third – Alex Berry – 'Keystone Law set to become third UK firm to float' (Legal Week 16 November, 2017 - http://www.legalweek.com/sites/legalweek/2017/11/16/keystone-law-set-to-become-third-uk-firm-to-float/?slreturn=20180021110634 – accessed 21 January, 2018 and Rosenblatt seem set to follow –James Booth 'Exclusive: Rosenblatt appoints advisers as it looks to become the fourth English law firm to float' (City A.M. 29 March, 2018) http://www.cityam.com/283088/exclusive-rosenblatt-appoints-advisers-looks-become-fourth - accessed 29 March, 2018

[237] Khiara and Jones – there are now 61 offices in Australia and 10 in the UK, Slater & Gordon having acquired Russell Jones and Walker in February, 2012 http://www.slatergordon.co.uk/about-us/history/ - accessed 16 June, 2013

[238] John Hyde 'Slater and Gordon plans UK closures after £493m losses' (The Law Society Gazette 29 February, 2016) - https://www.lawgazette.co.uk/practice/slater-and-gordon-plans-uk-closures-after-493m-losses/5053906.article - accessed 19 April, 2018

[239] John Hyde 'Slater and Gordon confirms plans to close four UK offices' - (The Law Society Gazette 29 November, 2017) - https://www.lawgazette.co.uk/practice/slater-and-gordon-confirms-plans-to-close-four-uk-offices/5063905.article - accessed 19 April, 2018

[240] The 'process' whereby something becomes less and less differentiated in the eyes of buyers as a result of which buyers care less and less about who they buy from - Rachel Khiara and Mark Jones 'The Legal Services Act 2007: the final countdown' (2011) Journal of International Banking and

responses "(i) …to differentiate one's product; (ii) …to compete on price on a basis that will still allow for profit; or (iii) get out of the market". They note that in many cases, law firms are "struggling to achieve the first response, loathe to adopt the third response and therefore 'defaulting' to the second response".[241]

It may seem natural that the opportunity for profitable work afforded by acting for claimants in group litigation is therefore likely to be attractive as a boost to business in these times of severely tight margins, as long as the cases offer the right level of return. Equally, it may seem natural for claimant lawyers to want to help these cases to as early a settlement as possible with the assistance of the media, thus maximising return and reducing outlay.

Khiara and Jones saw that these changes may lead to further developments including redistribution of work between law firms[242], to new entrants and non-lawyers[243], and from people to technology[244], and a redistribution of profit as lower charge out rates balance against the pressure on business costs. The most significant change however that they see, is the market now "being served by legal services businesses [like Slater & Gordon] and not just by [traditional] firms of solicitors".[245]

Service to Clients - Regarding service to clients, alongside other changes affecting the legal profession, there has been an evolution in the answer to the question to whom do lawyers owe their obligations, traditionally to their client and to the court. Paterson notes that he is in accord with Cyril Glasser in perceiving that there is a "growing awareness that lawyers have duties to others than their clients and the court".[246] Beginning from the snail in the bottle case[247] Paterson argues that a change has been forced by the consumer society to the centuries old belief that lawyers' obligations were confined to their clients. Over the last century, he says, there has been a trend to extend the legal obligations of lawyers to others, including disappointed beneficiaries under a negligently drafted will, witnesses and even an

---

Financial Law, 26.7, 410 http://scholar.google.co.uk/scholar?q=The+Legal+Services+Act+2007%3A+the+final+countdown+&btnG=&hl=en&as_sdt=0%2C5 – accessed 27 January, 2014 – P412

[241] Ibid – P412

[242] As commoditisation of services becomes more prevalent

[243] Particularly where services are integrated

[244] Ibid – P412

[245] Ibid – P412

[246]Alan Paterson - 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P 41 – referring to Glasser, the Legal Profession in the 1990's – from which "a common public service ideal, however, ridiculous such a notion appears, may be the cement which binds the profession together and gives it a coherence which will enable it to survive".

[247] Donoghue v Stevenson (All ER Rep 1, 1932), Also reported at 1932 SC (HL) 31

opposing party in litigation; this he says represents a re-writing of the contract between the lawyer and client concomitant with the re-writing of the professional contract with society.[248] He goes on to refer to complaints and the possible limits on the freedom of action of a lawyer in the course of representing a client citing as an example the criticism of counsel for the accused in the Milly Dowler trial in 2011 for his treatment of the victim's family in the witness box.[249] The fact that lawyers are now seen as having duties wider than those to the client and the court, impacts on the analysis of the conduct of a part of the profession in regard to the conduct of multi-party actions and the use of the media. Noting the perception in society of a wider range of responsibility for the legal professional, this thesis will take note not only of the expectations originating from the applicable regulations and codes of practice but also where conduct may not be covered by such regulations; however, the overriding concern is to establish whether the particular conduct under examination does or does not have an impact on access to justice for the corporate defendant. Noting that the first of the Regulatory Objectives referred to below[250] is "protecting and promoting the public interest" perhaps it can be questioned whether a claimant lawyer in a group litigation may have an obligation to the corporate defendant as well as to the claimant group.

Regulation of the Legal Profession - In Chapter 1, Section 5[251], the changes in approach to regulation of the legal profession were discussed including the development of "Outcomes Focussed Regulation". It is relevant to this thesis in a variety of ways; not just in regard to regulations as to what lawyers can and cannot or should or should not say about their cases and how they should approach the media, but including all aspects of professional ethics and standards of behaviour with regard to legal business as well as aspects of professional conduct. In addition it is important in an examination such as this that the conduct of lawyers and issues of professionalism be looked at against the backdrop of the prevailing and current regulatory environment. It is one thing to say simply that lawyers should not behave in a particular way because it is prohibited by their professional regulations but another to say lawyers should not behave in a particular way despite the fact that it is not, or is no longer, prohibited by their professional regulations; if that is the case, it should be acknowledged that whilst the behaviour may be criticised, there is not necessarily a breach of any specific regulation.

For many years, the profession was self-regulated but as Paterson suggests, self-regulation became an anachronism[252]. So, over time, there have not only been changes in regulations but also changes in regulators and the basis of regulation. The traditional regulatory model had been self-regulation of the legal profession by the

---

[248] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P43

[249] Ibid – P44

[250] (Legal Services Board, 2007) The eight Regulatory Objectives

[251] 'Changes affecting legal professional practice'

[252] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P29

legal profession. Paterson, refers to "… 'chaps regulating chaps' as the CEO of the English Legal Services Board dubbed it in 2009" and notes that economists have argued that this could be a cloak for "… ineffective disciplinary procedures and anti-competitive practices …" exacerbated by the gap in information between lawyers and "all but the most sophisticated of their business clients."[253]

The response of governments, consumer organisations and competition authorities around the world[254] he says has been "uniformly to move away from self-regulation towards co-regulation – a combination of self-regulation and external regulation – or even beyond".[255] This, he says has tended to over complicate matters causing Sir David Clementi in his report on the Regulatory Framework for the Legal Profession in 2004[256] to popularise the label of "regulatory maze" first given by Ann Abraham, the English Legal Services Ombudsman. Paterson, however, takes the view that whilst the "… haphazard evolution of co-regulation has led to inefficiencies …" making it ineffective, the "… next step after ineffective co-regulation should have been to try effective co-regulation… " rather than moving straight to independent regulation.[257] He sees the advent of ABS[258] as leading to a further development, from individual to entity regulation, which itself would have complexities "since complaints will also continue to be raised against individuals within the firms".[259] Paterson is sceptical about the concomitant move to "principle-based" regulation as a form of "light-touch" or "risk-based" regulation that was "less than spectacularly successful in policing bankers prior to the credit crunch" and sees the move away from the solicitors code of Conduct, 2007 after only three years as "regrettable";[260] and particularly so because the new general principles that are being brought in will "not be able to form the basis of prosecutions without detailed rules being drafted as an overlay to the new principles".[261] This is a point which manifests itself in the

---

[254] Noting that "Exceptionally fragmented markets for legal services, a greatly enhanced tension between commercial pressures and professional integrity and continuing debates as to whether regulation is standing in the way of new business structures and external investment have led the EU, other states, legal professions and societies to re-consider the regulatory framework for the profession and other providers of legal services in a wide range of jurisdictions." – Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P29

[255] Ibid – P29

[256] Ibid – P30 - Referring to D. Clementi, Review of the Regulatory Framework for Legal Services in England and Wales. Final Report (Ministry of Justice, December 2004)

[257] Ibid – P30

[258] Alternative Business Structures – see above 'Changes affecting legal professional practice'

[259] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P31

[260] Ibid – P32

[261] Ibid - P32 – referring to indications by Professor Julia Black of LSE, the "leading expert on principle-based regulation"

SDT disciplinary action in the Leigh Day case referred to above in Section 1 of Chapter 1 and which is further discussed in Chapter 5. In that instance, certainly regarding the conduct of the press conference, there was no clear regulation to be breached, so the breach alleged was perforce described as contrary to a series of concepts and outcomes. Paterson comments further that City firms made clear to the Hunt and Smedley[262] regulation reviews that they "were expecting their own form of risk-based regulation" and considered clearly that "[l]ight touch regulation must not be allowed to get in the way of profit maximisation."[263]

He observes that a lot depends on who defines the risk, "the City firms and the Regulator see it as a risk to the corporate client. Others think there may be more risk to the public good *from* the corporate clients assisted by their legal advisers".[264] He refers to Lord Hunt's observation that the "principles-based approach does not work with individuals who have no principles"[265] but it also fails where there is no specific relevant regulation and where prosecutors have to fall back on concepts like "conduct unbecoming".

Applicable Regulatory Principles – Shortcomings in the "principles-based" approach to regulation are noted in the above section. It was also noted in Chapter 1[266] that with the move to the more "outcome" focus of regulation, the current code of conduct of the SRA[267] has no specific regulation on communications with the media in relation to litigation. However, within the stated principles there are those which are of application to multi-party litigation and the aspects discussed in this thesis. The SRA has 10 Core "Principles" and the BSB has "Duties". These are set out

[262] Lord Hunt, Legal Services Regulation Review (Law society, 2009), (http://www.legalregulationreview.com/site.php?s=1) now available at https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/260035/The-Hunt-Review-of-the-Regulation-of-Legal-Services-NZ-Dec-2009.pdf - accessed 15 June, 2017

[263] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P32

[264] Ibid – P32 – emphasis from the publication

[265] Alan Paterson – P33 referring to Lord Hunt, Legal Services Regulation Review (Law society, 2009), (http://www.legalregulationreview.com/site.php?s=1) now available at https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/260035/The-Hunt-Review-of-the-Regulation-of-Legal-Services-NZ-Dec-2009.pdf - accessed 15 June, 2017 - P38

[266] In Section 8 of Chapter 1 under "Regulation for lawyers"

[267] SRA Handbook – SRA Code of Conduct 2011 Version 19, 1 October, 2017 https://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 14 January, 2018

respectively in the SRA Code of Conduct[268] and the BSB Handbook[269]. The SRA's Core Principles are set out below[270] as are the BSB Core Duties[271].

Boon and Levin have observed that many argue that codes are not an effective means of achieving ethical compliance[272] and they have criticised the fact that professionals engaged in self-regulation "often need to be alerted to their self-serving tendencies when drafting their rules."[273] They point to the fact that there are areas of practice that

> "… clearly involve the public interest [but] where the codes are silent … For example the codes say nothing about whistle-blowing obligations or the needs of clients who have no funds, or run out of funds, to obtain or keep representation … [and] there is virtually nothing on the relationship between lawyers and corporate clients."

---

[268] SRA Code of Conduct - https://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 17 January, 2019

[269] BSB Handbook - https://www.barstandardsboard.org.uk/media/1974165/bsb_handbook_january_2019.pdf - accessed 27 January, 2019

[270] 1.01 uphold the rule of law and the proper administration of justice;
1.02 act with integrity;
1.03 not allow your independence to be compromised;
1.04 act in the best interests of each client;
1.05 provide a proper standard of service to your clients;
1.06 behave in a way that maintains the trust the public places in you and in the provision of legal services;
1.07 comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
1.08 run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
1.09 run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
1.10. protect client money and assets.

[271] CD1You must observe your duty to the court in the administration of justice.
CD2 You must act in the best interests of each client.
CD3 You must act with honesty, and with integrity.
CD4 You must maintain your independence.
CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.
CD6 You must keep the affairs of each client confidential.
CD7 You must provide a competent standard of work and service to each client.
CD8 You must not discriminate unlawfully against any person.
CD9 You must be open and co-operative with your regulators.
CD10 You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.

[272] Andrew Boon and Jennifer Levin 'The Ethics and conduct of Lawyers in England and Wales' (2nd 2008, Hart Publishing) – ISBN 978-1-84113-708-7 – P 109

[273] Ibid P120

Nonetheless, we have already seen how the SRA used the Code in regard to the Al Sweady press conference[274] citing "Improper allegations at Press Conference" under Rule 1.02 (You must act with integrity), Rule 1.03 (You must not allow your independence to be compromised) and Rule 1.06 (You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession). It is arguable there was a contradiction here with Rule 1.04 (You must act in the best interests of each client) but it would be hard to argue that Rule 1.04 gives licence to ride roughshod over the remainder of the rules.

Obligations to Third Parties – Under the heading **"**Service to Clients" (above in this Section) the issue of lawyers' obligations to third parties was introduced. Whilst, as discussed in that section, there may be a growing expansion in the range of lawyers' responsibilities and obligations, it does not seem to be supported in the relevant regulations.

In Chapter 7 of his book "Lawyers' Ethics"[275] Boon examines various types of third party obligation and the mechanisms for dealing with them. He looks at "Liability Controls", for example with regard to liability for negligence that may affect a third party; he looks at "Forum Controls" which relate to the various forums in which lawyers may work or appear; and, finally he looks at "Conduct Controls".

For solicitors there is a specific provision in the 4th Section of the SRA Code of Conduct[276] headed "You and Others" which contains a list of four outcomes related to "others" [277]. Boon points out that the first one (not to take unfair advantage of third parties in either a professional or personal capacity) is the highest duty and is fairly narrow[278]. He notes that the second is quite specific in dealing with "contract races" in the sale of property and the fourth one "is really nothing to do with obligations to third parties"[279]. However, he points out that whilst "none are

---

[274] Referred to in Section 1 of Chapter 1

[275] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1

[276] SRA Code of Conduct - https://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 17 January, 2019

[277] (O)11.1 you do not take unfair advantage of third parties in either your professional or personal capacity;
(O)11.2 you perform all undertakings given by you within an agreed timescale or within a reasonable amount of time;
(O)11.3 where you act for a seller of land, you inform all buyers immediately of the seller's intention to deal with more than one buyer;
(O)11.4 you properly administer oaths, affirmations or declarations where you are authorised to do so.

[278] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P231

[279] Ibid P223

directed towards third parties", of the Core Responsibilities/Duties respectively for solicitors and barristers, "some might be interpreted as carrying responsibilities to third parties, viz, for solicitors:

> 1.01 uphold the rule of law and the proper administration of justice;
> 1.02 act with integrity;
> 1.03 not allow your independence to be compromised;
> 1.04 act in the best interests of each client;
> 1.05 provide a proper standard of service to your clients;
> 1.06 behave in a way that maintains the trust the public places in you and in the provision of legal services;

and for barristers:

> CD1You must observe your duty to the court in the administration of justice.
> CD2 You must act in the best interests of each client.
> CD3 You must act with honesty, and with integrity.
> CD4 You must maintain your independence.
> CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.

Boon concludes that the indicative behaviours for the SRA 4th Section "suggest that these outcomes are intended to have fairly limited scope"[280] and whilst he sees the general obligation not to take unfair advantage of others as the highest duty owed by solicitors to third parties, he says "it seems likely that this is intended to set a lower standard than would be set by an outcome such as 'treating others fairly' or even 'not treating them unfairly'. The indicative behaviours in being narrowly drawn referring only to not taking advantage of third parties' lack of legal knowledge he says "gives very little clue regarding the boundaries of not taking unfair advantage"[281]. He points out that the Bar code of Conduct has "no particular focus on lay third parties"[282].

Boon concludes that "any obligation that a lawyer owes to a third party potentially cuts across the duty owed to clients" and suggests that "It is perhaps for this reason that third party duties do not figure very significantly in codes of conduct"[283].

SECTION 6 - MEDIA AND THE JUDICIAL PROCESS

As noted at the beginning of Chapter 1, the judicial process is for the most part public (hearings in camera do occur but are rare). It is a matter of public interest that the judicial process is conducted publicly but proceedings are also interesting

[280] Ibid

[281] Ibid P225

[282] Ibid

[283] Ibid P231

to the public and to the media. There are many aspects to media coverage of legal proceedings and issues of contempt of court, sub-judice and honest comment have already been raised in Section 1 of Chapter 1. That section also discussed the attraction of GLOs to the media and related issues of professional ethics, and looked ahead to the question of the use of media by and for claimant lawyers. This Section of the Literature Review looks at the literature relevant to those areas.

Multi-Party Actions - In his 1992 publication "Toxic Torts"[284] Pugh acknowledges[285] that many defendants in multi-party actions will be multinational corporations with "a very major reputation to protect"[286]. He observes that "at worst, claims can seriously undermine the financial and moral credibility of the whole company"[287]. He points to the fact that most of the major multi-party actions have arisen since 1989 and identifies as reasons an "enormous increase in public concern regarding environmental pollution"[288], the "development of scientific research regarding understanding the stages of complex illness"[289] and the fact that "political awareness of concerns"[290] has led to an increase in funding for the relevant research. He observes that the cases divide into those that are claimant led and those that are lawyer led and points to the fact that it will be part of the lawyer's job in a lawyer led action, to allay the fears of the action being more about the pursuit of the lawyer's interests than those of the claimants including considerations of ambulance chasing and attempts to profit from the claimants' misfortune. Unsurprisingly perhaps, what he does not focus on is the position of the defendant in the group litigation process, nor does he raise any issue of rights of defendants and how these may be restricted by the methods employed by claimant lawyers in conducting multi-party actions.

Pugh does speculate, albeit clearly on the basis of actual experience in conducting and observing multi-party actions, as to the position of the defendant as far as reacting to the claim is concerned; however only to the extent of asserting that the defendant will often play the "dead bat" of "vigorous denial that there is any substance to the allegations whatsoever"[291].

He quotes as examples British Nuclear Fuels (in regard to allegations regarding leukaemia) and a claim involving Docklands Development Corporation and Olympia

---

[284] Charles Pugh and Martyn Day 'Toxic Torts' (Cameron May in association with the United Kingdom Environmental Law Association, 1992) ISBN 1874698007

[285] Ibid - P1, Introduction

[286] Ibid - P1, Introduction

[287] Ibid – P1, Introduction

[288] Ibid - P3, Introduction

[289] Ibid - P3, Introduction

[290] Ibid - P3, Introduction

[291] Ibid - Chapter 5, Pp 30 to 31

and York (involving claims concerning interference with TV reception). He makes the point that this makes it important for the claimant lawyer to ensure that the claim is "well researched". Interestingly, he states that "A case which the lawyer takes on hoping that the defendant will settle at an early stage, has virtually no chance of success". That seems to be fundamentally at odds with some clear suggestions in the literature (referred to below) that that is precisely what some practitioners do and with success. There is clear indication of activation of public interest by claimant lawyers via the media with the aim of cornering a corporate defendant into an early settlement (prior to the spending of real resources on evidence gathering and scientific work) by, amongst other things, media pressure and threat to reputation.

Pugh observes that whilst a corporate defendant may settle a single personal injury claim following an injury to one employee in a work accident purely based on the economics of fighting the claim, when it comes to multi-party actions, the defendant will not wish, in effect to open the flood gates by making an early settlement. He observes that for example in a group claim alleging illness caused by toxic waste, when the only link between the injured and the company is their misfortune to live in the vicinity of the plant, the corporate body will do all in its power to resist the claims". In that regard, however, it is interesting to note that even Pugh, having made his negative assertion about the folly of hoping for a defendant to settle at an early stage, then goes on to make the contradictory observation that, "…whilst settling may cause the company a lot of [public relations] difficulties, losing the case at trial would be a disaster for them…". On the basis of this and other literature, it is submitted that the fear of reputational damage is one of the real driving forces for the corporation in its approach to settlement and one that claimants are able to exploit by use of media, meaning that in some cases, claimant lawyers may indeed take on cases hoping for early settlement.

Media coverage of proceedings - Lord Taylor noted, in his address to the Commonwealth judges' and Magistrates'' Association Symposium referred to above,[292] the reluctance of democratic governments to interfere with the freedom of the media "… to express views or criticism however extreme …" possibly not only through respect for the general principle, "… but also through fear of provoking the hostility of the press, an ever more influential shaper of public opinion."

In relation to media coverage of proceedings, Lord Taylor notes that the press is restricted by the law of contempt which "exists to protect the integrity of the trial process by preventing disclosure of material which could prejudice the fairness of the proceedings". At first instance "the risk of prosecution for contempt of court usually acts as a sufficient brake on media excesses" although "some newspapers push that risk to the limits". Once there is a conviction and an appeal has been lodged, the "test in the Contempt of Court Act in the UK is that matters may be reported unless their disclosure would cause 'substantial risk of serious prejudice'.

---

[292] Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

The view taken by the House of Lords has been that that threshold is very high "where the tribunal is a bench of professional Appeal Court Judges rather than a jury of lay people". This "has led to a disturbing tendency among some defence lawyers to use the media in the run-up to a major appeal in order to activate public interest and create a climate in which the case is widely perceived in advance of the hearing as a miscarriage of justice."

Lord Taylor believed that the practice of 'activation of public interest' by defence lawyers in criminal appeal cases "is to be deprecated" and that the expression by lawyers in public of personal views about the guilt or innocence of a client, or any other aspect of a case"… may be inconsistent with a lawyer's primary obligation to the court."

Lord Taylor noted that "Whether inspired by one of the parties or whether undertaken by the press on their own initiative" high profile cases have received ever increasing coverage "sometimes saturation coverage" prior to trial to such an extent "… as to create anxieties as to whether a fair trial can take place." In looking at what can be done to curb or counteract media excesses, he nevertheless took the view that despite "many sins and calumnies" being committed in its name, "… freedom of expression must surely be maintained." He stated a hope that editing standards would "… aim at accuracy and fairness …" but recognised that media standards were being driven down by circulation battles. While he was clear in stating the importance of recognising that "… the right of the public to information, and of the media to report and express views freely …" necessarily had to be balanced against "… the right of the parties, and in particular of the defendant in a criminal case, to a fair trial" he made no proposal as to how to address the issue. He recognised the danger raised by "… irresponsible or merely excessive reporting of the judicial process or in advance of it …" as being that the legal process itself may become impossible and warned that " 'trial by television' then ceases to be an admonitory slogan and becomes a real and dangerous threat to the Rule of Law."

There are important differences between the position of a defendant in criminal proceeding and a corporate defendant in a civil claim. The corporate defendant in a civil claim does not face the threat of deprivation of liberty and does not require the degree of protection afforded to a defendant in a criminal trial but some of the differences, not least the difference in standard of proof make the position easier for claimants. Notwithstanding those differences, Lord Taylor's observations on the behaviour of the media and the legal profession are of direct relevance to the question of the rights of the corporate defendant. These days it is not just a question of "trial by television" but trial across the whole media spectrum, including social media. It may well be that one threat to the rule of law could be that press and media coverage activated by claimant lawyers might result in prejudice to a corporate defendant in seeking to exercise a right of access to justice or could amount to an effective denial of that right if the risk of exercising it is perceived as too great.

Lawyers' Comments to the Media - The issue of Lawyers' Comments to the Media was referred by the then Lord Chancellor, Lord Mackay, to his Advisory Committee on Legal Education and Conduct by letter dated 6th February, 1996 which is annexed

to the Committee's Report[293]. The basis of the reference was that the Law Society had declined to look at the issue. In the letter to Lord Steyn, who chaired the Committee, the Lord Chancellor referred to an increasing number of cases, in which instructing solicitors had given interviews to the media "… in which they expressed their own personal opinion as to the merits of their clients' cases, or upon issues of fact which are likely to be in issue in the proceedings" He noted that the practice appeared to be growing and that "Its effect can only be prejudicial to the integrity of the trial".

The focus was on criminal trials but the invitation was to consider the issue for all court activity. In line with the more prescriptive approach to regulation at that time, the Advisory Committee noted that "… a lawyer should be free to make for his client any statement the client would be at liberty to make for himself …"[294] and to "… make any statement of incontrovertible fact ((e.g. about how long it has taken the prosecution to take a certain step)"[295] but that there was "… an overriding public interest …" in the prohibition of the public expression of lawyers' personal opinions on the merits of their clients' cases during the course of the proceedings including from very outset of the laying of a charge to the disposal of any appeal[296].

The committee recommended the adoption of rules by the Law Society that lawyers should not say or do anything which might prejudice the outcome of the proceedings and should be prohibited from expressing their personal opinions on the merits of their clients' cases during the course of proceedings. It was recommended that the same rules should apply to Solicitor Advocates (for whom there was a separate Code of Conduct at the time[297]). It was further recommended that the Bar Council should examine its current rule (with a view to clarification and examination as to why it should not adopt similar rules) and that the Law Society and the Bar Council should consider whether the same rules proposed for criminal proceedings should apply to civil proceedings as well.

In the current era of "Outcomes Focussed Regulation" such specific rules have no place, which given the foresight in examining the issue as long ago as 1996 is to be regretted; the change in approach has arguably had the effect of stultifying the development of what could have been an extremely important area of professional

---

[293] Lord Chancellors' Advisory Committee on Legal Education and Conduct (ACLEC) 'Lawyers' Comments to the Media' (May 1997) ("The ACLEC Report) – Lord Chancellor's Department

[294] The ACLEC Report – Paragraph 12 of Summary of Conclusions and Recommendations and Paragraph 78 of the Report

[295] Ibid – Paragraph 13 of Summary of Conclusions and Recommendations and Paragraph 80 of the Report

[296] Ibid – Paragraph 14 of Summary of Conclusions and Recommendations and Paragraph 82 of the Report

[297] The separate code was merged with the SRA Code of Conduct under the SRA Handbook in 2007 when the Solicitors Code of Conduct 2007 came into force – confirmed by letter from SRA (Professional Ethics) dated 7 April, 2015.

discipline. It is interesting to note here the observation made in the ACLEC Report that:

> "The law of contempt does not constitute an effective control on the media, the police or the defence, especially in the pre-trial stage of criminal proceedings, either with regard to prejudice to the outcome of judicial proceedings, or to public recognition of the principle that issues in criminal cases are to be determined exclusively by the courts …"[298],

which supports the observations of Stapely[299] and others referred to above in Section 1 of this Chapter under "Access to Justice and the Changing Face of Civil Justice".

Media as a weapon - The press and media were a particular focus of attention with the Leveson Inquiry reporting at the end of 2012[300]. Whilst the focus of that Inquiry was very much on the culture and practice and ethics of the press, more important in this thesis is the culture, practice and ethics of the legal profession in their "use" of the press when introducing major pieces of high stakes Group Litigation.

The use of media as a weapon and as a means of bringing pressure on a corporate defendant may be more obvious if the media attention that is sought is in the geographical area where the corporate defendant operates or is headquartered as distinct from the location where the claim arose and/or where claimants and potential claimants are situated. One example of this is the reporting in the UK of the claims against BP in the High Court in London alleging negligence in regard to an oil spill in Columbia on behalf of 73 Columbian farmers. The referenced Guardian report[301] contains direct quotes from the lawyers involved as to the allegations of BP's failures leading to the spill and of BP's subsequent failure to accept "responsibility for" the spill. More recently an article appeared in the same publication[302] referring to claims by more than 100 Columbian farmers against BP alleging negligence in the construction of the Ocensa pipeline causing serious damage to land, crops and animals and again containing direct quotes from the lawyers (Leigh Day). Whether those accusations were true or false, the issue to be looked at is the extent to which the media attention in such cases can have the

---

[298] The ACLEC (Advisory Committee on Legal Education and Conduct) Report – Paragraph 2 of Summary of Conclusions and Recommendations and Paragraph 19 of the Report.

[299] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X

[300] Lord Leveson 'An Inquiry into the Culture, Practices and Ethics of the Press – Report' (November, 2012) ("The Leveson Report") - The Stationery Office Ltd., ISBN 9780102981063

[301] Diane Taylor 'BP oil spill: Colombian farmers sue for negligence' (The Guardian 11 January, 2011) http://www.theguardian.com/environment/2011/jan/11/bp-oil-spill-colombian-farmers - accessed 2 December, 2014

[302] Diane Taylor 'Colombian farmers sue BP in British court' (The Guardian 15 October, 2014) http://www.theguardian.com/global-development/2014/oct/15/colombian-farmers-sue-bp-british-court - accessed 2 December, 2014

effect of exerting pressure on the defendant prior to the presentation and testing of the evidence in court on a trial of the merits.

There is a question to be asked as to the extent to which such media usage and activation occurs with the knowledge and agreement of the clients or with little or no involvement from them and, as a matter of professional ethics whether the consent of clients is required as to the activation of media. However, in the second of the Guardian articles referred to above, there is also a quotation from two of the claimants so it may be assumed in that case at least that those two clients not only consented but were willing participants.

Activation of the media on behalf of claimants adds a further dimension to "settlement blackmail" various types of which have been referred to above. Christopher Hodges (in "From class actions to collective redress: a revolution in approach to compensation")[303] refers to this in regard to the north-American class action system, observing that that system can lead to "excess and abuse", where business interests argue that the "significant financial incentives in the system produce injustice". He cites as examples expensive battles over certification of classes and even "where a large number of individual claims are brought seriatim [separately] ... the costs and risks of defending a claim are too high and it is commercially cheaper to settle (the "settlement blackmail" issue)".

The press and media, may be attracted by being handed a campaign on a plate, often without needing to do any costly, independent research and especially one where they are able to take a "popular" angle against "big business". Such media attention, whether fair or unfair, correct or incorrect, is bound to affect the reputation of any defendant, corporate or otherwise, however, it is not something that just happens.

Legal campaigning - It is right to distinguish campaigning to achieve a desired result in a specific legal action such as a specific multi-party action, from other campaigning undertaken by lawyers which may also involve press activation. Many lawyers involve themselves with campaigns to achieve changes in legislation or in policies or practices and it is clear that this is a right and opportunity protected by Article 10 ECHR[304]. Katie Ghose describes this as the result of many lawyers working 'downstream' with people who "are on the receiving end of policies and practices … imposed by national or local government or other decision-making bodies" wanting to "go 'upriver' and discover what it is that's causing the problems and how it might

[303] Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28

[304] See above references to the McLibel case in Section 2 of Chapter 1 and e.g. the reference quoted to the effect that under Article 10 ECHR "in a democratic society even small and informal campaign groups … had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest…"

be changed."[305] She describes that sort of campaigning as being about "… going 'upriver' and seeing what might be done to stem the tide, clean the water or do whatever it is that would have a positive impact on those further down".[306] There is a wealth of literature on "cause lawyering", including Scheingold's 'The Politics of Rights'[307], in which lawyers might both make political statements and take legal cases on behalf of groups[308]. To this has been added more recently in the US literature, legal scholarly analysis of "Movement Lawyering" for example Cummings' eponymous research paper[309]. The abstract at the beginning of the paper describes the literature as refocusing attention on fundamental questions about the lawyer's role in social change, thereby offering a "crucial opportunity to jumpstart a contemporary dialogue". Cummings defines 'Movement Lawyering' as:

> "…the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define"[310].

In his introduction, Cummings refers to scepticism "about the power of law by itself to transform society without concurrent political organizing and long-term efforts in support of implementation and norm change" in order to achieve sustainable social change. The paper makes many references to the use of media and examples include using media strategies to publicize the legal exploitation of immigrant workers[311], the use of social media to change the terms of debate regarding the 'Dreamers'[312], and the use of social media as a "powerful tool to advance the cause" in the

---

[305] Katie Ghose 'Beyond the Courtroom – A Lawyer's Guide to Campaigning' (Legal Action Group 2005) ISBN 10 190330735X – P3

[306] Ibid – P3

[307] Stuart Scheingold 'the politics of Rights: lawyers, public policy and political change'(2nd Edn The University of Michigan Press) – ISBN-13 978-0-472-03005-7

[308] Scheingold in 'the politics of Rights' characterises such lawyers as "the activist bar" considering the description a 'public interest' (those lawyers who he says are often thought of, although not uniformly, in relation to consumer, environmental and poverty law, and guided by not so much by public interest as by a sense of personal responsibility to act in furtherance of goals and values in which they believe) as being inadequate to describe lawyers who may divide their time between activist work and conventional practice, who do not comprise a homogenous or even a distinct group with no consensus between them as to either methods or goals.

[309] Scott Cummings 'Movement Lawyering' – UCLA Public Law & Legal theory Research Paper Series – Research Paper No. 17-43 – 2017 Univ. of Illinois Law Review 1645 (2017) 1645-1732

[310] Ibid – Part IV P1690

[311] Ibid – Part II P1659

[312] The "Dreamers" - undocumented youth who claimed the right to legalization as immigrants – Ibid – Part III P1683

"#Blacklivesmatter" campaign[313]. He also describes 'Movement Lawyering' as the resounding arrival of a new wave of progressive social movement politics, one that seeks "… to fuse aggressive protest actions, savvy media strategy, and credible insider politics into a powerful new challenge to inequality"[314] and similarly he discusses the "strategic use of litigation" and the "importance of media strategies" to "shift public support towards…causes"[315]. He further discusses what he calls "integrated advocacy"[316] as a strategy to "maximize political pressure and transform public opinion".

The type of campaigning/activism that Scheingold, Ghose and Cummings discuss is very different from the type of media activation being considered in this thesis. That is not to say that some claimant lawyers involved in activation of media in group litigation such as discussed in this thesis are not motivated by cause or by public interest but the campaigning activation of media under discussion is clearly for a different purpose. The purposes under discussion in this thesis are those that are primarily motivated as a means to achieving the success of the claim, with any wider purpose, for example the aim of long term change of the behaviour of corporate big business, being secondary; whereas, the purposes of campaigning in cause, movement, or public interest lawyering are primarily motivated as a means of bringing about legal, social and/or political change, as is eloquently described in Cummings' definition of movement lawyering, referred to above.

Pugh and Day et al, as we have seen, give advice on the cultivation of media[317] and Pugh again (in "Toxic Torts"[318]) makes it clear that claimant lawyers actively foster relationships with the media and intentionally use the media as a weapon in their armoury. This includes the aim of creating a high press profile to bring pressure to bear on corporate defendants. It is clear from this and other comments that use of media by lawyers is not casual or coincidental; it is deliberate, planned and the result of cultivated relationships. Neil Rose in the Law Society's Gazette stresses the most important aspect of contact with the press as being relationships and speaks of the need to build on relationships[319] if there is to be any value to the legal practitioner. Absent such relationships, other consultants can be used. In his article,

---

[313] Ibid – Part III P1683

[314] Ibid – Part III P1684

[315] Ibid – Part III P1685

[316] Where "lawyers combine modes of advocacy----litigation, policy reform, transactional work, organizing support, media relations, and community education" – Ibid Part IV B P1696

[317] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[318] Charles Pugh and Martyn Day 'Toxic Torts' (Cameron May in association with the United Kingdom Environmental Law Association, 1992) ISBN 1874698007

[319] Neil Rose 'How to navigate a two-way street with the Fourth Estate' (2005) Law Society's Gazette, 102(28), 28

"Media Handling", Toby Craig, a PR consultant writing in "Counsel" Magazine[320] explains the role of PR consultants in handling media and in particular in assisting counsel who are concerned about their own freedoms at that time to communicate with the press. "Communications professionals" he says, "should be able to find creative ways to promote their client's message which are compatible with the legal process". He recognises bluntly that "Fear of negative publicity can be a significant factor leading to early settlement". "Litigation" he says, "…can destroy reputations, regardless of the merits of the claim involved"[321]. He further points out that sensational reporting of a claimant's case, before even a defence has been put, is often given more extensive coverage than the defence story or the eventual outcome of the case.

For his article, Craig received contributions from Frances Gibb, Legal Editor of The Times and Joshua Rozenberg, then Legal Editor of the Daily Telegraph; the former talked of her use for comment of the same lawyers again and again, once she finds those who can be readily contacted and are ready to express themselves clearly and briefly; the latter of his appreciation for those of counsel who assist by e.g. the provision of skeleton arguments for the press. This suggests strongly that lawyers who wish to "activate" media for the purposes of their clients are therefore those who have worked at cultivating the necessary relationships in order to command the respect and attention of the journalists with whom they wish to work.

The tendency of the media to over simplify and sensationalise is well noted and perhaps this works in favour of those wishing to use the media strategically alongside litigation. In her book focussing on the relationship of law and media[322] Lieve Gies describes "tensions characterising the relationship between law and the media"[323]. She points to "judicial and academic concerns" being in keeping with widely-held ideas about media culture, that "… the media distort, influence and act as a poor proxy for a proper understanding of what law is about… ". She also points to examples of criticism of journalists by Lords Justice Phillips and Falconer "… for their inaccurate and sensationalist reporting of sentencing issues…". She observes that "…to the trained legal eye, information in the media tends to be simplistic, misleading and superficial. More emotion than fact…"[324]. However, the sense from those discussing use of the media for strategic ends alongside litigation[325] is that this may be one area where such "tensions" are turned into synergy because the emotional and simplistic approach taken by the media is very suitable to be used

[320] Toby Craig - 'Media Handling' (Counsel - May 2008) P 6–8)

[321] Ibid

[322] Lieve Gies 'Law and the Media: the future of an uneasy relationship' (GlassHouse – Routledge-Cavendish 2008) ISBN 9781904385332

[323] Ibid – P3

[324] Ibid – P2

[325] E.g. Levick & Smith as referred to in Section 6 of Chapter 1 and with particular regard to the Daimler/Chrysler research they refer to.

and exploited by claimant lawyers engaged in activating media as part of a campaign in support of group litigation.

In his book "In the Court of Public Opinion – Winning Strategies for Litigation Communications"[326] Haggerty talks of the practice of "litigation public relations" as being still relatively new, much as Beke does, as referred to in Section 1 of this Chapter. However, Haggerty is approaching the issue very much as a practitioner in the US using litigation PR as a weapon in litigation and his book which is written as a guide to litigators, communications professionals and corporate clients as to how to approach and use litigation PR as such weapon in parallel with the litigation process. He views the issue from what he calls the "… intersection of media, public opinion, and the legal process" and advises his readers that "the world is your courtroom, and public opinion, more often than not, your judge and jury."[327] He summarizes "winning" as:

- "…convincing a plaintiff (or prosecutor, or… regulator) not to file a lawsuit in the first place;

- …convincing a defendant that you mean business and that despite the defendant's outsized resources, this case is just not going to go away;

- …getting the other side to realize that the damage to their reputation will be great, and therefore settlement ought to be top-of mind;

- …preventing copycat lawsuits from other parties looking to capitalize on a company's travails;

- …millions of dollars at the settlement table, depending on how weakened a party is by the damage to its business and reputation;

- Tailoring a settlement in ways that limit the public relations or public opinion damage."[328]

He asks "Can public relations be instrumental in bringing about the resolutions described here?" and answers it "You bet. In fact I believe that effective communications techniques can be the deciding factor."[329]

Beke's observation as to the difference in aims in litigation PR between the US and England has already been noted above in Section 1 of this Chapter, but it is nonetheless important to note such a strong belief in the power of litigation PR as a

---

[326] James F. Haggerty, 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7 – Preface - P xi

[327] Ibid - Preface Pp xii and xiii

[328] Ibid - Preface Pp xiii and xiv

[329] Ibid - Preface P xiv

weapon in litigation as is stated, and indeed practised, by Haggerty, particularly in regard to the comments on the impact on the defendant's reputation. As a practitioner, Haggerty is not concerned only about claimants though, and, as demonstrated by his last point above, he is also concerned for defendant clients and at points in the book laments their lack of use of litigation PR; he makes the balanced point that "… while you can have a victory in the court of public opinion without a victory in the courtroom…" that legal victory will not count for much if, "… in the process you sacrifice reputation, corporate character, and all the other elements that make up an organization's goodwill in the marketplace."

Whether one accepts the concept of a "court of public opinion" or not[330] it has to be accepted that there are those who look to the media as a legitimate weapon to be used alongside a court process, and a very powerful weapon at that.

SECTION 7 - ACTIVATION OF MEDIA BY THE LEGAL PROFESSION

There seems to be little direct reference in the literature to the effect of media and media activation on defendant corporations involved in group litigation and as to whether such attention is prejudicial or could lead to a potential deprivation of or limitation on a right of access to justice. This is despite the fact that it is clear that the influence of media on defendants is clearly acknowledged: for example by Day et al in their writings on their practises in regard to the media relating to their legal practice[331], Beke talks about the issue of "pressure leverage" against defendants[332], Stapely discusses the "considerable latitude to the news media in reporting the background to a sensational case"[333] and, as is discussed in Section 2 above, the House of Lords in their unanimous decision in Sunday Times v The UK[334] found that:

> "…the projected article was avowedly written with the purpose and object of arousing public sympathy with, and support for, the claims that were being made and in order to bring pressure upon Distillers to pay more."

Whilst the relevance of media on the position of corporate defendants is therefore

---

[330] See above in Section 1 of Chapter 1, it is considered here to be a "forum" of public opinion perhaps but certainly not a court, being devoid of the rules, protections and safeguards which are at the core of the operations of a court of law, and therefore not a legitimate place for the resolution of any kind of litigated dispute.

[331] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[332] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0 – P 24

[333] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X – P54

[334] (1979-1980) 2 EHRR 245 – 26 April, 1979 http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015

apparent in the literature, there seems to be none that specifically addresses the themes of this thesis. However, there is literature describing and discussing the role and use of media and media professionals in regard to litigation and that literature is discussed in this Section.

In the chapter on "The Media" in their book Multi-Party Actions, Martyn Day, Paul Balan and Geraldine McCool assert that as "multi-party actions attract a great deal of media attention", "Plaintiffs' [Claimants'] lawyers need to ensure that this attention operates primarily to the benefit of the plaintiffs [claimants] rather than the defendants"[335]. They recite "a whole series of reasons why it may be important to be in touch with the media in the early days of a case", including advertising in the newspapers for clients, using the media to let other potential claimants know about the action, the media playing a part in suggesting to the [then] Legal Aid Board that this is a case of great public importance such that it looks favourably on the action [although this is of less significance now] and in ensuring that the judiciary are aware of the issues by the time it comes to trial. Most significantly they say that the media can play a part in "… encouraging the defendants to come to a decision that this is a case that is too weak to fight and that it is better to have an early settlement than have continued adverse publicity".

They observe that "Almost without exception, the media invariably start off on the side of the plaintiffs [claimants]"[336] and include "general tips" on dealing with the media and advice on how to "cultivate contacts in the media." Whilst emphasising that the reason for media contact should be to benefit the clients' rather than the lawyers' interests, they say that "In general terms, the plaintiffs' [claimants'] lawyers should see the media as an asset to be worked with for the benefit of the client"[337].

In similar vein Levick and Smith writing in a US context note the result of research conducted by Daimler/Chrysler "about how the consuming public was likely to react in a crisis situation with *no* facts[338] yet still confronted with the question, 'Is the company guilty or innocent?' ". The result they say was "sobering":

> "…more than two-thirds of consumers presumed companies to be guilty simply because they were accused, the absence of facts notwithstanding. It is the people who buy your products that are most predisposed to find you guilty as charged."[339]

---

[335] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[336] Ibid – P87

[337] Ibid – P99

[338] Emphasis from the publication.

[339] Richard S Levick and Larry Smith 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526 – Introduction Pxviii

Beke is forthright in describing the use of the media generally in litigation (not necessarily group litigation): "for the claimant it was about pressure; for the defendant it was about disaffirming allegations"[340]. He compares the situation with use of media in litigation in the US pointing out that the use of media in the English jurisdiction is "not about influencing the outcome of the trial from the judge and jury perspective as it may be in the US" but says that when a PR professional is working with the Claimant's side, his or her work is "usually about pressure leverage"[341]. Levick and Smith note that "On the defense side, lawyers who understand the impact of public opinion, and are capable of affecting it, are rare, especially when their clients are corporations", whereas "The plaintiffs' bar on the other hand views communications as a veritable full employment act. [They]… are masterful media manipulators and they're getting better at it all the time".[342]

Commenting on the power of the media Beke refers to the "Agenda Setting Theory" saying that the press has the ability to give special matters prominent attention and that they set the key areas [of the agenda]; "the media does not tell people what to think about the issues but what issues they should be thinking about"[343]. Bacquet too talks about the "agenda-setting function" of the media[344] and Lord Taylor referred to the press as a "shaper of public opinion" [345] .

Coffey adds to this discussion clearly stating his view that the agenda can in fact be set by those who originate the story or activate the media. As he says, "The court

---

[340] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0

[341] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0 - P 24

[342] Richard S Levick and Larry Smith 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526 – Introduction Pxviii

[343] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0 - P7 referring to McCombs M. E, Shaw D, L (1972) The Agenda Setting Function of Mass Media - Public Opin Q 36: 176-187)

[344] Sylvie Bacquet – 'Press Coverage of the Second Intifada (September 200 – April 2002) – Impressions of media bias' , Saarbrucken, 2011 - VDM Verlag Dr Mueller GmbH & Co KG - ISBN 978-3-639-32178-4 - at P 104 she commented that although it was not possible to prove that press coverage was responsible for changing the course of events, "… this study has demonstrated that in some circumstances the media can have an agenda-setting function"

[345] Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

of public opinion is always in session … and whoever spins the narrative controls the story – and often its consequences."[346]

In discussing "Media" all forms of media are included: newspapers, radio and TV are dominant currently but also included are trade press and journals and increasingly social media. The circulation of printed newspapers is falling but the bigger titles are available on line and TV stations also have an online presence. It is known that a number of the more serious titles and stations are also used as a source for other smaller and sometimes international titles and stations so their coverage is a lot wider than just their own readership, listeners or viewers. As advertisers target their audiences more and more specifically by reference to on-line presence and through social media this may add an interesting and powerful dynamic to the activation and use of media by legal professionals.

Social media has distinct and some may say unfortunate characteristics that lend themselves particularly to campaigning and in that respect a number of interesting observations are being made.

Katie Glass in the Sunday Times commenting on the #MeToo social media hashtag[347] refers to "The lynch-mob mentality of Twitter" allowing no time for nuance or context. She makes the point that questions that should be answered by a jury are laid open to online gossip. Whereas in court, sexual assault cases are decided on the basis of evidence, due process and a presumption of innocence, it is troubling that in the type of "… trial by Twitter spawned by #MeToo … the law is dispensed with. Now if someone says you are a rapist online, you are."[348]

An Economist leading article gives several comments on social media that are relevant to note:

> "The use of social media does not cause division so much as amplify it"[349]
>
> "…because of how they [social media platforms] work, they wield extraordinary influence."[350]

---

[346] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100 – P35

[347] "… a two-word hashtag used on social media in October 2017 to denounce sexual assault and harassment, in the wake of sexual misconduct allegations against Harvey Weinstein" – Wikipedia https://en.wikipedia.org/wiki/Me_Too_(hashtag) – accessed 12/01/18

[348] Katie Glass "This #MeToo stampede threatens to bury the most serious sex allegations" (Sunday Times 22/10/17) - https://www.thetimes.co.uk/article/katie-glass-this-metoo-stampede-threatens-to-bury-the-most-serious-sex-allegations-xqzjzr7r8 - accessed 12/11/2017

[349] The Economist (unattributed) –"Do Social Media Threaten Democracy" (The Economist – Leading Article November 4th-10th 2017)

[350] Ibid

> "Everyone who has scrolled through Facebook knows how, instead of imparting wisdom, the system dishes out compulsive stuff that tends to reinforce people's biases"[351]
>
> "Because each side hears time and again that the other lot are good for nothing but lying, bad faith and slander, the system has even less room for empathy. Because people are sucked into a maelstrom of pettiness, scandal and outrage, they lose sight of what matters for the society they share."[352]
>
> "In Myanmar, where Facebook is the main source of news for many, it has deepened the hatred of the Rohingya, victims of ethnic cleansing."[353]

In a recent Guardian article, Paul Lewis quotes James Williams, a former Google strategist who has looked in detail at the role and dynamics of social media in what he calls the "attention economy" which he says is "… set up to promote a phenomenon like Trump who is masterly at grabbing and retaining the attention of supporters and critics alike, of exploiting or creating outrage …". Williams had said that this was not only distorting the way we view politics but, over time, may be changing the way we think, making us less rational and more impulsive' and he spoke of the habituation of people to a 'perpetual cognitive style of outrage'[354] Referring to all forms of media, Levick and Smith note that in todays' world "Judgement [by those exposed to media] is nearly instantaneous, often unforgiving, and increasingly permanent".[355]

Summary and Conclusion

Section 1 of Chapter 2 looked at the discussion on access to justice, which notwithstanding that it has primarily been thought of in relation to complainants, is equally applicable to corporate defendants and there is no reason why the concept should not apply to both sides. This is certainly supportable as the discussion under "Access to Justice, ECHR and the Corporation" illustrated. Section 2 looked into the issue of the relative power between claimant and defendant and in particular how the dynamic can be said to change where multi-party litigation is involved. Section 3 looked at the issue of access to justice related to collective or multi-party actions parading the literature showing the evolution of the concept and what has been written on the first example of an opt-out group procedure in England and Wales

---

[351] Ibid

[352] Ibid

[353] Ibid

[354] Paul Lewis – " 'Our minds can be hijacked': the tech insiders who fear a smartphone dystopia" (The Guardian 6/10/2017) - https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia - accessed 12/11/2017

[355] Richard S Levick and Larry Smith 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526 – Introduction Pxviii

under the Consumer Rights Act, 2015. Section 4 looked at writings on access to justice and costs which seems to be in a pendulum swing either side of the pragmatic economic solutions discussed and proposed by Zuckerman. As such the issue of costs is somewhat awry. In combination with the current lack of any workable legal aid structure, the current litigation funding situation and the undoubted problems with access to justice brought about since LASPO and the Jackson reforms, it would seem that fertile ground for the manipulation of process by those conducting group litigation has been produced. Section 5 looked at literature on the changes affecting civil justice and the legal profession and in particular at the rapidity and breadth of some of those changes.

From the literature referred to in Sections 6 and 7 of this Chapter, it is clear that use of media as a weapon in litigation and particularly multi-party litigation is well known. The literature suggests that it can be a very effective weapon and may become even more so in the age of social media and digital communication. It is questionable whether the use of media to broadcast allegations that are not yet evidenced in this way is ethical and it is equally questionable whether the modern approach of outcomes focussed regulation for the legal profession in England and Wales is equipped to address the issue. As was discussed in Section 5, the current approach certainly does not seem to have added certainty to the ethical position and it is regrettable that the conclusions of the ACLEC report have gone unheeded.

The research for this thesis was conducted with the background of themes raised and discussed in the literature review very much in mind. The next Chapter, Chapter 3 Methodology, describes how the research was conducted having first discussed the supporting theory for the approaches taken in the research.

CHAPTER 3

METHODOLOGY

SECTION 1 – THEMES FOR RESEARCH AND RESEARCH QUESTIONS

As described in Chapter 1, (Introduction) this thesis sets out to see if defendants may potentially be denied a right of access to justice as a consequence of considering themselves forced into settlement by reason of fear of adverse publicity, particularly where publicity and media attention has been courted and activated by those interested in and/or connected with a particular action.

In the Introduction, the potential strength of media influence was discussed in relation to some recent well-known examples involving Prince Andrew and lawyer Alan Dershowitz, and the cases of the "Coughing Major" and Peter Cruddas. Illustrations were also given of media coverage in some group litigation cases. These included the Columbian farmers' case against BP and Taylor's Guardian article[1] which is an example of press coverage in UK where the defendant corporation is headquartered and where the trial takes place as distinct from coverage where the events took place and where people affected by them are. Examples were also given of coverage including strong statements of allegations sometimes appearing as factual statements long before trial of any substantive issues in 3 GLO cases.

In Chapter 2[2] the tension was identified between the importance of justice being seen to be done (along with rights of freedom of expression) which dictate that media must be allowed access to proceedings and to publish accounts of them, and the right to a fair trial which could be prejudiced by that same media attention and publication. However, much of the media attention focussed on group litigation, seen from some of the examples referred to above, is pre-trial at which point there is little of a judicial process to be reported; there is therefore no requirement for reports in the media to see that justice is being done and the danger is that if publicity and consequent damage to reputation were to drive a defendant to a settlement prior to trial, there will be no judicial process. That being the case, far from the media demonstrating that justice in a legal sense is being done, it will effectively have prevented the normal procedural course of evidence being weighed and challenged fairly within the court system.

In addition, it was noted in Chapter 2 that there is a difference between media reports resulting from activation of media and those that the media may make of its own volition from a journalist's or a publication's wish to report on a particular case

[1] Diane Taylor 'BP oil spill: Colombian farmers sue for negligence' (The Guardian 11 January, 2011) http://www.theguardian.com/environment/2011/jan/11/bp-oil-spill-colombian-farmers - accessed 2 December, 2014

[2] Literature Review – Section 5 - Media and the Judicial Process

or issue. Reporting on cases and litigation by media acting on its own volition may well have a powerful impact on the reputation of a defendant, particularly if the journalist or the publication has a crusading agenda of its own, but it is the activation of media by those involved in the litigation that is of more interest in this thesis, in part because it can relate to professional standards and in part because a sustained and managed activation by professionals with intimate knowledge of a case can have an enormous impact on the reputation of a defendant. As discussed in Chapter 2[3], Lord Taylor considered that:

> "One very real danger raised by irresponsible or merely excessive reporting of the judicial process *or in advance of it*[4] is that the process itself may become impossible; 'trial by television' then ceases to be an admonitory slogan and becomes a real and dangerous threat to the Rule of Law."[5]

Although he was discussing media activity in criminal actions it is equally applicable to civil cases and this presents a joint issue of a threat to the rule of law and a question of professional standards. The issues to be considered in the research therefore include a requirement to distinguish between the reporting by media in the normal course and that which is the result of activation by professionals involved in a case.

In Chapter 1[6] the question of settlement being potentially less damaging for a corporate defendant than the endurance of reputational damage was raised; and in Chapter 2[7], this was extended to question whether reputational pressure was itself a form of "settlement blackmail". Craig[8] recognised bluntly that "Fear of negative publicity can be a significant factor leading to early settlement". "Litigation" he says,

> "…can destroy reputations, regardless of the merits of the claim involved. Sensational reporting of a claimant's case, before a defence has been put, is often covered more extensively than the defence story or the eventual outcome of the case."

These issues link to the questions of professional standards referred to above and which were discussed in some detail in sections 2 and 3 of Chapter 1 against the

---

[3] Section 5 – Media and the Judicial Process

[4] Emphasis added

[5] Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

[6] Introduction - General Introduction

[7] Literature Review – Section 5 - Media and the Judicial Process

[8] Toby Craig, 'Media Handling' 2008 (Counsel - May 2008) P 6–8

backdrop of the recent changes to the funding systems, regulation and codes of conduct of the legal professions.

The central theme of access to justice and its importance as being "vital to a functioning democracy and the rule of law"[9] was discussed at length in Chapter 1[10] including Emberland's exposition[11] of corporations being included in those having fundamental rights under Article 13 ECHR and thus companies also enjoying the right of access to justice. It is concluded that it is therefore legitimate to be looking in the research at the issue of whether that right of a corporation to access to justice is impacted adversely or at all by the efforts of members of the legal profession to activate media in furtherance of their cases when there is no or little opportunity for response by defendants and perhaps in part motivated by their own financial and business model.

The six research questions arising from the theme of the thesis, as developed in the introduction and the literature review therefore are:

1. to establish whether there is media activation in connection with group litigation and if so, who are the activators and to what purpose are they activating the media;

2. can activated media be distinguished from media attention at the instigation of the journalist or the publication;

3. what, if any, impact does it have on corporate defendants – does it affect reputation;

4. is the impact of media on reputation an influential factor in the settle or fight decision for corporate defendants facing group litigation;

5. if so, does it does it represent an influence in the legal process which has, or could have, the effect of preventing access to justice for such defendants; and

6. can it lead to settlement on terms that do not properly reflect the potential strength of the defendant's case?

[9] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530

[10] Introduction – Access to Justice

[11] Marius Emberland 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7 - Pvii, Preface

As observed in Chapter 1[12] with reference to Sunday Times v The UK[13], whilst the relevance of media on corporate defendants is to some extent apparent in the literature, there seems to be no literature that specifically analyses or discusses the impact of media activation on defendant corporations in group litigation cases. Despite searches no analysis was found of issues of access to justice for corporations and neither was there any analysis of the impact of media attention in so far as rights of access to justice may be concerned. That being the case, it was not possible to conduct this research by looking only at what others had written or found about this issue. Answering the research questions needed direct information, where available, from legal professionals involved in the practice of group litigation as claimant and defendant representatives.

The option of approaching the claimants themselves was considered but rejected on the basis that (a) the claimants in multiple group actions would be too numerous to make an approach practical; (b) their identities, other than those few named as lead claimants, are confidential; (c) as group members, as distinct from litigants in unitary actions, they are very much more remote from the running of their cases. As it turned out from the responses, this was a practical decision because it became clear that clients rarely get involved with media activation and are not the leaders of it, one of the reasons being that group actions tend to be lawyer led. For example here is the view of one of the QC respondents:

> "In the action groups, clients are often the members; however it is relatively rare for the client to get involved [in media activation] in a group litigation where there is a solicitor and an action group involved, but they do do it. Some go to the press; some the press seek out e.g. if there was a car liability problem, the press might want to interview claimants. Most commonly activation is without the clients and it isn't client driven. Clients would be willing participants but many of [the cases] are lawyer led. Lawyers lead the cases and seek out the clients. Lawyers drive the action – they may have been approached by people with grievances but the claim will be the lawyers'."[14]

It was decided to approach respondents who were practising lawyers both on the claimant and defence side and to the extent possible in-house lawyers working inside the corporate defendants themselves.

As the research would involve approaching qualified professionals, the Solicitors Regulation Authority and the Bar Standards Board were notified of the intention to conduct the research, the background and area of the research and, in outline, the nature and substance of the questions that may be asked. It was essential that the ethical arrangements and codes of the respective professional bodies should be addressed before approaching the professional subjects for information. The SRA

---

[12] Introduction – Access to Justice and the Changing Face of Civil Justice

[13](1979-1980) 2 EHRR 245 – 26 April, 1979 http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015

[14] Respondent 1 - QC

and the BSB raised no objections and were clear about the expressed need for compliance with professional ethical standards, for example with regard to client confidentiality.[15]

SECTION 2 – APPROACH TO RESEARCH

The research conducted was qualitative research using aspects of grounded theory. Qualitative, rather than quantitative research was appropriate as put by Kirk and Miller because "Technically, a 'qualitative observation' identifies the presence or absence of something in contrast to 'quantitative observation' which involves measuring the degree to which some feature is present. To identify something the observer must know what qualifies as that thing, which involves measuring the degree to which some feature is present"[16]. The purpose of this research was to establish if certain behaviours and methods regarding media are actually used in the conduct of group litigation, not to measure the extent or frequency of such use. While Kirk and Miller state that qualitative research "does not imply a commitment to innumeracy" they say that "The accumulated wisdom of the academic tradition of qualitative research is largely a formal distillation of sophisticated techniques employed by all sorts of professionals – adventurers, detectives, journalists, spies – to find out things about people."[17] Bryman similarly states that "the distinctiveness of qualitative research does not reside solely in the absence of numbers."[18] As Webley puts it: "It is not possible to measure the frequency of a 'social fact' until it has been identified and defined"[19]; so the first step is to identify the "whether".

Qualitative methods involving interviewing participants necessarily introduces subjective and interpretive elements arising from the researcher's reaction to or understanding of what has been said by the participants and although Webley is clear that "data [in qualitative research] may be derived from the research participants … directly (in the form of quotes) or via the researcher in the form of his or her reaction to or understanding of what was said …"[20], it is important to make the difference clear. Qualitative methods rely on inductive reasoning (rather than the deductive reasoning used in quantitative methods) – rather than starting with "a general hypothesis posed before the data collection begins … inductive reasoning

---

[15] Letter from SRA (Professional Ethics) Ref: R/PE/AG/Guidance/001576-14 dated 28 April, 2014; email from BSB (Director, Bar Standards Board) Ref: 001576-14 dated 22 May, 2014

[16] Jeremy Kirk and Marc Miller 'Reliability and Validity in Qualitative Research' (Sage University Paper series on Qualitative Research Methods, Volume 1 1986) ISBN 0-8039-2470-4 – P9

[17] Ibid – P 10

[18] Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 – P367

[19] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H, (eds) 'The Oxford Handbook of Empirical Legal Research', (OUP 2010) ISBN: 9780199542475 Chapter 38 927-950 – P2

[20] Ibid - P2

seeks to derive general themes or patterns from the data collected as the research progresses."[21] As Bryman puts it, one feature of qualitative research is "an inductive view of the relationship between theory and research, whereby the former is generated out of the latter."[22]

Bryman is critical of descriptions of qualitative research by comparison with quantitative research "A potential problem with this tactic is that it means that qualitative research ends up being addressed in terms of what quantitative research is not".[23] In addition to the "inductive view" mentioned above, he adds two other "noteworthy" features:

> "an epistemological[24] position described as interpretivist, meaning that … the stress is on understanding of the social world through an examination of the interpretation of that world by its participants; an ontological[25] position described as constructionist, which implies that social properties are outcomes of the interactions between individuals, rather than phenomena 'out there' and separate from those involved in its construction."[26]

Kirk and Miller assert that "Qualitative research is socially concerned, cosmopolitan, and, above all, objective."[27] "Like natural science, qualitative social research is pluralistic" in that "A variety of models may be applied to the same object for different purposes"[28] and they give examples of man being "an object of certain mass to an engineer, a bundle of neuroses to the psychologist, a walking pharmacy to the biochemist…" and so on.

The data for this research took the form of notes of interviews during the pilot stage (referred to below) and of verbatim transcripts of interviews that had been recorded (with the participants' permission) by the researcher in all but two of the interviews post the pilot stage (the two exceptions were for one participant who preferred not to be recorded and another who preferred to respond to the questions initially in questionnaire form).

---

[21] Ibid - P3

[22] Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 – P366

[23] Ibid – P377

[24] Epistemology - The theory of knowledge, especially with regard to its methods, validity, and scope, and the distinction between justified belief and opinion - https://en.oxforddictionaries.com /definition/epistemology - accessed 27 January, 2018

[25] Ontology - The branch of metaphysics dealing with the nature of being - https://en.oxforddictionaries.com/definition/ontology - accessed 27 January, 2018

[26] Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 – P376

[27] Jeremy Kirk and Marc Miller 'Reliability and Validity in Qualitative Research' (Sage University Paper series on Qualitative Research Methods, Volume 1 1986) ISBN 0-8039-2470-4 – P10

[28] Ibid - P12

In describing "qualitative fieldstudy" Lofland et al point out that the researchers are featured "as observers and participants in the lives of the people being studied", the researcher striving to be "a participant and a witness to the lives of others". They give as a "central reason" for "observing and/or participating in the lives of others … that a great many aspects of social life can be seen, felt, and analytically articulated only in this manner … the researcher becomes the primary instrument or medium through which the research is conducted"[29]. Webley refers to Lofland[30] as arguing from a positivist approach usually associated with quantitative methods that:

> "…the role of a qualitative researcher is not to interject one's own view but instead to describe accurately another's experience so as to elicit what the research participant believes or understands, and to provide quotes as evidence, rather than to judge through one's own lens what that person must think or feel".

However, Webley points out that an interpretivist approach would hold that "in order to really learn from others, one may need to interact with them rather than to remain entirely distanced" in other words not stripping away the context, and she points out that an interpretivist researcher "would argue that her analysis will always reflect her own frame of reference, because no-one is capable of being objective … [and that]:

> "to deny this is to deny the opportunity for the researcher to uncover and to critique her own understanding, which is an important part of interpretivist research."[31]

The interviews for this research were conducted as semi-structured interviews. According to Bryman, "The interview is probably the most widely employed method in qualitative research"[32] largely because of its flexibility and "although interviewing, the transcription of interviews, and the analysis of transcripts are all very time-consuming, … they can be more readily accommodated into researchers' personal lives"[33].

Bryman goes on to comment that the two main types of interview used in qualitative

---

[29] John Lofland, David Snow, Leon Anderson and Lyn Lofland 'Analyzing Social Settings – A guide to Qualitative Observation and Analysis' 4th edn (Thomson, Wadsworth 2006) ISBN 0-534-52861-9

[30] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H, (eds) 'The Oxford Handbook of Empirical Legal Research', (OUP 2010) ISBN: 9780199542475 Chapter 38 927-950 - P5 – referring to Lofland 'Analyzing Social Settings– A guide to Qualitative Observation and Analysis' Wadsworth 1971 L.C. Cat. Card No. 74-149015

[31] Ibid - Chapter 38 927-950 - P5

[32] Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 – P436

[33] Ibid – P436

research are the unstructured and the semi-structured interview. He notes that qualitative interviewing:

> "…tends to be flexible, responding to the direction in which interviewees take the interview and perhaps adjusting the emphases in the research as a result of significant issues that emerge in the course of interviews. By contrast, quantitative interviews are typically inflexible, because of the need to standardize the way in which each interviewee is dealt with."[34]

In the interviews for this research the interviewees were permitted flexibility to ramble and to go off at tangents because this, as Bryman notes "gives insight into what the interviewee sees as relevant and important"[35]. As will be discussed below, the responses of interviewees, particularly at the pilot stage, had some direct impact on the direction that this research took.

The interviews were semi-structured; that is they were conducted on the basis of a Topic Guide with as Bryman suggests a "list of questions or fairly specific topics to be covered …. But the interviewee [having] a great deal of leeway in how to reply".[36] The Topic Guides are included at Addendum 3. The primary Topic Guide was used for lawyers and that was also used as a rough guide for the PR interviews; then separate ones were developed for journalists and judges. Bryman further notes that

> "Questions may not follow on exactly in the way outlined on the schedule; Questions that are not included in the guide may be asked as the interviewer picks up on things said by interviewees. But by and large, all the questions will be asked and a similar wording will be used from interviewee to interviewee."[37]

Lofland describes the "unstructured interview" or "intensive interviewing with an interview guide" as having as its object:

> "…not to elicit choices between alternative answers to preformed questions but, rather, to elicit from the interviewee what he considers important questions relative to a given topic, his descriptions of some situations being explored. Its object is to carry on a guided conversation and to elicit rich, detailed materials that can be used in qualitative analysis … to find out what kinds of things are happening, rather than to determine the frequency of predetermined kinds of things that the researcher already believes can happen."[38]

---

[34] Ibid – P437

[35] Ibid– P 437

[36] Ibid - P438

[37] IbidP438

[38] John Lofland 'Analyzing Social Settings – A guide to Qualitative Observation and Analysis' Wadsworth 1971 L.C. Cat. Card No. 74-149015 – P76

He states that the "qualitative analyst seeks to provide an explicit rendering of the structure, order, and patterns found among a set of participants"[39] maintaining that the "strong suit of the qualitative researcher is his ability to provide an orderly presentation of rich, descriptive detail."[40] Within the bounds of striving to achieve consistency, a flexible approach was used but often with some aspects of interviews developed from those that had gone before.

Aspects of grounded theory used in the research included theoretical sampling, coding and theoretical saturation. A "crucial characteristic" of theoretical sampling as explained by Bryman is "an ongoing process rather than a distinct and single stage" because it is the data as collected and coded that dictates where the process goes next; "Moreover" he says, "it is important to realize that it is not just the people that are the objects of sampling … but also events and contexts as well."[41] Coding he says is "the key process in grounded theory, whereby data are broken down into component parts, which are given names", however, he continues that in grounded theory coding is:

> "…somewhat more tentative than in relation to the generation of quantitative data, where there is a tendency to think in terms of data and codes as very fixed. Coding in qualitative data analysis tends to be in a constant state of potential revision and fluidity ... The data are treated as potential indicators of concepts and the indicators are constantly compared to see what concepts they best fit."[42]

As a type of theoretical sampling, the coding used was flexible and unspecific, not requiring data to be fitted into pre-allocated codes but classified according to what the data contained and revealed. In the event answers soon began to form into a recognisable pattern.

Theoretical saturation describes the process of continuation of sampling "until a category has been saturated with data"[43] in other words that the further data is not disclosing new information. Bryman relates this to:

> "… two phases in grounded theory: the coding of data (implying that you reach a point where there is no further point in reviewing your data to see how well they fit with our concepts or categories) and the collection of data (implying that, once a concept or category has been developed, you may wish to continue collecting data … but then reach a point where new data are no longer

[39] Ibid – P7

[40] Ibid – P59

[41] Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 - Pp415-416

[42] Ibid - P542

[43] Ibid - P416

> illuminating the concept."[44]

Webley explains that grounded theory:

> "…seeks to collect and analyse data in such a way as to generate theory from data sources using a constant comparative method. [Requiring] the researcher to revisit the descriptions of phenomena to examine whether they have continued validity or need amendment"[45] which she says "… appears to be broadly positivist … however, the way in which the researcher extracts data from the sources appears to have more in common with interpretivism."

For this research this attribute of grounded theory was particularly valuable in that whilst the conclusions are fundamentally drawn from direct quotes, the conclusions require some knowledge of context and some interpretation. It was noted during the process that, if the claimant side are using media as a weapon in the litigation and the defendant side trying to avoid the damage that unwarranted media attention may do, it is possible that answers on some topics from some subjects might be more coy; or not as full and frank as on other topics.

Grounded theory was also appropriate in "developing theory as the research proceeds rather than testing a hypothesis posited in advance…" and because it "… follows the natural pattern of human enquiry"[46]. As Webley summarises "… grounded theory provides a framework for the whole research process and not simply a means of extracting data. It is a theory of research, a data collection method, a mode of analysis and a way of generating theory."[47]

The research design was relatively fluid so that changing conditions could be met. In particular, a pilot was carried out using the first version of a questionnaire[48] and that pilot led to the development of topic guides[49] for the conduct of semi-structured discussions (usually by 'phone) rather than the more rigid format of a questionnaire to be completed without the researcher being present.

In regard to sampling, the objective was as Webley summarises to interview:

> "…a sufficient number of people [and observe] sufficient instances in order to capture a spectrum of viewpoints and experiences … to be able to report

---

[44] Ibid - P542

[45] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H, (eds) 'The Oxford Handbook of Empirical Legal Research', (OUP 2010) ISBN: 9780199542475 Chapter 38 927-950 - P5

[46] Ibid - P15

[47] Ibid - P15

[48] See Appendix 4

[49] See Appendix 5

> findings that report the nuances of experience rather than a narrow perspective."[50]

For the main research, coupled with a review of the GLOs from the Court system, a snowball sampling technique was used (beginning with a small number of participants known to the researcher and asking them to provide details of others who would make useful and knowledgeable participants, and then interviewing those others and asking them in turn for further recommendations). The background to that decision and an account of the research is described more fully below in Section 6.

It is recognised that use of the snowball sampling technique could possibly lead to selection bias. Selection bias, according to Collier and Mahoney[51],

> "… is commonly understood as occurring when some form of selection process in either the design of the study or the real-world phenomena under investigation results in inferences that suffer from systematic error"[52].

In this case, the use of the snowballing technique could have resulted in some element of bias, possibly by limiting the group of those approached as potential respondents and thereby affecting the outcome of the research. However, looking at the list of GLOs on the MOJ website[53] and at the names of the law firms most commonly appearing there it was apparent that, notwithstanding that the research involved a relatively small sample, all the major players had been included. In addition, in talking to those firms as to who else they regularly see participating in multi-party litigation, whether under GLOs or not, and to whom they would recommend approaching for the purposes of the research it was again apparent that those firms and individuals referred to had been or were to be included. As it was a condition of the interviews that no individual person, firm or company would be named in the thesis[54] it is not possible to confirm this by naming the firms and individuals concerned but the researcher is satisfied that it was so. It seemed that lawyers working in the field were as ready to recommend involving 'worthy opponents' as they were competitors and that thereby a satisfactory sample of lawyers on both the claimant and defence side had been assembled. In effect, the snowballing technique was used to gain initial access but once gained, it led to including all of the major players in multi-party litigation.

---

[50] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H, (eds) 'The Oxford Handbook of Empirical Legal Research', (OUP 2010) ISBN: 9780199542475 Chapter 38 927-950 - P7

[51] David Collier and James Mahoney (1996). Insights and Pitfalls: Selection Bias in Qualitative Research. World Politics, 49(1), 56-91. doi:10.1353/wp.1996.0023

[52] Ibid P59

[53] https://www.gov.uk/guidance/group-litigation-orders - last accessed 19 March, 2019

[54] See below Section 7 "Conduct of Main Research" under "Interviews"

SECTION 3 – RESPONDENTS AND INITIAL APPROACH

To answer the questions posed for the research and particularly to find the information pertaining to the activation of media by lawyers it was necessary to approach lawyers involved in group litigation on the claimant side. The basis for the decisions on whom to approach is set out in Sections 4 and 6 below. To ascertain the impact, effect and reaction to any such activation it would be necessary to approach lawyers involved in group litigation on the defence side. The respondents would therefore include practising lawyers (solicitors and barristers), in house counsel, and litigation PR professionals. At the outset, it was also considered that journalists and judges might be usefully included.

With the involvement of competing and doubtless very busy professionals, coordinating and organising a focus group was impractical. Initially, a questionnaire[55] was piloted and sent to respondents inviting them individually to complete and return it.

Three of the respondents for the pilot study were an in-house lawyer, a QC and a PR professional who were all known personally and professionally to the researcher but with whom the questions on the questionnaire had not previously been discussed and with one solicitor who was introduced to the researcher by another professional colleague. Respondents for the main research were intended to be identified from the list of GLOs on the MOJ website[56] (but that decision had to be later adjusted - see Section 6 below).

SECTION 4 – PILOT STUDY

The pilot study was conducted using a preliminary draft of the questionnaire. The questionnaire was sent to one former in house lawyer from a major multinational company that had been involved in group litigation, a senior QC with experience of group litigation from the claimant and the defendant side, a litigation solicitor with experience in handling group litigation and a PR professional who was also qualified as a solicitor with long experience of litigation related PR. All but the solicitor agreed to participate. The Solicitor was so concerned about client confidentiality that he declined to participate at all, even at the level of a discussion of general experience instead of answering the questionnaire with its case specific questions.
The others preferred to work through the questionnaire in discussion in an interview rather than completing and returning it. An introductory discussion with the QC illuminated the perceived difficulties of client confidentiality. Although the questionnaire had made it clear that no specific client cases should be referred to in order to preserve client confidentiality, the professional concern was wider. Firstly the QC would not want to reveal any possibility of confidential client information without the client's permission, and questions as to how and on what basis a decision to settle or fight was made might do just that. Secondly, with a long

[55] Attached as Addendum 2

[56] https://www.gov.uk/guidance/group-litigation-orders - last accessed 19 March, 2019

experience of GLO work, to approach each client for permission to discuss the case would simply be too big an undertaking. Thirdly such an approach would in all probability be misguided in that the client may well not wish it to be known if indeed a settlement had been prompted by fear of the impact of media pressure and the QC would not want to put himself in the position of proposing such a step. It was therefore clarified that discussion would be at a much more general level based on experience over time. Although the answers might not then be tied to specific cases, this would provide a much better overview which in any event was more appropriate for the purpose of the enquiry necessary for this research.

Aside from clearly showing a reluctance on the part of the respondents to talk about actual cases and to name cases and clients, the initial results from the pilot were encouraging and provided responses that were of value. The pilot also served to set the scene well for the main study.

SECTION 5 - LESSONS FROM PILOT STUDY

The lessons taken from the initial pilot study were:

(a) there was a reluctance to complete a questionnaire and a preference to respond by interview; and

(b) there was high concern not to infringe client confidentiality and therefore little willingness to discuss specific cases and no agreement to be quoted on them.

These lessons were used to revise the approach. Further research would be conducted by interview (in person or by phone) on the basis of a semi-structured Topic Guide[57] which was compiled in place of the questionnaire to provide the required answers but on the basis of signposts from the responses in the initial interviews. This in turn would enable an in vivo coding approach to be used in assessing the results of the main research. Ironically, many of the respondents did in fact refer to specific cases even though it was made clear to them that it was not necessary to do so.

SECTION 6 - PREPARATION FOR MAIN RESEARCH

Before conducting the main research the scope and the subjects needed to be decided. Identifying the actual group litigation cases from the MOJ website listing of GLOs was not possible because the MOJ list only the names of the orders and they seldom include the name of either claimant or defendant. The MOJ list starts from 2001 and currently lists 105 GLOs[58]. Most of the entries have the name of a lead law firm, invariably the lead claimant firm but no other firms; often there is more than

[57] Attached as Addendum 3

[58] See Appendix 2

one claimant firm. Enquiries including letters, emails and a phone discussion with the QBD listing office[59] disclosed that there was no list in existence which matches the MOJ's GLO list to the cases by name as they would appear in a court listing or a law report. This made it extremely difficult to identify defendants, other claimant law firms and defendant law firms from public sources. Each GLO name, as it appeared in the then published MOJ list, was therefore searched on the internet for more general information (from the media and from law firm websites) about the GLO and a list compiled from information found, including the name of the defendant where possible, the names of lawyers and law firms involved and sometimes the case names. The information found in this manner was not always reliable or complete and was always inconsistent. It was not possible to identify even the claimant lawyers involved in all of the cases and it was very hard to identify those involved on the defence side; the information became thinner the older the cases.

The interviews were begun with personal contacts with the aim of reaching more respondents by using 'snowball' or 'chain' sampling as discussed above. These were conducted gradually while work on the internet searches was conducted. From the internet searches, a list of the principal available information was compiled including the identity of defendants and the lawyers involved. It was accepted that not all defendant identities would be found and not all lawyers would necessarily be identified. However, while using the snowball approach, reference was also made to the information gleaned from the internet searches and the listing of lead law firms on the MOJ site and this ensured that all of those firms (and at least one of the individual lawyers from those firms whose names had been found) could be approached. This was easier in the case of firms dealing with claimant work because they tend to specialise in certain types of group litigation work. It was much harder on the defence side, since large corporate entities tended to use a range of lawyers for their general work and might use any one of these to defend a specific set of allegations. They would not necessarily be specialists in the field of defending such cases. Nevertheless using the snowball approach among the defence lawyers themselves and also asking the claimant lawyers who were interviewed and those in-house lawyers interviewed, it was concluded that together with the interviews of a number of counsel working both on claimant and defence side, an appropriate sample could be found for the research which would include representation of the main participants in multi-party litigation at law firm and counsel level.

A list of respondents to approach was prepared largely based on a combination of recommendation and the lists made from the Ministry of Justice GLO list and approaches by email were commenced. Some met with acceptances, some with refusal to participate and some with silence. On the whole the 'snowball' or 'chain' sampling proved to be the most effective, largely because it was easy to say in introduction "so and so suggested that you would make a valuable contribution to the research" which straight away disclosed a personal introduction and gave a much greater chance of acceptance. Towards the end of the interviews with the lawyers, interviews were conducted with further litigation PR professionals two journalists

[59] Phone discussion with Mr Edward Boswell 29 April, 2015; letter to Mr Edward Boswell, 29th April, 2015 and response June, 2015

and a judge. The PR professional interviews were very informative and were probably the most frank, although it is noted that they may have had an interest in underscoring their contribution to the achievement of any settlement through their assistance with the media.

The journalist interviews did not seem to provide much additional information adding to the process of answering the research questions. They did however, provide insight as to information on GLOs originating in the main from claimant side lawyers with an interest in publicising their cases and prosecuting their campaigns. The interview with the judge, whilst interesting, did not contribute to answering the research questions; to an extent that was always going to be the case in looking at media activation as a driver towards settlement; it was only going to be in a very small minority of cases that settlement would occur during a substantive trial and even then the judge, unless asked to approve a settlement (e.g. for minors), would have little involvement. One insurer was also interviewed but as to factual matters only. The in-house lawyers were by far the most difficult to approach. They were hard to find and hard to find contact details for and even on personal recommendations were less than forthcoming. Those that were successfully approached were however, helpful.

The interview details were as follows:

Respondent	**Approached**	**No Response**	**Declined/never fixed**	**Interviewed**
Claimant lawyers	19	8	3	8
Defence lawyers	11	3	1	7
Counsel	4	1	-	3
Journalists	4	-	2	2
Judges	1	-	-	1
Litigation PR	5	-	2	3
In-House	22	12	6	4
Insurance	1	-	-	1
Total	**64**	**24**	**14**	**29**

SECTION 7 – CONDUCT OF MAIN RESEARCH

Interviews - Most of the interviews were conducted by ’phone, with a few face to face and one initially by email with a follow-up in person.

The decision to use ’phone calls was in reality that of the respondents not the researcher. It was the way the respondents in the main were prepared to

participate. They demonstrated quite clearly, except in one case, that they were not ready to complete and return a questionnaire and it was equally clear that trying to get space in busy lawyers' diaries for face to face discussions was in the main going to be very difficult. It was possible to do a small number of the in-house lawyer interviews that way and all three of the PR interviews were carried out face-to-face but for private practice lawyers only one opted for a face to face meeting. In some cases, even getting appointments for 'phone calls was difficult and in two cases where the calls had to be interrupted, it took a long time to get the second part arranged. However, when on the calls the lawyers appeared to be very open and the discussions were interesting and informative. True, it was not possible to see and attempt to read facial expressions on the calls but it seemed that it was in the circumstances the most effective way to get the interviews done. Silences, and inflexion and the manner of reacting to questions also helped the researcher to gain an impression of when the interviewee was being fulsome in answer, and when they were being more guarded.

For each of the interviews, including by 'phone and in person, permission was sought at the outset to record the interview as a way of hastening the interview process without having to keep pausing for note taking and having a more complete record of what was said. The 'ground rules' were then set out viz: the recordings would only be for the purpose of transcribing and would not be used for any other purpose; direct quotations from the interviews may be used but if they were, they would not be attributed to named individuals; no individual person, firm or company would be named in the thesis and they would not be asked to name cases or clients; to the extent that they did, such names would remain in the recordings and the notes taken from them but would not appear in the thesis or its Appendices. The notes of the interviews would be seen only by the writer and the supervisor. In keeping with the theory relevant to qualitative sampling discussed above in Section 2 of this Chapter data collection was continued to the point where it was considered that "new data are no longer illuminating the concept"[60]. In other words more of the same began to be generated in terms of answers with no new angles or concepts being added. For example, all respondents were consistent in saying that their cases had attracted media attention and they were all (except in the case discussed in the interview with the judge) clear that the media coverage included activated media. All were clear, including both claimant and defendant side respondents and the journalists and the PR respondents, that the activation was for the most part by claimant solicitors.

Whilst there was variation in the purposes attributed to media activation, the various different purposes began to fall under clear headings, typically and consistently including pressure on the defendant, recruitment of clients to augment the cohort and the search for evidence or corroboration. A consistency was also reached on the issue of whether there was engagement by the defendant in the media battle, with respondents invariably saying that the defendants shied away from engagement. On the issue of accuracy in the media there was a mixture but with the options of either "accurate" or "inaccurate" further interviews, once the

[60] See above, Section 2 of this Chapter: Alan Bryman – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9 - P542

variety of responses had been achieved, were unlikely to have given any further clarity. Similarly, responses on the substantive issue as to whether activated media attention had impacted a decision to settle, were consistently within a range which became fairly quickly established. Some would not accept that activated media would have such an impact but it could be said of the defendant side among those that "they would say that wouldn't they". Others, more on the claimant side were clear that it could have such an effect and activation was always worth trying in case it did and the PR respondents were among those who were quite adamant that activated media certainly can and does affect such decisions, which is supported by the relevant literature.

Data Analysis Matrix - A data analysis matrix was prepared using quotations from interviews; as it is appended to the thesis[61] the initials of respondents in its key have been removed as have any specific references to cases, firms, people or companies. This is the origin of the convention used below of using the letters "CCC" for cases, "FFF" for firms, "SS" for solicitors, "JJ" for journalists and "PR" for PR professionals. Although respondents were not asked to name cases, many of them did, which was actually of great assistance in the course of the discussions, however, in keeping with the ground rules, these case names have not found their way into the write up. In preparing the Data Analysis Matrix, the type of work and experience of the respondents is summarized in a key but the identification of the respondent is not included.

Respondents - All of the respondents whose information and observations appear in the Matrix at Appendix 6 and whose interviews are used in the discussion section below, were people of considerable experience in group litigation cases and had been specifically asked about their group litigation experiences as opposed to their experience with unitary actions. With claimant solicitors this was actually much clearer and they invariably had more experience of group actions than the defence side. This is because there are firms and individual solicitors who specialise in running group claims for claimants and most of the claimant side solicitors interviewed fell into that category. Conversely on the defence side it was harder to track down solicitors with group litigation experience; it seems less common for solicitors to specialise in the defence of group actions with the exception of one of the respondents whose main practice has been acting for insurance companies in group claims involving child abuse; nevertheless the defence solicitors interviewed mostly had experience in excess of 5 group actions.

Group Actions - Many of the group actions discussed by the respondents were not actually under formal group litigation orders; in fact the minority were. This was partly because some spoke about cases and experience which pre-dated the current GLO regime and partly because GLO's had not always been applied for. Nevertheless it was considered that the absence of a formal GLO did not in any way invalidate the responses given or the value of the experience of the respondent. It was established for the discussions that a group action would be one that involved 10 or more individual claimants.

[61] See Appendix 6

The defendants in the group claims discussed were all corporate of one description or another; none of the respondents had any experience or recollection of any group action against an individual. The defendant corporations ranged from private companies and PLCs to government departments including Customs and Excise, the NHS, schools, religious organisations and charities.

SECTION 8 - DATA ANALYSIS

This section describes the process employed in handling and analysing the data generated from the research.

Completing the Data Analysis Matrix - The approach to the data is discussed in Section 1 of Chapter 4 but in order to get to that stage, key issues were selected from the questions in the Topic Guides[62]. The eventual aim was to answer the six research questions set out in Section 1 of this Chapter but a step by step approach was taken in first selecting these specific key issues.

Selected Key Issues from the Topic Guides:

(a) Had there been media attention in group actions involving the Respondent in question;

(b) Had there been activation of media in those cases and if so, by whom, which media and how were they activated;

(c) To what discernible purpose had there been media activation;

(d) Had activated media attention impacted on a decision to settle?

(e) Had the defendant engaged in the media battle; and

(f) How accurate had reporting of the cases been.

As discussed below in Section 1 of Chapter 4, key issues (d) and (f) were additional to those strictly required to answer the six research questions but were added because they had become relevant to the whole area of the discussions with the Respondents in the interviews and were beginning to show some clear results.

Analysis - After typing up each interview the text was read and was marked to highlight answers and comments relevant to the key areas for the Data Analysis Matrix. As the process evolved and the researcher became more adept at dealing with the process, and as the researcher was himself typing up the interviews, it

[62] See Appendix 5

became possible to add highlights to specific areas of text during the typing up process in order to provide easy reference of relevant parts of the text later on. The specific answers and comments on those issues were then copied into the Matrix for reference later on. If there was a large volume of comment on a particular area or issue in a specific interview, the principal or headline comment was taken but the others were highlighted for reference later on as illustrations when it came to writing Chapter 4. Most of the interviews contained useful data for most of the selected key issues which indicated that adequate and sufficient data was being gathered.

Chapter 4 was designed to look at selected key issues set out above under "Completing the Data Analysis Matrix" from the data gained from the interviews with the respondents. However, in addition to just those selected key issues, the data would be used to shed light on other issues in order to provide a much more complete picture of the process of media activation and its impact in group litigation cases. The other issues would include not only the selected key issues including whether or not there was media activation, but if there was, by whom, which media, how was it activated and to what purpose. Other issues appearing in Chapter 4 will also include information to help to answer the important issue that if defendant-side lawyers thought that the media was being activated by claimant lawyers, what was it about the media coverage that led to that conclusion and how were they able to conclude that it was activated by claimant lawyers. Other issues covered in Chapter 4 included the timing of activation and the issue of engagement by the defendant with the media.

The intention was that if data from the interviews was sufficiently clear on relevant issues it would provide support and illustration for the answers to the six research questions. As commented on above and in Chapter 4 itself, it was intended to make extensive use of quotes from the respondents to assist in answering the selected key issues and to make quite clear that when reached, the conclusions would be exclusively based on the data.

SECTION 9 - CONCLUSIONS

The approach taken to the conclusion was to reach it as the fifth and sixth of the questions set out in Section 1 of this Chapter. The six research questions were:

1. to establish whether there is media activation in connection with group litigation and if so, who are the activators and to what purpose are they activating the media;

2. can activated media be distinguished from media attention at the instigation of the journalist or the publication;

3. what, if any, impact does it have on corporate defendants – does it affect reputation; and

4. is the impact of media on reputation an influential factor in the settle or fight

decision for corporate defendants facing group litigation; and

5. if so, does it does it represent an influence in the legal process which has, or could have, the effect of preventing access to justice for such defendants; and

6. can it lead to settlement on terms that do not properly reflect the potential strength of the defendant's case?

Section 2 of Chapter 5, "Summary of Findings" is set out to reflect the above approach and leads to Section 3 of Chapter 5 "Conclusion". Questions (a), (b) and (c) are addressed separately and in some detail in Section 2 of Chapter 5 and questions (d), (e) and (f) are dealt with together, each by reference to the discussion in Chapter 4 and the data itself. Question (a) is answered in the affirmative with the claimant lawyers being identified as the most regular and prominent protagonists. Question (b) is also answered in the affirmative with illustrations as discussed in Chapter 4. The question of the impact of activated media on corporate defendants is discussed on the basis of the data, again with illustrations and having moved logically through those three steps the final three questions were addressed, in part as a conclusion based on the data, but also in part from answers in the actual data itself. In this way, the two substantive questions in (e) and (f) were approached and the conclusions reached, as set out in Chapter 5.

SECTION 10 – SUMMARY

Chapter 3 has described the methodology for the research having first, in Sections 1 and 2 set out the themes for the research, the research questions and the approach taken to the research. Section 2 set out the qualitative nature of the research and discussed some of the theoretical background supporting the approaches used in interviewing and forming conclusions from the data. In Section 3 the background to the choice of respondents and approaches to them was outlined and in Section 4 the Pilot Study was described. Using lessons learned from the Pilot Study regarding both questions and the use of semi-structured interviews with a Topic Guide, as described in Section 5, an account of the preparation for the main research and its conduct were set out in Sections 6 and 7. Section 8 then described the treatment applied to the data from the research including the compilation of the Data Analysis Matrix which contributed to the ability to make extensive use of quotes from the research respondents in writing up Chapter 4. The conclusions in Section 8 demonstrated the approach taken to the research questions and the process employed in answering them in logical sequence using the data from the research; Section 8 also referred to the approach to the research questions as they are discussed below in Chapter 5.

The above will lead into Chapter 4 which will present and discuss the data gained during the research in terms of answering the principal research questions.

CHAPTER 4

DATA AND DISCUSSION

Introduction

This Chapter sets out the responses from the respondents in relation to the questions asked and discussed during the interviews and with regard to the questions that the research sought to answer. The Chapter begins in Section 1 with a re-cap of the questions that were set out in Section 1 of Chapter 3. In Section 2, is a discussion of the responses. This has been directly related to those research questions. However, as the researcher's questions and the respondents' answers have inevitably thrown up further issues and sub-issues, these have been addressed in sub-sections to the numbered questions. To a large extent the answers relate to the information set out in the Data Analysis Matrix but, as required, further detail has been taken from the records of the interviews.

Section 2 of this Chapter includes extensive quotes from the respondents. This is in part to show the basis for the conclusions set out in Chapter 5 and in part to show in some cases the convergence and in others the divergence of opinion and experiences of the respondents. As is to be expected there was considerable convergence in the views expressed by those in the same professional groups of claimant or defence lawyers and naturally in many instances clear divergence between claimant and defence lawyers as groups. However, in some cases e.g. regarding the approach of the defendant to the media there was general agreement across the respondents as a whole. The extensive quotes set out the basis for the conclusions, and help to demonstrate that all the results and conclusions of the research are entirely based on and supported by the responses given to the researcher in the course of the interviews[1]. In addition, as referred to in Chapter 3, the quotes in many cases are quite powerful and speak clearly for themselves in answering the selected questions.

SECTION 1 – QUESTIONS TO BE ANSWERED FROM THE DATA

Responses from the respondents in the research are summarised below from the extracts in the Data Analysis Matrix at Addendum 4.

The research set out in regard to group litigation cases to answer the six research questions:

1. to establish whether there is media activation in connection with group litigation and if so, who are the activators and to what purpose are they activating the media;

[1] In reaching those conclusions the researcher has not drawn on his own experience as in-house counsel or otherwise.

2. can activated media be distinguished from media attention at the instigation of a journalist or the publication;

3. what, if any impact does it have on corporate defendants (e.g. does it affect reputation?);

4. is the impact of media on reputation an influential factor in the settle or fight decision for corporate defendants facing group litigation;

5. if so, does it represent an influence in the legal process which has, or could have, the effect of preventing access to justice for such defendants; and

6. can it lead to settlement on terms that do not properly reflect the potential strength of the defendant's case?

For this it was necessary to focus on the following selected key issues from the questions in the Topic Guide and which were included in the Data Analysis Matrix:

(a) Had there been media attention in group actions involving the Respondent in question;

(b) Had there been activation of media in those cases and if so, by whom, which media and how were they activated;

(c) To what discernible purpose had there been media activation;

(d) Had activated media attention impacted on a decision to settle;

As described in Section 7 of Chapter 3, the above formed the issues that were selected for inclusion in the Data Analysis Matrix along with two further questions:

(e) Had the defendant engaged in the media battle; (This was selected in order to see if, the media having been activated by or on behalf of claimant solicitors, the defendants themselves joined in and thereby contributed to the effect of the media coverage.)

(f) How accurate has reporting of the cases been? (This was included to see if the reporting was fair and accurate.)

SECTION 2 - DISCUSSION OF RESPONSES

Do Group Litigation cases attract media attention? - Universally the answer given was yes they do. All respondents, without exception, spoke of group litigation cases attracting media attention in all formats (radio, TV, press, social media ["much

larger growth in recent years"[2]] and in news, documentaries and even in some cases, drama and drama documentaries) at both local and national and sometimes international level. One senior QC[3] considered that GLO's were very different from unitary actions in that they "start with a public interest, [with] a large number of people involved … therefore the media are interested and the impact is greater". "Undoubtedly" he said, "publicity is a part of litigation".

1. **Level of Media Interest** - Levels of media interest vary, according to some respondents, one observing that in his experience "pharma cases and anything to do with children get more [media attention]"[4], a theme echoed by several other respondents as well, one of whom added that "a connection with public authority figures and possibly corruption" would also add to media interest having "all the ingredients of a red hot story"[5]; another added that the involvement of a "celebrity" would also generate "considerable" media interest. One in-house lawyer found that publicity was greatest around the time of settlement, going on to say that "individuals against a large corporation will attract media attention".

   The "David and Goliath" allusion was made by one defence lawyer saying that the media "like to tap into easy narratives", the "lack of trust in corporations and claimants interested in generating maximum publicity[6]" adding to the picture[7]. One defence solicitor also reported that in some cases the level of attention had caused "parliamentarians and government" to become interested to the extent that the defendant had been called to explain "why [the client] had settled cases in the US and not in the UK", causing them to have to explain "the differences in litigation and why [settlement] is appropriate in one situation and not in another".

   Although the cases attract attention, it seems to be the human interest regarding the clients that is most captivating:

   > "…the whole media landscape is about personal lives; if it was a business class action, even then [the media would] want to know the story and if you don't give it to them as a claimant the only way we'd get round that is to say don't forget so and so … is the person they're really after and try and get them to focus on the individual on the defendant side because it's always about individuals…".[8]

---

[2] Respondent 11 – claimant solicitor

[3] Respondent 1 – claimant and defence

[4] Respondent 2 – PR consultant.

[5] Respondent 7 – claimant solicitor.

[6] Respondent 5 – in house.

[7] Respondent 5 – in house.

[8] Respondent 24 – PR.

> "In virtually every case the media is keen not to just talk to us as lawyers but also to talk to the clients."[9]
>
> "…so [the media] happen to know I'm involved for victims and they want access to victims so they can tell human stories – they don't really want to talk to lawyers but if they can't talk to victims they will talk to lawyers…"[10]
>
> "The best way [of getting media attention] is by having a client who will talk to the press; If I just ring up a journalist and tell them I've got this case, I may be lucky, they might be interested if they've got a quiet space; but for them a news story is not having a lawyer quoted or interviewed, the news story is the human interest angle…"[11]

As referred to in Chapter 1, Section 2, "multi-party actions attract a great deal of media attention"[12] and this is unequivocally and unanimously borne out by the respondents. From the comments of respondents, which to a large extent coincide with views advanced in Chapter 1, a variety of reasons can be offered as to why media attention is attracted, however, this does not assist in identifying whether group litigation or elements of it is simply something that attracts journalists and media commentators or whether their attention is intentionally drawn or directed in any way.

Further, the fact of media interest and the reasons why the media are interested is not in itself as important as the fact that the comments come from claimant lawyers who are using and exploiting that interest in a particular way and for their particular purposes in order to disseminate their clients' stories prior to any opportunity for them to be challenged and proven. The following discussion will look at the whether, the how and the why of media activation.

2. **Is there activation of media and if so by whom, which media and how is it activated?** - This question also looked at whether the media attention was activated by interested parties or was it the result of journalists finding the cases of interest enough to write about/broadcast for their readers/listeners/viewers. Respondents were specifically asked if they could differentiate between activated media attention and media attention originating purely from journalistic interest. Responses were clear, yes they can tell the difference (as discussed further below), yes media is activated

[9] Respondent 14 – claimant solicitor.

[10] Respondent 7 – claimant solicitor.

[11] Respondent 11 – claimant solicitor.

[12] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

and for the most part (although not exclusively) activation is by claimant solicitors.

3. **Is there activation of media and if so by whom?** Again, the responses were unanimous and consistent; yes media is activated, it is activated in the main by claimant law firms. Some illustrations from solicitors from various firms acting on the defence side are:

> "…usually by the claimant side; essentially solicitors and action groups"; "PR consultants in claimant cases, invariably instructed by lawyers"[13];
>
> "Media activation is immediately obvious in GLO cases; by typically claimant attorneys[14]";
>
> "Activation by claimant solicitors – absolutely no doubt about it whatsoever[15]";
>
> "…we do get the impression that media attention has been activated; we get that a lot; it will be [activated] by solicitors[16]".
>
> "The media has been activated by the claimant law firm… Amnesty or Friends of the Earth are used publicly to try and credentialise the litigation, used by [FFF the claimants' lawyers]. … Here I have not seen coverage that I did not [conclude] was activated – none at all".[17]

Some illustrations from solicitors from various firms acting on the claimant side are:

> "More often than not I've courted the media deliberately…[18]";
>
> "Yes, very much so, yes I do deploy the media myself[19]";
>
> "In all of those cases, pretty much I've engaged with media myself[20]";

---

[13] Respondent 1 – QC claimant and defence

[14] Respondent 5 – in-house; this was a US attorney but working in-house in the UK and talking in an English litigation context, hence the reference to "attorneys" is taken to be to solicitors.

[15] Respondent 6 – in-house

[16] Respondent 16 – defence solicitor

[17] Respondent 28 – defence solicitor

[18] Respondent 11 – claimant solicitor

[19] Respondent 7 – claimant solicitor

[20] Respondent 14 – claimant solicitor

> "I have been significantly involved in liaising with the press and activating them – certainly claimants themselves have also done this – I have my own personal media contacts across the board [TV, radio, press] built up over the last 20 years[21]";
>
> "… there are 2 sides to activation; positive media courting by claimants and parties … [including] interested parties or meddling parties, equally and positive media courting by solicitors… [22]",

This last was unusual as a response in specifically referring to the courting of media by claimants and "interested" or "meddling" or "other" parties[23].The comment was made in the context of child abuse cases where it seems, and there was support for this from other claimant lawyers working in the same field, that once a claim is put into the public domain, there are some "survivors" who want to tell their own stories and others, maybe who are not included in group claims, who will also want to say their piece publicly. A further and interesting illustration of a similar situation but this time from the defence side is:

> "As well as activation by solicitors, [I was] also aware of activation sometimes by individual claimants … in some of the cases … patient groups … have gone to the media and presented their position through representatives of those groups, NGO's sometimes are involved in these sort of cases, and there are cases of documents from the litigation then being used in disclosure to the press[24]".
>
> "The activators have been claimants, solicitors and unions … I have used the media."[25]

One PR firm was quite specific about their instructions and aims:

> "Acting for claimant. Our role is to give communication support – PR and communications; so … about raising awareness and also driving participation. … and we're taking quite an explicit campaign focus to that to try and drive that participation … we're taking a very campaign

[21] Respondent 15 – claimant solicitor

[22] Respondent 12 – claimant solicitor

[23] Respondent 12 explained his reference to "meddling" or "other" parties as "often groups of disaffected individuals who … themselves have fallen into conflict with authority at some point in time; they have failed to attain any level of justice for themselves and they then go on a crusade [and] join [in with the publicity]. Tagging onto others and tagging onto other groups but not getting involved themselves and they can be in themselves agitators; often includes disaffected claimants; claimants with views that in some way the group action is not going the way they want it to go…"

[24] Respondent 13 – defence solicitor

[25] Respondent 19 – claimant solicitor

> driven approach ... we will send our invoices to the [claimant] law firm."[26]

All respondents accepted that media activation is carried out by claimants' lawyers or those acting on their behalf and on some occasions by claimants. The use of media by claimant lawyers is well recognised and seems to be accepted, although not welcomed by defendants, as part of the group litigation process.

4. **Is the media being exploited or treated as passive?** - The assumption that media can be fed stories and will simply accept them and publish them may seem to suggest that the media is passive, acquiescent or easily compliant. Two clear angles on this issue came out of the interviews. One was that a journalist said he benefitted as much as those "activating" the media:

> "If people give me information which they do every minute of the day … they're doing so for a purpose, it's not because they want to be nice to me, they're doing so because they want that information published and it's in their interest so to do, so they are using me but on the other hand I'm using them. They're using me and I'm using them. They are giving me a story and sometimes it's mutual sometimes it's a win win situation, they have got a story they want published and I've got a story they've given me and everyone's happy."[27]

He recognised that they were "activating" him and his interest as a journalist for their own ends but that happened to suit him too in giving him a story. He went on to say that he considered that this was legitimate on the part of lawyers activating the media in that it was advancing the interests of their clients:

> "The claimant lawyers are not going to talk to us just because they want to help us, they do so because they see an advantage to their clients. … In other words, they think publicity is going to help their claims."[28]

The other journalist had a similar view:

> "…it serves our interests as well; I certainly wouldn't condemn them [claimant lawyers] for getting in touch. They normally put out a press release, if they've got some cases, or they can contact you individually, but no if it wasn't useful to you to do the story, you wouldn't do it. If it wasn't a good story then you'd ignore it and one often does."

---

[26] Respondent 25 - PR

[27] Respondent 23 - journalist

[28] Respondent 23 - journalist

Another view was voiced by several respondents that journalists might be "lazy":

> "…journalists generally are very lazy and therefore if they've got to fill copy space they will be fed stories and just replicate them word for word …"[29]
> "…all journalists are total lazy ********s. You have to write much of the story for them; they are quite lazy; … probably 90% just simply take the press releases, do a tiny bit of additional ringing round a couple of people see what the press release is for the defendants and then write the story; or often just go on cuttings from the past. I presume it's because budgets are tight so journalists are having to do three or four stories a day, so they just haven't got time to do the in depth stuff…"[30]

In the journalists' defence, one of the PR respondents did speak of the modern pressures on journalists which may give the impression sometimes of laziness but may also explain their willingness to accept the largesse of stories "on a plate":

> "Journalists get a tough time these days; they don't just have to write to a deadline, but they will have to prepare a more expanded piece for online publication, maybe put something in local media and maybe prepare a short video as well; so they now have to do four pieces in the time they used to be allotted to do one. The really detailed journalistic work is done by the Opinion writers, others don't have time for proper research … Local papers are dying; therefore the journalists often have three "beats" instead of one and they are less experienced. So their research tends to be superficial and in large part involves recycling other stories."[31]

5. **An essential part of the process** - Several respondents on both sides of the claimant/defendant divide simply accept that media and media activation is part of the litigation process.

> "… [it's] a feature of group litigation – it affects sometimes hundreds and thousands of claimants and is therefore of public concern, therefore of interest to the media."[32]

An interesting take on activation came from a somewhat shy claimant lawyer who said of a particular period of his career:

---

[29] Respondent 22 – in-house lawyer

[30] Respondent 14 – claimant solicitor

[31] Respondent 2 - PR

[32] Respondent 1 - QC

> "I was aware of the need to use the media and I was happy to use [SS]; if you wind him up, off he'll go and do it and he does it well. So … I had the benefit of having [SS] so I didn't have to do it myself but I would prep him and make suggestions as to what we should be doing in terms of the media.[33]"

SS had then been a senior solicitor colleague of this respondent, now at a different firm. SS was also a respondent in this research at the other firm. A final comment from one claimant lawyer, was:

> "…the involvement of the media is terribly important or was terribly important but [it was] also a very delicate balance; you had to be very careful, but I would not have succeeded in my aspect of the [CCC cases] for example, without JJ of the Sunday Times … In [another case] we were almost there and one particular firm of lawyers was being amazingly difficult and I arranged for him to be met by the media as he came out of my office to be questioned about what was going on and undoubtedly the use of the media was actually very very important - but [the media is] actually quite a dangerous ally to have - ...obviously you couldn't trust them totally[34]".

So, from the candid responses of the claimant lawyers it may be said to be established that there is media activation by claimant solicitors involved in group cases. It appears to be systematic and systemic as a regular part of the group litigation process. Particularly comments like "I was aware of the need to use the media" seem to emphasise not only that media activation is used on a regular basis, but that it is more than just an adjunct; not a mere side-line but seen, particularly by claimant lawyers as an essential part of the process.

6. **The Defence Side and how do they know media has been "activated" and by whom?** - In regard to assessing the observations of the defence side lawyers, the question of how they could tell that activation was by claimant solicitors (as distinct from it being the result of journalists or publications acting on their own initiative) needs to be raised. Some illustrations of answers on this specific point are:

> "The driving force is the solicitor because the journalist is only ever as good as his information. How do solicitors do it? They have contacts with newspapers, they have [their own] websites and journalists will go to those sites; also they work with NGO's who feed the media; but essentially it's the solicitors that feed the media. They feed details of the hearings and comment before and after them."[35]

---

[33] Respondent 17 – claimant solicitor

[34] Respondent 18 – claimant solicitor

[35] Respondent 1 - QC

"Stories were attributed to [FFF firm, the claimant solicitors] so [we] knew it was activated by them[36]";

"You can tell it's by claimant lawyers because typically they will send out a press release; they send out on newswires and publish on their web and intranet site and on their social media channels[37]";

"…[we] can look at their web sites; actively putting out statements and commentary; threatening law suits they're going to bring. All lawyer led. [there is] a wide network that [claimant lawyers] are plugged into; human rights groups and some journalists interested in their side of things and they can bring in others...[38]";

"…[we] know that because there are a handful of journalists who [we] see reporting cases from time to time in a particular way and assume, on good grounds that they are fed by claimant lawyers. Those are at the Guardian and the Independent; if they write a story, it's strongly believed to have come from claimant lawyers. Often [FFF firm] but they are all at it. [We] can see the same on law firms' web sites; that's one of the bases for the assumption that it originates from them. [We] can also see it in pre-action correspondence – e.g. "We are happy to deal with this on a confidential basis and if it doesn't settle it's in our clients' interests for this to be aired[39]";

"For [CCC case] and the current one there's always been big footprints left in terms of quotes and details that could only have been provided by the claimants' lawyers. In [CCC case] that was the closest degree of liaison between the law firm and the press in that there was a close relationship with a Guardian journalist … and he (a) would attend hearings and (b) be told about hearings and (c) would be given skeletons etc in advance (d) you would have the timing of articles to coincide with hearings; that made it pretty obvious. In the current case you have press articles which have contemporaneous or parallel […] press releases at the same time which suggests there was an active degree of collusion as it were. Also understanding from talking to the PR consultants that that's how the press works, that it's only on few occasions that you would get a consistent coherent and ongoing interest from a journalist[40]";

---

[36] Respondent 4 – in-house

[37] Respondent 5 – in-house

[38] Respondent 6 in-house

[39] Respondent 9 – defence solicitor

[40] Respondent 10- claimant and defence solicitor

> "it will be [activated] by solicitors because they'll be quoted in it. A solicitor will be identified and their firm will be identified…[41]";
>
> "…and there are cases of documents from the litigation then being used in disclosure to the press; the law firms representing the claimants are quite savvy with the press and have good connections with journalists over the years and are able to get a story out in the Guardian or the Times they can do that without too much trouble[42]".

The above seems to support the contention that their views that media are activated by claimant solicitors are well founded, as in fact we know them to be from the responses of the claimant solicitors themselves.

Which media is activated? - The term "media" was used by respondents to cover all types of publication including web sites and intranet, social media and news wires as well as TV, radio and the press. For example, this comment on the origin of "activation" includes a wide range:

> "…claimant lawyers … typically … will send out a press release; they send out on newswires and publish on their web and intranet site and on their social media channels. Some media (not the wires) would contact you before they run the story.[43]

Another respondent spoke directly of his use of a local newspaper:

> "I talked to the client and said you don't have to be named but I want to tell your story to the [named newspaper] give them an exclusive… 'top solicitor appeals for witnesses'…"[44]

Speaking specifically about child abuse cases another respondent referred to all types of media and then set out the stages of media coverage, he then went on to mention broadcast media in terms of cross coverage from one media type to another:

> "Coverage is press, TV, radio, everything…"
>
> "…it tends to hit social media first so survivor groups tend to try to publicise cases through social media before they go to what used to be called the mainstream media. Arguably in some ways social media is more main stream now but that would tend to be their route."

---

[41] Respondent 16 – defence solicitor

[42] Respondent 13 – defence solicitor

[43] Respondent 5 – in-house counsel

[44] Respondent 7 – claimant solicitor

> "…we know that sometimes bits of the media will cooperate with each other so there might e.g. be a story that we would share with the Times and the BBC and the BBC Today programme would run with it first thing in the morning and that coincides with a bigger more detailed piece in the Times, that kind of thing can happen …"[45]

Conversely there was an example cited of just the opposite happening:

> "…the Standard for example, we briefed them and they'd actually filed a piece but when they saw it was in the Times that morning they wouldn't run it."[46]

One in-house counsel also talked about coverage in left wing press and on trade union web sites and in the trade press:

> "Sometimes in the national papers often in the left wing papers such as the Morning Star and the union web sites and there's been a lot of attention in the trade press …"[47]

His comments also included reference to the Socialist Worker as another smaller circulation newspaper in addition to the Morning Star.

Use of trade press was also mentioned by PR Respondents 24 (see below) and in-house counsel Respondent 23 said that on his case "… there's been a lot of attention in the trade press covering the [*industry named*] industry".[48]

In the discussion on 'Pressure on the Defendant' below, there are references to the careful choice of media in order to target a specific audience for example management, staff, investors or shareholders. Respondent 24 also discussed the selection of specific publications to appeal to their specific readership and that once placed an appetite for more material on a particular issue was developed:

> "…we found out … by speaking to the journalists … and in some cases they self-selected; … the journalists … were interested and they checked with the editor and the editor went 'we love [*issue*], we get lots of reader comments about [*issue*] we get lots of feedback and interaction'; one story in the Money Mail, they came back and said we want the next instalment so 'we had so much [of a] reader outcry from that article' so they were really on the money on who, and what really rocked the boat of their readers".[49]

---

[45] Respondent 20 – claimant solicitor

[46] Respondent 24 – PR

[47] Respondent 23 – in-house counsel

[48] Respondent 23 – in-house counsel

[49] Respondent 24 - PR

They also commented on targeting specific parts of publications to get the right attention, for example "if it's a business story, you target the business desk…". These observations were typical, showing that a broad range of media conduits and methods are used as the medium to put messages out with the media being carefully selected according to the desired impact and the location of the desired impact and the target audience.

An interesting development is the inclusion of digital and social media in the process. One of the PR respondents said that it would be using the press and media from day one but integrating with digital and social media:

> "On the day of the launch [of the campaign] we will be engaging with media across the board some that will be aimed more at putting particular pressure on the corporate so papers that they [the defendants] might care about, so the Financial Times or the New York Times … we will also be targeting tabloid media as our class is so large that we get a cross section of the population; so we're targeting the normal wide range of TV so broadcast media and also papers on the day ... and also taking a strong digital approach as well, so it's very social media and web-site for want of a better word and the grand term for that is an integrated approach to comms"[50].

How is media activated? - The comment by Respondent 5 referred to in the section above, talks of press releases by claimant law firms to newswires, on their web and intranet sites and on social media channels. This was a common observation and confirms the use of "private" media if it can be called that. As far as the "professional" media is concerned, activation seems to be conducted via cultivated and established contacts in the media. For example:

> "We have a lot of contacts in the press and broadcast media and we know how the media operate…"[51]

> "Wide network that [claimant lawyers] are plugged into; human rights groups and some journalists interested in their side of things and they can bring in others…"[52]

> "…some firms of solicitors are very media savvy, they court the media…"[53]

These contacts are built up over many years:

[50] Respondent 25 - PR

[51] Respondent 20 – claimant solicitor

[52] Respondent 5 – in-house counsel

[53] Respondent 12 – claimant solicitor

> "I have been significantly involved in liaising with the press and activating them … Have my own personal media contacts; across the board [TV, radio, press]; built up over the last 20 odd years …"[54]
>
> "…clearly over the years you develop contacts with journalists …"[55]
>
> "We were able to involve the press … your choice of people was terribly important and that had to be built up over a considerable amount of time …"[56]
>
> "…we have very strong links with the media…"[57]

Speaking of having cases "ventilated" through media outlets, one claimant solicitor was clear, "those outlets would be people we have relationships with"[58].

Some of the claimant firms also referred to communications resources in-house which also contribute to the dissemination of information to the media so the relationships become institutional as well as personal:

> "We have a media and communications team in the firm; so the relationships are both theirs and mine …"[59]
>
> "…me and other members in the team have sufficient experience of media and we've got quite an experienced in-house guy and you can deal with things much quicker [than using outside agencies]".[60]

In addition, some media activation by claimant lawyers is through professional PR companies. Respondent 24 clearly stated that as a PR provider they were "Instructed by the claimant lawyers."[61] They continued by explaining that in one case they had been able to plan a 2 year programme:

> "…the lawyer saying this is my 2 year window of what I expect … and we actually had a … discussion about where and when and how you should drop the media bombs and what would be useful for him which moments were

[54] Respondent 15 – claimant solicitor

[55] Respondent 14 – claimant solicitor

[56] Respondent 18 – claimant solicitor

[57] Respondent 20 – claimant solicitor

[58] Respondent 19 – claimant solicitor

[59] Respondent 20 – claimant solicitor

[60] Respondent 14 – claimant solicitor

[61] Respondent 24 – PR

> useful pressure moments for him and which moments were the ones to wait and see."[62]

Activation through professional media then seems to be a function performed at the instigation of and mainly by the solicitors themselves who are working the cases, via journalists and contacts that they have built up personally.

PR firms are well placed to make direct approaches to media and will prepare the ground with them ahead of a campaign:

> "We have decided on a target top 10 [publications] that we want to pre-brief to make sure that they're aware of what is going to happen on the day so that we can get on to the morning shows so we're doing pre-briefs the week beforehand and then there'll be a press release going out on the day as well …"[63]

As part of the process they will time broadcasts so as to attract further press coverage:

> "…if you're in the morning on the morning breakfast shows, it will be picked up by print later and there's more of a chance that it'll get into print than the other way round. [using] broadcasters, BBC, Sky, ITV; we're not doing locals at the moment, we will probably do locals further down the line. [also] internationals, CNN, Bloomberg."[64]

This "broadcast first" strategy as they put it is part of their use of some of the media as nodes from which others will pick up and repeat the information to a wider audience including on an international basis where an international company is involved:

> "…some of them are nodes so e.g. we might go after some more international publications because they will then create a chamber on another continent … it helps to show that there is pressure in different jurisdictions as well."[65]

There were several references to timing coincident with events in the litigation process:

> "We're timing alongside the filing of the claim. We really coincide our communications strategy with the legal strategy so using moments in the legal timeline as hooks for media."[66]

---

[62] Respondent 24 – PR

[63] Respondent 25 - PR

[64] Respondent 25 - PR

[65] Respondent 25 - PR

[66] Respondent 25 - PR

In addition to direct contact with media, there is evidence that some claimant lawyers and PR representatives use court proceedings with a view to placing material for it to be picked up by the media. Most Respondents seemed to be reticent about discussing the topic of "placing" material in court proceedings and some said they would never do it, but one claimant lawyer was clear he had seen it done by both claimant and defendants[67] and others were clear on the point:

> "…at the CMC's that happened on every occasion; … there were certain statements made in open court which we felt veered on the edge of being unprofessional. … In conventional litigation one wouldn't have expected some of the remarks to have been made. … they weren't in any sense misleading the court but they were just rather more [gratuitous] than they needed to be …"[68]

> "I haven't really put stuff in court in order to get it into the public domain to be used in the press but I would do it if I thought it was the right thing to do … if I thought it would give us a strategic advantage, I would make sure something was referred to in court or was placed into a witness statement so it would get it into the public sphere, definitely."[69]

> "Absolutely have experience of it being done by claimants and I would say that was par for the course. However, Judges are easily annoyed if they think the courtroom is being used as a forum to expose a position for wider public consumption; and they will be fairly annoyed if they think the media is used in some way to influence what goes on in the courtroom. Think people are generally careful not to overdo that …"[70]

> "…there are some outrageous examples of claimants making points in court with the knowledge that they'll be picked up by the press and they have been; and that's the only reason they make that point. Have seen at trial on the first day 2 or 3 times points that are blatantly there to be picked up by the media and that were picked up. Also have seen those points tweeted and re-tweeted by the claimant lawyers until the defence complained to the judge and the tweeting stopped."[71]

Arguably, although it is clearly still activation of the media, being in a court setting, such statements are made in a context where the defence may have the opportunity to answer the issue. However, with the propensity of the media to pick up the claimant side and to disfavour the defence side which is discussed

---

[67] Respondent 18 – claimant solicitor

[68] Respondent 23 – in-house

[69] Respondent 19 – claimant solicitor

[70] Respondent 13 – defendant solicitor

[71] Respondent 9 – defendant solicitor

below under question 5 "How accurate has reporting been and how fair?" this opportunity may in fact not make any practical difference in terms of media coverage and reputational damage; it is just another method of the claimant side feeding the media.

One in-house respondent spoke of a constant repetition of a mis-description used in court so that it was picked up in the media:

> " …they were looking for soundbites to get out into the media… [I] was surprised to see it in the UK and it's a direct use of tactics which is basically a distortion of the facts but if you keep repeating it, it just gets picked up and the truth of the matter just gets lost."[72]

In one case one PR respondent said:

> "…if the lawyer who's instructed us is media friendly, … and if the barrister is sufficiently media friendly, then he will be writing his opening address/skeleton argument whatever it was, with some key phrases in it which play to a media audience …".[73]

They continued that in one case "… we were brainstorming the best phrases to use in that opening address which would play out in a headline would really capture what it is …" in the hope that it would be picked up but also with a view to feeding it to the media; they also mentioned the power of a photograph and said that in one case:

> "…there was no need to show photographic evidence in court but we wanted it to be shown because the moment we knew the QC had shown it and was holding it up and showing it around, we could press a button and send it electronically that same photo to all the media so [we set it up] … with the lawyers".[74]

One variation on the relationship aspect came from one of the PR respondents, saying that for them it was becoming less of a relationship issue as the media is becoming under resourced citing the fact that now only the FT and Bloomberg have full time court reporters whereas in the past you could expect all publications to have one. So they said:

> "…it's less of a relationship game these days as a value of the story game … So before in the old days it used to be very much you'd speak to your regular person and they would give you a view on what they think, now there are just fewer and fewer journalists and they're all very young and therefore it's frustrating because they're not the decision makers. Whereas if you had a

[72] Respondent 6 – in-house

[73] Respondent 24 – PR

[74] Respondent 24 PR

> seasoned journalist in their role really covering consumer affairs for the last 12 years or whatever, they would absolutely know what's going to hit their audience and now it's more tricky …"[75]

They did also make an interesting point on the spread of media attention saying "once the story flies somewhere then many others feel they have to follow".[76]

These answers give credibility in an English context to Coffey's observations referred to above[77] about US "… press-savvy lawyers craft[ing] court papers that not only nourish procedural requirements but also feed the press."[78]

For what purpose(s) is media activated? - The next area of interest, having established that there is media interest in group cases and that it is activated in large part by claimant solicitors is to look at why it is done, to what purpose and with what aims.

A variety of reasons were put forward by respondents for activation of media. The purposes and aims of media activation are multiple and those described by respondents were wider and somewhat more complex than those suggested at the outset in Chapter 1 and in the literature. Part of the stated reasoning invariably was to put pressure on corporate defendants by putting their reputations at risk. Other reasoning included "advertising" the claim itself (in addition to required formal advertising in the London Gazette) to encourage claimants to join the action, obtaining corroborating and further evidence, getting witnesses to come forward and advertising for the law firm itself.

1. **Pressure on the Defendant** - One principal aim, that of putting pressure on the defendants, emerged clearly and was a constant throughout the respondents' answers. The pressure on defendants was partly to affect decisions on settlement, including timing and amount and partly to force changes in behaviour and commercial/industrial practices.

> "…In several ways [media] can help group litigation. If a story's in the newspapers it will exert tactical pressure on the defendants to do the right thing; it has an impact on the way defendant solicitors behave; they've told me so. … Newspapers can help you; they are investigating too for different purposes. Using the media is of vital importance on many levels."[79]

---

[75] Respondent 24 – PR

[76] Respondent 24 – PR

[77] In Section 7 of Chapter 1 under "Restrictions on media activity related to litigation"

[78] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100 – P299

[79] Respondent 7 – claimant solicitor

Another claimant solicitor said "[the] principal aims of activation of media, [are] to increase the risks, financial risks to a company." [80]

The impression of in-house lawyers was:

> "Law firms that do GLO work are much more media savvy and can run a media campaign so as to bring pressure to bear [on defendants]"[81];
>
> "…to try to create reputational damage for the defendants to encourage them to settle faster and higher …"[82]
>
> "…[they] will seek to get publicity where the litigation is taking place so as to inflict reputational damage; communicating not to their clients but to a public that's of interest to the defendant …"[83]
>
> "…it's a tool towards achieving a settlement…"[84]
>
> "…to achieve a tactical advantage …"[85]
>
> "[the] purpose of media activation … is purely to create leverage; leverage to force us to settle; it's their biggest weapon."[86]

The same respondent continued with regard to pressure:

> "…what they want is to create enough of an uncomfortable position that defendants just say they'll throw in the towel and settle because it's easier and less of a headache. They target [media activity] at certain times; [the] maximum opportunity to create pressure was at the beginning and the end [of the proceedings] and they wanted straight away to talk settlement. They target at times when a defendant will cave…",

and also underlining their view that the location of decision makers influences the arena selected for the media activation:

> "…[I'm] not aware of any media activation in the places where the claims arose. [It's the] place of claim … [it's] here because we are here

[80] Respondent 10 – claimant solicitor.

[81] Respondent 3 – in house counsel

[82] Respondent 5 – in house counsel

[83] Respondent 5 – in house counsel

[84] Respondent 5 – in house counsel

[85] Respondent 7 – claimant solicitor

[86] Respondent 6 – in-house counsel

> not because court is here. They think in our back yard that will have the maximum impact and they chose to bring the claim here …"[87]

Another defence solicitor was equally clear:

> "The clear objective of the campaign is to create uncomfortable shareholder interest in the story so that it puts pressure on the respondent companies to settle; that is the objective of the media campaign. I think it's just pressure to settle."[88]

and in regard to location the same respondent continued:

> "Obviously here … is … the London media, the financial media are those that are going to have the most impact from a corporate perspective on whether a corporate defendant will settle or not … DDD doesn't really care that much what the Guardian has to say, because the Guardian will never believe that DDD is anything other than … a polluter, a human rights abuser, so that's a battle that was lost years ago; it certainly does care if the Financial Times reports on something …"

The impression of one of the PR respondents was:

> "The clear aim was to cause as much embarrassment to and concern within the company (i.e. the non-legal part of the company; the boards of directors …and executive committees). The aim clearly [is] to get [the defendant corporation] to settle for as large a sum as quickly as possible …[89]

The other PR respondents said the intention:

> "…was to provide general awareness of the case, and also then to build media pressure on the defendants … The intention on all of them was to procure settlement; to try and see whether there would be pressure for settlement … the idea is that you publicise the claim, get media column inches coverage so that public opinion is sufficiently powerful or an irritant so that there's additional pressure aside from the usual litigation [pressure]."[90]

One of the QC respondents who had done both claimant and defendant group litigation was clear on the aim being in part to put pressure on a defendant to drive to a higher settlement:

---

[87] Respondent 6 – in-house counsel

[88] Respondent 28 – defence solicitor

[89] Respondent 2 - PR

[90] Respondent 24 - PR

> "Two drivers: one is publicity for the lawyers; one is maximising potential leverage for the client. The [FFF firm]'s of this world see themselves as human rights lawyers and they think that attracting publicity for the firm and individuals is good in itself; … The motive is that if we frighten [DDD] sufficiently about what we're going to say about the behaviour [related to the CCC case] they will see political and commercial interest in settling at a higher figure; they will give these people more money than they would if they weren't being frightened."

One in-house respondent was clear on the fact that in some cases, the only explanation for activating media is to influence the defendant:

> "[The reason for activating media is] in US it's to gather the group; but not here because [these foreign claimants] don't read the Guardian, it is therefore to influence the decision maker; maybe in the US [it can be] because of juries [who] not only read the media but can be influenced by it; judges may be theoretically influenced but our [UK] judges are so good at being careful about the nature and the source of the evidence they rely on and they're also probably pretty wise to what does go on in media and who is speaking in media so it isn't really doing that so the reasons why the media is used by law firms in this [UK] system, are to promote the law firm for the purpose of future claims although that's secondary because mostly they're brought on behalf of foreign claimants who don't read the Guardian, therefore the primary reason is to influence the defendant in terms of the timing and the amount of settlement … [I] do see it more in the sense of a potential use of the media to influence the ultimate outcome [of litigation] to somewhere different from where it would have been on the legal merits alone."[91]

Another respondent, a defence solicitor, who was equally clear that one of the purposes was to attract clients made the point that that couldn't be so for cases where there were overseas clients and pressure therefore was the driver:

> "…Lots of cases with groups of overseas clients, therefore publication in England isn't going to attract more clients; it's to put pressure, moral pressure on defendants, stakeholders and shareholders; pressure to get a settlement."[92]

That raised the point that the pressure was directed sometimes so as to be indirect via "stakeholders and shareholders", stakeholders including:

[91] Respondent 5 – in-house counsel

[92] Respondent 9 – defence solicitor

> "…shareholders, customers and employees, government authorities and Human Rights organisations; e.g. UK national central point for Human Rights [Equality and Human Rights Commission] …"[93]

He went on to say that "companies don't like this coverage because it gets noticed by people who will be active [and influential]".

With regard to shareholders, one aim of pressure was to try to affect the defendant's share price:

> "…Money talks; the old horny theory was supposed to be that if you could affect a share price that was far more potent than anything else; if you affected a share price, they'd come and settle"[94]

but he noted that the share prices "don't seem to move that much" and that some companies were simply too big for their share price to be affected.

Another example of indirect pressure was to aim at the defendants' potential clients (or customers) in a case that concerned certain business practises of the defendants, in part pure pressure on the defendant and in part to encourage a change of behaviour and adherance to codes of practice:

> "…one of the objectives is to have various councils not employ [*field of business*] companies [involved] in what they would consider to be these practices [*practices*]; and the more they can publicise the claim and the impact on individuals, the greater the ability to mobilise local councillors to vote in favour of policies that would require signing up to various compliance codes or whatever."[95]

The defence side in the same case remarked that in addition to coverage in the "… national papers often in the left wing papers such as the Morning Star and the union web sites …" there had been "… a lot of attention in the trade press covering the [*industry named*] industry. So it's received more media attention than any other case I've ever been involved in", remarking that "because of the identity of the … companies, those 10 were the top 10 [companies] in the industry so from a trade perspective, a trade press perspective, it's a sexy story …"[96]

Pressure via trade journals, can cause embarrassment before competitors as well as being a way to seeking to "put off" clients and potential clients[97].

---

[93] Respondent 9 – defence solicitor

[94] Respondent 11 – claimant solicitor

[95] Respondent 10 – claimant solicitor

[96] Respondent 23 – in-house

[97] Respondent 23 – in-house

Adding to a comment on using media to reach the management of the defendant one of the PR respondents said "… and of course you've also got trade media so a competitive environment so if your competitors feel that somebody's under pressure …" it might in turn exert pressure on the defendant's management which adds impact to the observations above on the use of trade press.[98]

Pressure via government was also noted:

> "In those sort of cases the claimant lawyers are using media to put pressure on the government to put pressure on our client to do in the UK what they've done in the US."[99]

The PR respondents also described how, when instructed by claimant lawyers they carefully "tailor [the story] and shape it for different audiences … trying to put pressure on the defendant from a number of different perspectives". One example they gave began with "… more the emotional, Money Mail kind of a story appealing to the consumer market"[100], and continuing:

> "…the second was a business story so thinking about the claim and the finance … designed to put pressure on the defendant as a company and its parent entity on what the value of the claim [was], [what] the implications for the corporate entity would be if they lost … above and beyond that particular case …",

and in a personal injury case against a county council:

> "…a sort of local council angle, how they didn't achieve best practice and had fallen short of their mission as a county council …".

In regard to public company defendants they said that this also went to timing of targeting:

> "If you have a listed company for example, you'd be targeting a story that's going to reach their shareholders so sometimes you look at the financial calendar of the company coming up and you're trying to particularly [find] either a media or the timing that's going to reach [them]."[101]

They also distinguished between trying to reach staff and management of defendant companies:

---

[98] Respondent 24 – PR

[99] Respondent 13 – defendant solicitor

[100] Respondent 24 - PR

[101] Respondent 24 – PR

> "…ultimately, you're trying to reach the decision makers at the top of the tree at the defendant entity and so other things may just be additional irritants but they're still quite useful because if you're trying to get to the staff of the entity, who are their greatest ambassadors but who can also be their greatest critics internally and you want to put messages to them that this is really unhelpful then you would go through publications and media that the staff would read more than management would read …"[102]

adding to that last remark "… or potential customers …" which supports the above idea of management being influenced by what they recognise may be seen by their customers and potential customers.

On the issue of elevating a matter by media attention, Respondent 14 made a very clear comment on the power of the media to lift a matter to the attention of those higher up in the defendant organisation:

> "For me the media is a powerful ally for claimants and that is for a number of reasons. The first of those is that it ensures that it brings the case to the attention of the senior people within the defendants; whether they are in government or big multi-nationals then it makes sure that the senior people are paying attention; from my experience in litigating that is quite important because often things can get stuck with in-house counsel, or stuck with the solicitors and having the ear of the people who make the decisions in a company is in my view quite significant; is an important benefit."[103]

This was supported by another claimant solicitor who said the job is done better by media than by lawyers:

> "…there is no doubt that pressure on people like [DDD] to do the right thing is best exerted by the media rather than by the lawyers."[104]

He also spoke of "ambushing" a difficult defendant lawyer with the media[105]:

> "in [CCC], the air crash we were almost there and one particular firm of lawyers was being amazingly difficult and I arranged for him to be met by the media as he came out of my office to be questioned about what

[102] Respondent 24 – PR

[103] Respondent 14 – claimant solicitor

[104] Respondent 18 – claimant solicitor

[105] Also referred to above in this Chapter under "An essential part of the process"

> was going on and undoubtedly the use of the media was actually very very important."[106]

One of the PR respondents also observed:

> "…we're aiming … to stir it beyond the little department or fiefdom of people who are dealing with it and shake some trees where other people are saying "get rid of that" "get it out of the papers" "why are we fighting this case" "why haven't we settled it..."[107]

The same PR respondent also spoke of making analysts aware of litigation so as to influence their assessments of corporate defendants:

> "…we did actually make … a list of analysts who would cover this particular company and we informed them that a writ had been served on this company and asked them to consider what impact that would be and that was a very aggressive tactic … The analysts themselves are quite influential in the media so they would all put out a note or whatever."[108]

They even in one case told of informing analysts before a writ had been served:

> "Sometimes it's useful to do something even before a claim's been filed but not served, if you're really being pushy you can start talking about a claim then and then the defendant doesn't really know – it's known through pre-action protocol it's going to happen but it hasn't seen the filed claim so you could be really pushy then, you could even send it to analysts at that point and that puts immediate pressure before they've even seen it which is a real nightmare for the litigation department or external legal team… ".[109]

The concept of using media activation to put pressure on defendants was therefore multi-faceted and complex, not just the simplicity of placing something in the media with a view to media attention causing a collapse in the resolve of a defendant corporation.

2. **Other Purposes of activation** - Other general purposes attributed by two respondents who had handled both claimant and defendant cases included:

> "To recruit claimants; serve the interests of action groups; put pressure on defendants";[110]

---

[106] Respondent 18 – claimant lawyer

[107] Respondent 24 - PR

[108] Respondent 24 – PR

[109] Respondent 24 – PR

[110] Respondent 1 – QC

"Mobilise sympathy, convey understanding of loss; building awareness in the media; convey that claimants are at a disadvantage"[111].

3. **Recruitment of claimants for a current case (and for future cases)** - The use of media to recruit claimants to join a group action, was often mentioned in the responses though it should be noted that a simple statement of the nature of the claim could achieve this end rather than some of the more tendentious allegations sometimes raised; examples are:

"To attract more claimants; ([there is] often a race by claimant lawyers [against each other] to sign up claimants) …"[112];

"…in group actions [media activation] was useful to get claimants … to come forward" … "we use the media not only to get claimants but for other claimants to support the existing claimants"[113];

"[An]other reason is in UK based cases,[media activation] can attract clients." … "the primary purpose [of publicity] there is to attract clients not to put pressure on defendants."[114];

"they're business motives really, to keep the cases in the public eye and to attract clients; that's the principal objective to most solicitors."[115];

"…in a business sense it was very important to have that media profile because people would read about it in the media … in the print media, certainly not the internet and people read things in the [local paper] … and make a phone call and that would turn hopefully into a case[116] or a witness."[117]

4. **Finding witnesses** - Initially at least, for claimant solicitors running child abuse claims, the aim of recruiting clients seems to have been twinned with the need to find corroborative evidence:

---

[111] Respondent 2 - PR

[112] Respondent 5 – in house counsel

[113] Respondent 17 – claimant solicitor

[114] Respondent 9 – defence solicitor

[115] Respondent 17 – claimant solicitor

[116] It should be noted that individual claimants in group litigation were often referred to by respondents as individual cases so rather than a group litigation being viewed as one case, it was viewed as one action made up of a number of individual cases which is the reality of the GLO as a case management device and of cases run on the basis of consolidation.

[117] Respondent 17 – claimant solicitor

> "We wanted to find corroborative evidence; using publicity openly to get other witnesses that [the defendants] are aware of but don't want to tell me about …"

Corroboration, it appeared, was of fundamental importance in child abuse cases prior to 2008 when it was necessary for a complex of reasons based on vicarious liability and limitation issues to prove systemic failures on behalf of an institution in order to found liability. Since the 2008 decisions in the cases of Hoare[118] and Young[119] relating to limitation issues, it has been easier to use the decision in Lister v Hall[120] on vicarious liability and as a result "claims are more likely to proceed on the basis of the vicarious liability of employers[121]". So once a conviction of an individual staff member had been secured, the need to prove systemic failings on the part of the institution by corroborative evidence was no longer there. Corroboration as a motive for media activation in child abuse cases falls away post 2008 but, as this particular solicitor also mentioned, the media activation helped him to identify witnesses that the defendant did not wish to reveal.

Aside from the corroboration issue, which would have been directed very much at claimants themselves as witnesses, there were other respondents for whom the question of finding witnesses was also important:

> "...third issue is that it also encourages witnesses to come forward."[122] -
>
> "[media activation] was useful to get … witnesses to come forward …"[123] –
>
> "…I might put out a tweet and it might be seen by a witness; that's a form of media." and "… part of the goal is to obtain evidence to win the case." [124]

5. **Advertising** - Aside from any advertising of a GLO itself under court order[125] or which claimant lawyers may wish to make on their own web sites or

---

[118] A v Hoare and other appeals [2008] UKHL 8, [2008] All ER (D) 251 (Jan)

[119] Young v Catholic Care (Diocese of Leeds) [2006] EWCA Civ 1534, [2007] 1 All ER 895

[120] Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 2 All ER 769

[121] Paula Jefferson, 'Making History' (2008) New Law Journal - http://www.newlawjournal.co.uk/nlj 15 February 2008 - accessed 13 June, 2016

[122] Respondent 14 – claimant solicitor

[123] Respondent 17 – claimant solicitor

[124] Respondent 7 – claimant solicitor

[125] CPR 19.11(3)(c) provides that the court can give directions for publicising a GLO and Practice Direction 19B.11 requires that a copy of each GLO be sent to the Law Society and to the Senior Master, Queen's Bench Division; the editorial note to the CPR explains this is so that it and any cut-

elsewhere, several respondents spoke of media activation being used as a means of claimant lawyers advertising their practices and their specialisations. Some of the claimant lawyers themselves were quite frank about it:

> "…also to enhance [the claimant lawyers'] brand"[126];
>
> "…part of the goal is to get business …"[127]
>
> "[There are] two drivers: one is publicity for the lawyers …"[128]
>
> "a secondary [focus of media activation is] in terms of the promotion of the firm's name itself …"[129]
>
> "It's effectively an attempt to generate business."[130]
>
> "…no doubt we have some commercial reasons … we benefit commercially from publicising our cases"[131]
>
> "…large claimant law firms have a reputation as standing up for the down trodden or those who wouldn't otherwise have access to justice who have suffered at the hands of large corporations; they want to maintain their reputation and being publicly associated with group actions helps with that."[132]

One of the PR respondents also added:

"…sometimes it's just about name checking legal teams; for them it's important that [they're mentioned] maybe the clients don't want it so much but the lawyers certainly do."[133]

---

off dates can be advertised to minimise the risk of individuals starting their own proceedings at a later date but explains that neither the rule nor the practice direction give guidance on the form of any publicity nor on who might be ordered to pay the costs of placing the appropriate advertisements.

[126] Respondent 5 – in house counsel

[127] Respondent 7 – claimant solicitor

[128] Respondent 8 – QC

[129] Respondent 15 – claimant solicitor

[130] Respondent 16 – defence solicitor

[131] Respondent 20 – claimant solicitor

[132] Respondent 13 – defendant solicitor

[133] Respondent 24 – PR

6. **Some claimants appreciate publicity** - For the most part, it was clear that media activation was lawyer led with little involvement from claimants; the following were examples:

> "…it is relatively rare for the client to get involved [in media activation] in a group litigation where there is a solicitor and an action group involved, but they do do it. Some go to the press; some the press seek out … Most commonly activation is without the clients and it isn't client driven."[134]

> "Don't think [C lawyer] consulted clients before going to media; a lot of poorly educated [claimants] [a long way away]."[135]

> "claimants not involved and weren't aware; didn't even know what had been claimed on their behalf."[136]

> "I don't think they have the knowledge, consent or approval of the rank and file of their clients but they probably correctly assume that the rank and file don't really care what's said in the English press as long as they get their compensation."[137]

But there was evidence from some respondents that some clients themselves sometimes want publicity for their cases. It was apparent that some claimants will be involved with media activity in some of the cases although this was not a general rule.

> One of the PR respondents said, referring to a case with overseas claimants, that whilst it was not the primary impression,
>
> > "The Secondary impression was that it was partly for the benefit of … clients to show them … [that the case was before the English courts] …"[138]
>
> Another PR respondent said this was not the case for those who joined the group action with a view to a "quick buck", they would not seek publicity, but that for example in a personal injury case that involved deformity in new-born children there was for the claimant parents a sense of "validation" from the media activation:

---

[134] Respondent 1 – QC

[135] Respondent 4 - QC

[136] Respondent 6 – in-house counsel

[137] Respondent 5 – in-house counsel

[138] Respondent 2 – PR

> "…the [CCC] parents that we dealt with who felt that there had been gross negligence on the part of the [DDD], that they'd been treated abominably, that their lives had been ruined by this action and that they needed for cathartic, justice, whatever motivation, they needed to make a [statement] and as much noise as possible. There was a feeling of guilt that 'why had my child been borne deformed', 'had I done something wrong' and it was a way of assuaging some of that too and for helping the child to understand that it wasn't [their fault] …".[139]

Speaking of an announcement made by him on the court steps in regard to a child abuse action, one claimant lawyer said "I thought it was a very important moral imperative for the claimants to have their say via me".[140] He went on to say:

> "…the abuse of their childhood has happened in the dark; … they … were put where people couldn't see, where society cared no more for them; … And so they were abused in that darkness; for them … it was … really about shining a light into that darkness. That was the justice that these guys wanted; they thought and I've heard it countless times, hundreds of times; they thought, to shine a light into this darkness so in a way, in their naïve sort of sense, nobody would have to go through that again …"[141]

In the main it appeared from the interviews of respondents that although nearly half the respondents themselves indicated that at some point in the conduct of their cases the client was involved in the activation of media, in sheer numbers of clients this was the exception rather than the rule. Among those claimant lawyers that routinely involved the claimants were certainly those running the claims with fewer individual cases, such as the child abuse cases; not only are those cases with fewer numbers, but they involved claimants potentially with very serious emotional issues and who may, because of their experiences, be especially sensitive to issues of publicity; in their cases it would be vital to ensure that any steps taken with the media were handled both delicately and with their full knowledge and consent. In addition, in cases such as the Columbian Farmers' case (which was not discussed in an interview with any respondent but which is included here purely for illustrative purposes) sometimes some of the claimants are either interviewed for media and/or may be called to give evidence. Naturally, media attention would need to be conducted with their knowledge and consent. The Guardian article referred to in Section 6 of Chapter 2 with reference to that case[142], referred to two of the claimants, Rodrigo de Jesus

---

[139] Respondent 24 – PR

[140] Respondent 12 – claimant solicitor

[141] Respondent 12 – claimant solicitor

[142] Diane Taylor 'Colombian farmers sue BP in British court' (The Guardian 15 October, 2014) http://www.theguardian.com/global-development/2014/oct/15/colombian-farmers-sue-bp-british-court - accessed 2 December, 2014 and 17 March, 2019

Mesa and Rogelio Velez Montoya, both of whom are pictured with the article, coming to London to give evidence. There is every likelihood that they had been consulted on the issue of being photographed and the photographs with their names being put in the press but the overwhelming inference from the interviews with the respondents during the research, was that it would have been very unlikely if the other 98 claimants in that case had been consulted or indeed knew much about any media involvement[143]. The reference to the lack of awareness of media attention for large numbers of claimants and particularly in the cases where there would have been many tens of thousands of claimants "poorly educated" and "a long way off" was much more typical. This indicated that although nearly half the respondents mentioned client involvement of claimants in publicity, in terms of the huge numbers of actual claimants across all group litigation cases, it would be much less common and in the larger cases quite unusual.

It is acknowledged here that there is of course a practical issue in consulting twenty to thirty thousand claimants before involving the media in one way or another and no ethical point is being made in that regard. It is also acknowledged that there is probably a lot of truth in the observation of Respondent 5, referred to above, in that the vast majority of the rank and file of the claimants probably do not much care about what is said in the English media as long as they get the compensation that is being claimed for them.

7. **Weak cases** - One of the in-house counsel made the observation that an additional purpose of the media activation was to bolster otherwise weak cases:

> "In both these cases, the underlying legal merits of claims are weak for them so they counteract by creating leverage in the media…"[144]

That respondent continued by speaking of blackmail in the context of undeserving cases:

> "What they do really amounts to blackmail; the extent to which they are relying on creating an unfair media storm to leverage cash out of [defendants] even when it's not justified …"

In addition, another respondent had pointed out that in group litigation weak cases do get swept along by the stronger ones:

> "…basically, defendants don't like groups; they know that if there is a group, the strength of the collective whole is greater than individual cases, because generally what they want to do is pick off … strong cases

[143] Although it cannot be stated categorically one way or the other in this particular case because no enquiry has been made.

[144] Respondent 6 – in-house counsel

> and settle them and fight the weaker cases; whereas with a group they can't do that because usually with a GLO there's an order that if there's going to be a test case, that case cannot be settled without leave of the court and if that case does settle, you have to substitute another one; so you end up with a representative action if you like."[145]

One claimant solicitor respondent referred to the threat of media exposure as leading directly to a settlement in a claim which was old and that he thought had no great prospect of success.[146]

Another aspect of the use of media to bolster the case was considered to be the emphasis of a non-essential part of the case to gain more sympathy:

> "…one of the themes that has been emphasized … which actually isn't an important [issue], isn't really a big problem, is about drinking water. So they're pretending that the whole thing is about having clean drinking water because that's a very emotive topic that the press are interested in; you get good visuals around that story; pictures of little children and things like that; it's not really about that at all but that's just clever media positioning and obviously it puts an enormous degree of pressure on the entity that's alleged to be responsible for that …"[147].

This respondent was the clearest on attributing motivation to the claimant law firm in activating the media:

> "…if you think about the business model of the claimant law firm, they want to get a win, they don't want to risk too much of their own equity, they know a lot of these cases are speculative so what they really want to do is create a huge splash and then get an early settlement and a nice uplift. [Can see this] quite easily because the claims are totally unparticularised. If you've got 40,000 people [FFF, claimant law firm] have admittedly served what they describe as a generic particulars of claim for each claimant; there's no way they can have independently audited each of those individuals and made a judgement about the extent to which their livelihoods have been impacted by … pollution and they're not even pretending to. … The sums alleged in damages are so far beyond the likely average yearly income of somebody in that region so it's all hugely inflated again for headline grabbing purposes and in order to create a sort of anchor for settlement, to get a number that's fixed in people's minds as to how much the claim is worth."[148]

---

[145] Respondent 7 – claimant solicitor

[146] Respondent 12 – claimant solicitor – referred to below in section 3 "Use of Media as a Threat"

[147] Respondent 28 – defence solicitor

[148] Respondent 28 – defence solicitor

8. **Use of media as a threat** - In addition to the perceived threat of media attention just referred to, several respondents spoke of use of direct threats of media attention.

Examples are:

> "Can also see it in pre-action correspondence – e.g. 'We are happy to deal with this on a confidential basis and if it doesn't settle it's in our clients' interests for this to be aired' ".[149]

> "…[DDD] know that if they do the wrong thing I'll be making a story out of it and trying to embarrass them … 'I don't want this to turn into a media storm' … they know that if they annoy me and if they behave improperly then I'll try and do that."[150]

> "…quite often important area was the pressure by shareholders on the board. So it isn't a soft woolly, it was a fairly hard-nosed view, I am going to hit your profits if you don't do the right thing."[151]

One pointed out that any threat had to be prior to media activation; in terms of cases involving insurers he said:

> "…if you wanted to use the reputational damage card against a big insurer in this context, you'd actually have to do it outside of the media it would be the threat because once you've done it and gone to the press, it's too late now because they haven't got anything to lose any more."

One very clear example came from a claimant solicitor:

> "…we did a claim which was quite old and didn't have great prospects of success if the truth be known, against [DDD], they were absolutely media shy and I think that the threat of media involvement and attention brought them to the settlement table very quickly. We didn't deploy the media … So I think in that sense it was the fear of it exploding on them."[152]

This illustrates not only a willingness to use media as a threat but shows that in some cases even the threat of media activation can be enough to force settlement and in that instance, on an admittedly old and weak case.

---

[149] Respondent 9 – defence solicitor

[150] Respondent 7 – claimant solicitor

[151] Respondent 18 – claimant solicitor

[152] Respondent 12 – claimant solicitor

Has the defendant engaged with the media? - Most respondents were in agreement that in the main, although some corporate defendants on occasion do engage with the media and one or two have actually run press campaigns of their own, it is unusual, most defendants preferring not to engage at all beyond what they consider essential responses to media enquiries; even then, their willingness and readiness to do so is still developing.

This was put clearly by a claimant solicitor respondent:

> "Defendants stay out of the media battle generally. It varies but often they'll make no comment or a very very brief comment. They certainly won't go out and court media attention in the sorts of cases that we're dealing with. …those claims that have merit are unlikely to be one which a defendant would want to have any additional publicity brought to. They'd rather bury it if possible."[153]

However, he did go on to admit that sometimes something had to be said by a defendant:

> "Sometimes it's not possible; something like [CCC] case or [CCC] case those very high profile incidents it's impossible for a company not to make some comment but it's much more reactive whereas from our side it's much more proactive."[154]

A QC respondent took a similar view:

> "…defendants try to decrease the likelihood of trial by media" – "it's a battle they can't win anyway" – "it's almost impossible [for a defendant] to get a clear win [in the media] …"[155]

This was supported clearly by one of the in-house counsel respondents seeking to minimise publicity by not adding to it:

> "…[we] very much instructed [PR company] to have a reactive role not a proactive role; we didn't want to be seen to be campaigning (a) in the sense that the media were 'agin' us, but (b) because we thought that way it would actually minimise publicity to the extent that it's possible to do so …"[156]

Another of the in-house respondents spoke of the discussion within his company when faced with a group litigation and adverse media attention saying some wanted to "sue or injunct" the media and others thought it better "not to engage but let it ride", however, on balance the view was:

---

[153] Respondent 15 – claimant solicitor

[154] Respondent 15 – claimant solicitor

[155] Respondent 1 – QC – mostly defence

[156] Respondent 23 – in-house counsel

> "…don't go against the media; don't touch an action against them with a barge pole ... [corporations] can't control the press … can't win against the press; even if [we] settle they ask 'why, what are you hiding?'"[157]

A number of respondents said that defendants would go as far as responding to press and media enquiries. A typical example was one in-house respondent who said of a previous role in a major company facing a group litigation with a large number of overseas claimants that they had "… engaged with journalists; provided them with a [defendant's] view that was different from what [claimant lawyers] were saying". They had "… tried to get the non-left wing press interested …" but that "… on balance [he was] surprised that a company as big as [DDD] was surprisingly unable and unwilling to use the media." He said that they:

> "…did at one stage join battle when [they] wanted to make known the settlement offer because [they] were pretty sure [the CCC lawyer] wasn't telling his clients [what was on offer]."[158]

Other in-house counsel described a development in their approach but still short of any form of managed media engagement:

> "Traditionally [we] would have said 'write what you like we don't comment'. We have moved to a position of saying if you're going to write it'd be nice if you spoke to us as well so we can have some input and an opportunity to balance; and there are situations where we go beyond that by saying if this is going to happen can we talk to you first. A lot of corporations are having to accept that the media is going to be activated so they need to be a bit more active [themselves]."[159]

Some defendant respondents feared that if the defendant engaged it might exacerbate the media situation. One in-house counsel said:

> "…[we are] not proactive unless something published is really outrageous; [we] need to avoid fuelling the fire but if there is something that really needs correcting then [we'll] do it."[160]

In the same vein of reluctance to engage, this respondent continued:

> "As a [defendant we] have sought to put [our] side of the story out. Often in response to approaches from journalists as opposed to actively putting a

[157] Respondent 3 – in-house counsel

[158] Respondent 4 – in-house counsel

[159] Respondent 5 – in-house counsel

[160] Respondent 6 – in-house counsel

> statement out; [we] don't often put press statements out unless it's required by reporting obligations but do prepare Q and A's."[161]

One defendant solicitor respondent gave a similar description noting that in the past there had been a reluctance partly based on what a judge's perception may be and partly because they see little benefit:

> "By and large they don't engage in the media battle. But it has changed over the years; in the old days they would say they would take no part in it; they would wait for the court hearing and be of the view that the judge would be annoyed if they were seen to have been engaging in an open argument; but now [I] would say if there were points that they needed to get across then they would want to say something … It seems that the corporates on the whole think that engaging won't change anything and that it's not worth engaging because it wouldn't do any good. Therefore there is not that much engagement [by corporate defendants]."[162]

One respondent made a series of points with the perception that even if defendants did engage with the media it was not likely to have a positive outcome:

> "Corporate defendants have tried to engage in the media battle but always, on a failing side; … because the impact is minimal because it doesn't make an interesting story … The … cases are so nuanced that except in the clearest circumstances, getting your message across that a claim is exaggerated, false in many respects is just too difficult and is just not of any interest to most journalists … it's just too hard a story to tell and it's just a bit dull … . It's just too difficult; journalists have a short attention span, they have too much to think about and you can't just express something and it doesn't make good copy."[163]

Claimant solicitor respondents supported the contention that the defendants tend to avoid media involvement:

> "…they tend to take a much more … reactive rather than proactive approach; their approach is very much about damage limitation …"[164]

Whilst supporting the general contention of reluctance to engage, it was observed by one respondent that the issue was in some respects subjective:

> "…it comes down to the personality of the lawyers; a lot of lawyers will prefer not to engage with the media but I've seen everything from "no comment" to bringing in advisers and actually developing a media strategy in

[161] Respondent 6 – in-house counsel

[162] Respondent 9 – defendant solicitor

[163] Respondent 10 – claimant and defendant solicitor

[164] Respondent 12 – claimant solicitor

> order to not only counter that of the claimants' lawyers but even to better them."[165]

One claimant solicitor respondent made clear his thoughts as to why defendants prefer to stay quiet:

> "Defendants [are] on a hiding to nothing. Nearly always the claim is by individuals who've suffered injury or loss at the hands of some relatively big organisation and therefore the sympathies of the media and the public will tend to be with the individuals rather than the company."[166]

However, he did go on to say that of late that situation is beginning to change:

> "…in the old days when I first got going when the use of the media was very limited, they [defendants] would tend to always go into their shell, but … as time has gone on, the defendants have become more sophisticated … PR agencies have become more sophisticated in saying 'it's much better that you [defendants] actually are making some of the key points you want to make, you can't just assume you're going to have a trial one day because often these cases settle, and therefore putting out your side of the story is quite important' … they don't want to say too much, that I can totally understand but they want to say enough to show that they've got some side to their case."[167]

One of the journalist respondents was clear that defendants generally are not so keen on communicating with the media:

> "…on the whole defendants are not very keen on talking to the media, not very keen on using the media, not very keen on responding through the media and there are various reasons for that but occasionally you might well hear from the defendant side rather than from the [claimant side] … the defendants tend to assume that there's absolutely nothing they can say, … (I think that's wrong), and there's no point in engaging; quite apart from the fact that their corporate structures are such that they tend not to want to speak or it's too complicated to get permission or nobody wants to take a decision to do so – they're not really geared up to it but sometimes they do."[168]

However, he was adamant that they really should respond if at all possible:

---

[165] Respondent 13 – defendant solicitor

[166] Respondent 14 – claimant solicitor

[167] Respondent 14 – claimant solicitor

[168] Respondent 22 – journalist

> "…there's always something a defendant can say, indeed the less they have to say the more important it is they should say it; but whatever it is there's always something they can say even if it's only sorry."[169]

It may be clear that a journalist would want to hear from both sides to make the story interesting although the evidence[170] is that even if they do, they do not always give much space to the defence view. This response is also interesting from the point of view that, as discussed in Section 6 of Chapter 1, it straight away assumes corporate defendant guilt. However, the view that it is more powerful for a defendant to assert itself was clearly supported by one of the PR respondents, who while noting also the variation from defendant to defendant and the fear of stoking the fire of media attention, said there was clear merit in defendants making some response:

> "…[a defendant statement] does diminish what the claimant is saying about them, otherwise if they don't [respond] there's a vacuum there to be filled by the claimant …"[171]

She made clear that from a claimant side she is not so concerned about simple denials but by clear statements of explanation:

> "…if I'm working for a claimant, I'm not worried about a 2 liner saying 'we're going to defend it' that's absolutely fine, that doesn't worry me, what would worry me far more is if they suddenly say 'on the contrary, not only does this not have any merit because of this, this and this, but actually we have purposely done this, this, this and this' or whatever …"[172]

She concluded, as did the journalist:

> "…I think there's a big room for … change, not the mind set of claimants because people 'get' how you can go to the media and tell your story, but I think there's still a massive educational programme to be done to get defendants to talk … and change their [approach] … I do think that my biggest point is that I think that defendants could do far more."[173]

The perceived risk of not responding was spelled out very clearly according to one defendant solicitor. He acknowledged the fear of media engagement on the part of the defendant and went on to speak of the potential damage of not responding:

---

[169] Respondent 22 – journalist

[170] As discussed under question 5 "How accurate has reporting been and how fair?"

[171] Respondent 24 - PR

[172] Respondent 24 - PR

[173] Respondent 24 - PR

> "Ongoing attritional reputational damage [is the risk of not dealing with the media issues] and it's hugely important and I'm really focusing a lot now on [DDD] clients for whom reputation is enormously significant … Absolutely [there is severe risk if they don't do that] the risk is almost irretrievable reputational damage …"[174]

Whatever the risks for defendants by not engaging with the media the fact is that traditionally defendants said nothing or very little in reaction to media attention, more recently they are sometimes correcting some very obvious inaccuracies and some of them have even tried a media strategy. There was, however, general agreement that from a media perspective, defendants, in terms of media, are on a hiding to nothing in these cases.

How accurate has reporting been and how fair? - Very few respondents considered media coverage to be accurate, some being very disparaging about the quality of the work of the journalists involved; many of the defendant side respondents and some claimant respondents alluded to experience of the coverage being heavily weighted in favour of the claimant side.

Many of the respondents, both claimant and defendant side complained of inaccuracies and over simplification. The following was typical:

> "Almost without exception reports were very very inaccurate. Dumbing down of the true position. They report what was said but it isn't the truth."[175]

A QC respondent found that it was hard to recognise the reality in some reports going on to say that the media introduces distortions and over simplifies:

> "…[it is] often difficult to understand how the reporter saw things, the way they are portrayed; it's very easy to spin and deploy information in such a way that it isn't a true reflection of what happens in court. Publicity is often misquoting and misleading. Media distorts or reports in a particular way …. Media looks for soundbites but cases are very complex."[176]

This theme of distortion was continued and amplified by another of the QCs referring to a specific instance as an example:

> "When there was a preliminary hearing when [DDD] won say 5 out of 6 points, [CCC lawyers] issued a big splash on the 6th point ignoring all the others."[177]

---

[174] Respondent 21 – defendant solicitor

[175] Respondent 6 – in-house counsel

[176] Respondent 1 – QC

[177] Respondent 4 – QC

A theme that also developed among the respondents was that the media gave little coverage to the defendant side even if they had responded to an enquiry:

> "Media reporting was accurate reporting [the claimant] side; several column inches of [CCC] side with a [DDD] denies at the end; always one side of the claim not the other;"[178]

On the issue of fairness, one respondent drew a distinction between the different tiers and types of media:

> "Tier 1 media[179] have an interest to produce something in a reasonably balanced way to their readers but there's a huge amount of media that doesn't take any step to present itself as balanced; a huge amount of dedicated new sites for environmental views or x, y or z. … tier 1 will aim to be fair and do try to ensure for their own sake, the sake of their readers that they present a balance."[180]

There was a feeling too that the defendant side is not so interesting for the media or the public:

> "Our [defendant] side of the story isn't generally the one that the public is interested in. Media want to sell papers so they present what's of interest to their readers;".[181]

Conversely, a small number of respondents, all on the claimant side, found the media coverage accurate:

> "[I] usually find that the reporting is accurate; surprised at how skilled they are at acquiring a huge amount of detailed evidence on very short notice and reporting it accurately."[182]

However, even that respondent spoke of inaccuracies in the tabloid media:

> "The only time I've noticed it to be inaccurate has been tabloid journalism; they tend to be worse at it. I think it's probably because they're more sensationalist; they're less involved with the details of the evidence and the effect of the evidence."[183]

---

[178] Respondent 4 - QC

[179] National Press and national TV

[180] Respondent 5 – In-house

[181] Respondent 5 – In-house

[182] Respondent 7 – claimant solicitor

[183] Respondent 7 – claimant solicitor

Another claimant lawyer was overall very pleased with the coverage his cases had received:

> "[I've] never had a complaint with the press; been very, very lucky. … I can think of one occasion I wasn't terribly impressed with the journalist but in fact they got slapped down by their own media team and we spoke to them the position was resolved. But I would say that 99.9% of my experience with the press thankfully to date has been very satisfactory."[184]

A similar story of satisfaction and admiration came from another claimant solicitor who found the coverage:

> "Generally very good; … Most of it is broadly accurate and some of it is very accurate – there are some really really good journalists, very bright people who research stories very well and come up with some really very incisive and very accurate descriptions on some pretty complex issues, and some very complex issues."[185]

However, even he conceded that "sometimes some of the detail gets lost, some of the reporting nuances aren't 100% accurate" and although he said "I think generally the quality is very good;" he further observed "but there is a range as you would expect and they've all got target audiences which they have appeal to and therefore tailor what they're saying accordingly."[186] On the issue of lack of detail, one respondent observed:

> "In CCC case they [DDD] were bounced by big picture stories, big emotive stories, allegations at a very high level of generality that are difficult to disprove unless you've got 20 specific facts/reports independent experts ready to go and they weren't."[187]

Some respondents, notably defence solicitors, were concerned about bias and specifically discussing activated or "orchestrated" media, one QC observed:

> "[CCC case] was the worst in terms of the most intense, unhelpful, inaccurate media coverage. The more orchestrated, it almost speaks for itself, the more partisan, the less objective and the less well informed and the less informing the media coverage will be; where there is a genuine public interest that has not been provoked by self-interest by lawyers but a genuine public interest because of a tragedy that has really sparked the public attention, like the [CCC case] ….you don't need to whip people up. … if something's happened a long way away, where nobody would know anything about it at all but for the

[184] Respondent 11 – claimant solicitor

[185] Respondent 15 – claimant solicitor

[186] Respondent 15 – claimant solicitor

[187] Respondent 28 – defence solicitor

> publicity that is driven by the lawyers, that tends to be more misleading and more deliberately so."[188]

One of the defence solicitors was even more vehement in terms of bias:

> "In general the representation of specific facts is accurate. But the holistic situation of rounded representation of a fair description is terrible; really, really bad – shocking; and the press attention to the defendant side just bears no resemblance to reality; you only get one side of the story. There is no fair summary of what's going on; it's often very biased and one-sided."[189]

Another had just come to accept that the reporting would be inaccurate and pro-claimant:

> "…when I first started in these cases I was shocked and appalled but over the years have got used to the idea the media reporting in general is pretty inaccurate. So whether it's more inaccurate in these cases I don't know but the short answer is the reporting isn't particularly accurate and it tends to present the claimants' point of view …"[190]

A more philosophical approach was taken by a solicitor with claimant and defence experience describing the media as:

> "…not very accurate; media [are] willing to take the claimant side unnecessarily and it's no criticism if you're a claimant lawyer especially in a group action you want to put your claims as high as possible … to encourage others to join and because of proportionality issues; and journalists are not particularly willing to engage in the nuances; they're clearly unwilling or unlikely to challenge what a claimant law firm is saying …"[191]

However, he conceded that the defence side tends to be more complex: "Most defences are based on jurisdictional limitation issues; they're seldom based on causation issues or liability issues …"[192]

Interestingly, one claimant solicitor who said that he had engaged with the media in nearly all of his cases described the media coverage as "quite mixed but often rubbish"[193] although that clearly did not deter him from his media activation.

---

[188] Respondent 8 – QC

[189] Respondent 9 – defence solicitor

[190] Respondent 13 – defence solicitor

[191] Respondent 10 – claimant and defence solicitor

[192] Respondent 10 – claimant and defence solicitor

[193] Respondent 14 – claimant solicitor

On the issue of changing press standards, one claimant solicitor complained that in his area of practice it was becoming more difficult to get the press interested:

> "Over the last 2 decades [media coverage] has become increasingly more salacious and less informative. I think it is very much something that is worked on the basis that it sells newspapers. I think that … the reporting has … become celebrity dependant. We have found it incredibly difficult even when we have occasionally advised the media of forthcoming hearings, to get anybody to turn up bar some junior junior junior reporter."[194]

This was echoed by another claimant solicitor who found media coverage: "Increasingly less accurate – more emotive and less investigative these days."[195] The "emotive" aspect was followed up by one in house counsel whose feeling was that the coverage was slanted:

> "I think [the media reporting] was … more inaccurate than accurate… … the rest of it was slanted either to generate a story, or in the case of people like the Morning Star and the Socialist Worker, for political reasons …"[196]

On fairness of coverage, he said: "… on the whole I think it was more unfair than fair. But there were a couple of examples, notably the BBC, and also interestingly the Guardian who were relatively objective …" but one of the PR respondents was clearer: "I don't think they use fairness as an arbiter. I don't think they have any qualms about taking sides."[197]

Perhaps the clearest description of the media coverage concerning group litigation came from one of the QCs:

> "Those waging trial by media will try to ensure that what happens [in the case] is deployed [in the media] in a way to serve the wider agenda of pressuring the defendant. Therefore what is said to press is not [designed] to give a balanced view but to report the things or the one thing that will cause greatest concern to the defendant …"[198]

He spoke of the fact that the mere use of allegations, as allegations, was enough to assist the claimants' cause "simply using the allegations can cause most damage" and he spoke of effectively using the presentation of steps in the proceedings to create media pressure with a view to settlement:

---

[194] Respondent 12 – claimant solicitor

[195] Respondent 18 – claimant solicitor

[196] Respondent 23 – in-house counsel

[197] Respondent 24 - PR

[198] Respondent 1 – QC

> "…or it may be perceived that the sensitivities are most touched by a wider application for documents or by impugning the integrity of those involved. A wider front is opened [in the media] to assist the litigation to produce a settlement and a payment quickly; those using this approach are not simply wanting to get reports but for the purpose of finding that which is exposed will give rise to the greatest concern on the part of the company and produce a settlement."[199]

He made the significant point that the litigation effectively provides the backdrop to the campaign:

> "To those that use the media, the litigation is no more than a platform; they can still get into difficulties with libel but it's often very difficult to prove a libel if they can say all they're doing is reporting allegations that are being made in the litigation."[200]

And he concluded that part of his response with an observation, as discussed in Chapter 1 that the litigation provides protection in regard to libel and by implication therefore enlarges the freedom of action in the media campaign: "The litigation therefore affords a degree of protection against libel that they would not otherwise have."

Is media activation ethical, reasonable, legal? - The journalist respondent had the view that using the media to put pressure on the defendant was a right and proper thing to do:

> "…public opinion can support a claim so right in the sense that if their [the claimant lawyers'] calculation is correct "is that a proper thing to do" probably yes, if you're acting in the best interest of your clients and you think the best interest of your clients involve publicity because that will put pressure on the defendant to settle then it's a legitimate and appropriate thing to do on behalf of your clients, so yes, it probably is the right thing to do on the whole."[201]

In fact, having said that the claimant lawyers talk to journalists because they see an advantage to their clients, he went on to express the view that "It would be improper to act otherwise to be honest." A view that was echoed by one of the claimant solicitors although he was talking about publicising deadlines:

> "…we would probably be criticised if we didn't publicise [a deadline]"[202]

---

[199] Respondent 1 - QC

[200] Respondent 1 - QC

[201] Respondent 22 - journalist

[202] Respondent 20 – claimant solicitor

One of the QC respondents spoke of the media being seen as part of the armoury of a claimant solicitor and of a sense of entitlement to use the media:

> "Certain firms see the media as being a legitimate piece of their armoury and they see it as perfectly legitimate; they don't see any professional objection. They'd say it was a perfectly legitimate tactic to use." and "… firms … certainly say 'I'm going to get a better deal for my client out of this so I'm entitled to resort to the media …' ".[203]

Some of the claimant solicitors made clear their belief that use of the media was quite legitimate:

> "…I believed that provided I behaved properly, honestly and didn't say things that were incorrect, then responsible members of the media, would make up their minds … it's a balance between being frank and honest with them … respecting the confidences that the defendant lawyers … placed in you because to get these cases settled, did require not just being right or wrong in the law but actually getting the sympathy is probably the wrong word but at least the recognition that if the cases could be settled they should be settled."[204]

> "…if I think it would assist our case to have it ventilated in the public sphere I have no problem in ringing up outlets and telling them what we have …"[205]

Naturally the defence side and in-house counsel see it differently:

> "From our perspective we regard it as inappropriate; there shouldn't be that sort of attempt to effectively wage litigation through the media."[206]

> "One law firm has a distinct model; huge media furore assuming and banking on the fact that the [defendant] will settle rather than face the trauma of a trial. When they did actually have to go to trial they were badly prepared. But they all play the media card. In slightly different ways but playing it effectively."[207]

> "…the exposure is something we would not like the media to be focussing on in our business. It is factor … that is used to make a settlement more likely or earlier or higher or a combination of those. … A deliberate use of the media to achieve an objective whether it's a misuse is open to debate; it would be a

---

[203] Respondent 8 - QC

[204] Respondent 18 – claimant solicitor

[205] Respondent 19 – claimant solicitor

[206] Respondent 16 – defence solicitor

[207] Respondent 6 – in-house counsel

misuse if the intention is to achieve a result that is different to what you'd get it if it were left to the judge."[208]

1. **Are clients aware of media activation?** - A sub-set of the issue of ethics is the question of whether claimant clients are consulted about use of the media in their cases or whether they are even aware that their cases are used in media activation.

> "Clients are aware [of what we are doing] because we would always speak to them first and get their story from them … We'd ask them permission to tout them to the media and also in the [CCC] one, I wrote up their story, their narrative and sent it back to them for their agreement, because … they can be quite sensitive 'well I wouldn't say it like that' "[209]

On the other hand one in-house lawyer was very clear:

> "In [CCC case], [FFF claimant law firm] generated it all. Half the time the [claimants] didn't know what was going on on their behalf; had not a clue … [it was] all lawyer driven and in some cases without any input from claimants; clearly the bigger the class the less likely [claimants will] be involved. In [CCC] that was certainly the case; they didn't know what was being claimed on their behalf – they didn't even know the value of their claims. It was put to a witness as to what he was claiming and he had no idea that he was claiming hundreds of thousands; they weren't even told. He said, 'no, no, no, that must be for everyone' and was told 'no that's the claim being made on your behalf'.[210]

One claimant solicitor who deals exclusively in child abuse cases was clear that clients are consulted about media activity:

> "Claimants are always consulted whenever there's going to be any publicity and if it's going to affect them and they're advised about the different ways in which media can anonymise and expose but mainly benefit the case …"[211]

He also discussed the use of a questionnaire at the beginning of a case asking if each client was "interested in helping the media and if so do you want to be anonymous or disclose your identity" adding "various options". In such cases great care is taken of the well-being of the claimant with due account being taken of the sensitivity to media exposure which may suit some claimants but not others.

---

[208] Respondent 5 – in-house counsel

[209] Respondent 24 – PR

[210] Respondent 6 – in-house counsel

[211] Respondent 7 – claimant solicitor

Another of the claimant solicitors, predominantly dealing with product liability issues also spoke of a questionnaire approach to see which clients may be prepared to talk to the press,

> "…subject to individual discussion and so in a big case, the [CCC] litigation, we always had a pool of people that we knew in principle were saying either we're prepared to talk to the press or are prepared to talk to the press anonymously and obviously we'd have a group that said no way."[212]

He went on to discuss that presenting a client to the media always had to be in the interests of the client, or at least not adverse to the client and not only in the interest of the solicitor:

> "…this is a golden rule certainly in my firm, … that it has to be in the interests of that client, you must never ever put a client up just for your benefit; quite clearly it is to your benefit, but you have to ensure that it is to their benefit, or put it the other way round, that it's not a disadvantage to them; … And generally speaking it would be rare that it wasn't in the client's interest because for instance … if they've got this dodgy product and you say 'look the reality is that the defendant's not going to listen to us but if it turns out there are another 100 of you out there it is to your benefit to generate more people' and they have to understand that it means sacrificing some of their privacy …"[213]

Another claimant solicitor discussed media activation with clients depending on the nature of the case:

> "…we speak with our clients and again it varies depending upon the nature of the case itself and the scale of the case, but we would always get consent from clients if they wished to make a comment and they're to be quoted, clearly they have to buy into that and they're informed of that and there's a written process which we follow; an internal process."[214]

One of the PR respondents echoed this saying that they effectively "mock interview" the clients so they know what they will say and "how they would come across".[215]

---

[212] Respondent 11 – claimant solicitor

[213] Respondent 11 – claimant solicitor

[214] Respondent 15 – claimant solicitor

[215] Respondent 24 – PR

One of the QC's was clear that media activation was a lawyer led exercise and based on the observation that the cases are often lawyer led and one of the quests is more clients:

> "Most commonly activation is without the clients and it isn't client driven… Clients would be willing participants but many of [the cases] are lawyer led. Lawyers lead the cases and seek out the clients."[216]

One of the in-house respondents was also clear talking about a case that had overseas claimants being run by a claimant law firm that was particularly active with the media that the media communications had little to do with the claimants:

> "…they're not necessarily doing any local proactive communications in [the country in question]. Clearly they are not communicating to their clients, they are communicating to a public that's of interest to the defendant …"[217].

He went on to expand that media activation may be done with the knowledge and consent of some of the claimants but certainly not all:

> "Claimant lawyers activating media are doing it with knowledge, consent of clients; maybe not all of them; they will try to get a local as a spokesperson; to what extent people out of UK can understand how media interacts, but media would rather have a quote from the [local client] not [the lawyer] … I would say they try to have a client spokesman; I don't think they have the knowledge, consent or approval of the rank and file of their clients but they probably correctly assume that the rank and file don't really care what's said in the English press as long as they get their compensation."[218]

So whilst it is clear that when using claimant participation in media activity, claimant solicitors invariably ensure client knowledge and consent if they want to present the client to the media, there was no evidence of consultation on the issue of media activation itself. From the comments of the defendant lawyers, certainly in the cases with overseas claimants, it would seem that it is predominantly clients that the claimant lawyer wishes to present to the media that are asked to consent to that part of the process. The indications were that while there was some participation in activation by some claimants in some cases the media activation was largely lawyer led and this was especially so in relation to cases where there were large numbers of claimants and/or large numbers of overseas claimants. As discussed above in this Chapter, it was often those solicitors running claims with smaller

---

[216] Respondent 1 – QC

[217] Respondent 5 – in-house counsel

[218] Respondent 5 – in-house counsel

numbers of claimants or where a small number of claimants from large cases were required for representative quotes and/or to give evidence (as in the Columbian Farmers' cases, also referred to above in this Chapter) where claimants would have been consulted and kept informed as to media activity. There was no evidence that claimant involvement was general or usual and the inference from the discussions with respondents was very much that consultation with individual claimants was less common. Statements that the media activation was lawyer led without claimant participation were far more numerous and much stronger.

However, the main ethical point being made in the thesis is not a specific criticism that claimants are not involved or consulted with regard to media involvement. The purpose of establishing whether they were or were not consulted was to discover who was behind the media activation; was it the solicitors, the claimants themselves, interest groups or NGOs. It is already established and accepted in the thesis that claimants have their Article 10 rights to be heard publicly and to have recourse to the media. However, where the media activation is lawyer led, and it seems from the research that it largely is, then the issue is directed towards the way in which those lawyers activate the media and the purposes for which they do it.

The criticism levelled is not with regard to the ethics of consultation of clients with regard to recourse to media, (that may be an issue but it would be the subject of a separate enquiry), but the extent to which claimant lawyers use activation of media as a strategic adjunct to and in some cases a substitute for the legal process itself. The issue is whether media campaigning is used unfairly and inaccurately to apply pressure to defendant corporations to force a settlement or to force a settlement on improved terms or with improved timing. In this way, media would be used towards achieving settlement as an alternative to litigation rather than a product of it as Genn[219] points out, and where media is used, also as noted by Genn[220] not as an adjunct to litigation but as a replacement for it.

2. **Claimants at a disadvantage in the court system -** The concept of requiring the media to assist because of claimants being at a disadvantage in the litigation was a theme that also emerged and it is also a sub-set of the ethics issue. It suggests that some of those who are activating media consider that at least part of the reason for doing so is in order to correct a disadvantage that they perceive to the claimant side.

   One of the PR respondents confirmed this saying that one of the aims of activation will be to "…convey that claimants are at a disadvantage …"[221];

---

[219] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P123

[220] ibid

[221] Respondent 2 – PR

conversely she said, the defendants "…will want to show that the claimants are not at a disadvantage. There is public anxiety if they see the situation as being unbalanced."[222]

This theme was echoed by one of the QC respondents:

> "Claimants would say that it's a legitimate weapon to use because of the inequality of arms. Companies gain access to justice in a way that is unfair because they hire the best lawyers and the best PR firms, and by using the media they're levelling the playing field."[223]

A clear statement on imbalance came from the claimant lawyer who had said that the media was better placed than lawyers to exert pressure on defendants but with respect to insurers as defendants he said:

> "It was clear to me, … that the balance of power between the world's insurers and their lawyers and individual solicitors acting for what are now called claimants, was an unfair balance."[224]

One claimant lawyer felt particularly strongly on the issue of imbalance:

> "Imbalances; massively so. If we were to issue these proceedings now it would be a £10,000 issue fee. That alone would put us under [pressure]. We're acting on a no win no fee basis and we've been doing so ever since 2009; the [defendant] companies have [declared] a £15m budget … until trial; … When it comes to applications, they can afford to make 7 or 8 applications and fail on each one; they haven't but they could. It would be a success for them because they'd slowed us up or they'd put us under such pressure that we could constantly fight a rear-guard action and manage crises rather than proactively plan our case and the best possible execution of our case."[225]

Whereas, he said, "if we make an application and we're not absolutely certain we're going to win it, that puts a lot of pressure on us because if we have costs awarded against us … it could make or break a small firm". He continued by talking about the numbers of lawyers the defendants could martial:

> "I have received letters from I think possibly 12 different solicitors at [FFF, defendant law firm], and each element of it seems to be sub-divided into different teams where I think they might have 12 teams and we have one team on the 12 different issues …"

---

[222] Respondent 2 – PR

[223] Respondent 1 – QC

[224] Respondent 18 – claimant solicitor

[225] Respondent 19 – claimant solicitor

He went on to say that the position had been exacerbated because of the changes in treatment of ATE premium "… the insurance premium is not recoverable from the defendants if you win your case, so those premiums are very high and people are going to have to pay a £10,000 premium at the end of the case that we represent, and it's very, very difficult".[226]

His clear point was that activation of the media enables them to get to the defendants' weak point for free, whereas to go through the courts system is fraught with expense and risk:

> "Activation of media gives us the ability to potentially cause reputational damage to the defendants and it gives us a pressure point where the court process doesn't always give us the same pressure point because there are costs pressures on us for any fights we take to the courts whereas the same pressures don't apply to us in the general public sphere, the media sphere. [The difference is that] saying things in the media is free of charge and saying them in court isn't; and also the fact that the companies don't care if they are involved in a high court litigation that they can bury and it doesn't become mainstream news or doesn't affect their corporate reputation …; I think they're less worried about whether they have to pay £13m or £15m or £40m or £45m than they are about their brand becoming associated with some of the [matters they were accused of]."[227]

One of the journalist respondents saw an imbalance between claimant and defendant:

> "…the defendant is the one with the money and the defendant has the resources so it's a question of a balance and you could say [activating the media is] the small claimants redressing the balance."[228],

taking advantage of his perception that "the press are more interested in the claimant side, it's more attractive and that's the one that'll get publicity".[229]

3. **Defendants at a disadvantage in the media arena** - Not only was there a perception that the media could be used to overcome a disadvantage for claimants in the courts system, there was also a perception that in the media arena the roles were reversed. So conversely in terms of the media coverage there was a perception among both claimant and defendant lawyers that the defendant was at a disadvantage. From the claimant side:

---

[226] Respondent 19 – claimant solicitor

[227] Respondent 19 – claimant solicitor

[228] Respondent 22 – Journalist

[229] Respondent 22 – Journalist

> "…let me start by saying clearly the media perceived me and people like me as being on the side of the angels and the righteous. When you have injured people, against corporations I had an unfair advantage."[230]

> "Because we are acting for the claimant, mostly the media is on our side."[231]

The journalist and PR respondents agreed:

> "…the journalist will always stay to listen to the allegations but they may not come to hear the defence at all. They are always more interested in the allegations."[232]

> "…it's certainly more interesting to hear from the claimants." [233]

From the defence side, the lawyers had much the same impression. Examples are:

> "…[the] fact is they contact to let us know and ask us for comment and give us a chance to explain our side of the situation but that doesn't mean they'll write in our favour … our side of the story isn't necessarily the one the public is interested in …".[234]

> "…the reporting isn't particularly accurate and it tends to present the claimants' point of view."[235]

The impression from one of the PR respondents was slightly different, citing one example of media being pro-defence:

> "I wouldn't agree that they always take the side of the claimant versus the defendant, I think it depends on who the defendant is. If you think about the [DDD] having all these class actions against them for whatever then people are taking the view and the side of the defendant, well the Daily Mail is."[236]

---

[230] Respondent 18 – claimant solicitor

[231] Respondent 14 – claimant solicitor

[232] Respondent 2 – PR

[233] Respondent 22 – journalist

[234] Respondent 5 – in-house counsel

[235] Respondent 13 – defence solicitor

[236] Respondent 24 – PR

However, it should be pointed out that she was referring to the series of claims against the MOD in connection with Iraq, which are in many senses exceptional[237].

One defence solicitor was of the view that the "prejudice" of press and readership may be separated according to public and private sectors:

> "I think there's a big difference between group legal actions against corporates versus group legal actions against … public sector or state owned – … your average Daily Mail reader has a real problem with the NHS being sued for £100m or for service men and women being sued and they find that utterly distasteful, a huge waste of public money, greedy lawyers all that sort of stuff; … when it comes to the corporates though there's no inherent sympathy for a corporate defendant; … so what if they get sued for a few hundred million, they've got billions so what difference does it make?"[238]

The journalist respondents had different ideas on whether the media advantage for the claimant caused over-compensation in favour of the claimant. On the risk of media attention over compensating and reversing the imbalance one said "I don't really think so, I haven't really seen any signs of that happening."[239]

The other conceded that there was a risk:

> "I suppose there is [a possibility of the use of the media over correcting that imbalance and turning it into an imbalance to the disfavour of the corporate defendant], you certainly can't rule that out; as a matter of principle that must be right and my only answer to that is well then the corporate defendant should use the same rules to speak to the media to play the same game. … I don't see why they don't."[240]

However, he was not taking account of the experiences of some of the lawyers involved on the defence side who were cautious of the press:

> "…as a [defendant] you have to be aware that things will get distorted and have to modify what you say accordingly … from a legal point of view we need to make certain points but have an eye to the distortions."[241]

---

[237] See Section 1 and commentary on the Al Sweady case in Chapter 1

[238] Respondent 28 – defence solicitor

[239] Respondent 27 - journalist

[240] Respondent 22 - journalist

[241] Respondent 6 – in-house counsel

Others made the point that the press were not even handed in their approach to claimant and defendant sides:

> "Often it was clear there had been a lot of preparation for the article on the [FFF, claimant law firm] side and you'd get a call from the Guardian at 4:00 in the afternoon saying we're going to press with this at 9:00 [p.m.] and can we have a comment – so [we] were given limited time to respond. That was always the case." [242]

Another in-house counsel example commented on the changes with regard to the amount of notice that defendants are given:

> "Notice has changed a lot over 10 years - in the 00's you'd easily have until say 7:00pm to respond to a filing deadline because [the press] were interested in going to press the next day; now they are targeting 3 different points in the day when people will look for new content – the early morning, then lunchtime then [evening] so you don't have the same amount of time; but still tier 1 … typically [will] call after a lunch time editorial conference and give 3 or 4 hours to respond but with different time zones, it's more complicated with different deadlines for getting stuff online."[243]

A defence solicitor gave a similar response:

> "…they were sometimes bounced into making responses which as it transpired had not been audited sufficiently and therefore they were discredited again. Bounced by [FFF, claimant solicitors] – bounced by the media 'we're running a story tomorrow, it's about how you did this that and the other' they [DDD] then scramble around trying to deal with it on a very fact specific basis [to] put something out there, … and then you know 2 days later [FFF claimant law firm] have found some other evidence and can disprove it …"[244]

One of the PR Respondents gave a frank account saying that though they may have worked on something for the claimant with the journalist for anything from 24 hours to 2 weeks, the defendant might only be given 2 to 3 hours to respond:

> "…the respondent/defendant would always be asked what do you have to say about this case; they wouldn't be given [much warning] – 24 hours – they'd be given a deadline but they wouldn't know that it was necessarily coming at all so the call would come out of the blue and

[242] Respondent 4 – in-house counsel

[243] Respondent 5 – in-house counsel

[244] Respondent 28 – defence solicitor

> they'd be given – it'd depend, if it's for a Sunday newspaper … they could well get to them on a Friday afternoon and then expect them to respond by 6 o'clock Friday afternoon, so they can get 2 to 3 hours. [we'd have worked on it with the journalist] sometimes it could be 24 hours, sometimes it could be 2 weeks"[245]

Asking a corporate defendant to respond out of the blue to anything within 2 to 3 hours would be a tall order for all but the very best prepared.

Intended and Actual Effects of activation - How effective is media activation? How damaging is media to the corporate defendant? Does it still work?

1. **"It doesn't have to be your fault to be your problem" -** This was an allusion by an in-house counsel[246] inter alia to the issues raised by media pressure, in effect compelling action and a response from a corporate defendant, even one that may not necessarily have liability. In general, like some of the comments below, it underlines the power of media activation:

> "Activation of media is worthwhile for claimants; G[eneral] C[ounsel]s are human beings and to be spending their days having to fend off the CEO various divisional managers, area managers, the Board because of the constant gripings going on in the press is just a pain in the neck and the higher the profile the greater the encouragement to the claimants really."[247]
>
> "…even the very allegation itself is damaging."[248]
>
> "…once allegations are made it's very difficult to get rid of them even if they're not true …"[249]

This leads to the perception, as earlier stated[250], that the defendant is not in a strong position with the media:

> "…[as a defendant] you <u>can't</u>[251] win, however much you do. However much good you, or however much wealth you create or jobs you bring, whatever you do is wrong. ... It's very difficult if they're trying with the

[245] Respondent 24 – PR

[246] Respondent 5a – in-house counsel.

[247] Respondent 10 – defence solicitor.

[248] Respondent 5 – in-house counsel.

[249] Respondent 19 – claimant solicitor.

[250] Chapter 4 – Section 4. Has the defendant engaged with the media?

[251] Respondent's emphasis.

> media to improve the position because good news isn't good copy … It's almost impossible [for a defendant] to get a clear win; (1) the press are not interested in good news; and (2) they are interested in allegations … therefore the allegations are in the media and that's that. … [the defendant] won't win the reputational battle even if they win the case."[252]

One claimant solicitor was among those who saw media activation as very effective:

> "I think we have been one of the pioneers of using the media to the benefit of claimants over the years; and that's been very largely a success. There's obviously some downsides, but I think that is small compared to the success to the claims that we have brought."[253]

In addition, we have already seen that even the threat of media can lead to settlement[254].

One in-house counsel pointed to the reduced effect in the market if all major players in it are affected by adverse group litigation-related media activation

> "…the clients were not put off in terms of future opportunity and that was always going to be a bit of a non-starter because if you're going to take out the 10 biggest … companies [in that business], you don't have many people who have that capability to undertake really big work so … that made us more relaxed about the impact the media might have on the settlement and the management of the litigation …"[255]

and the same in-house counsel also made the point that over-use of the media would also have a reduced effect:

> "…ironically because the case had had so much press coverage, in particular in the trade journals, … everyone reading the trade press certainly had got bored because there was nothing new coming out so though the claimant was trying to generate stories there weren't any hidden smoking guns and therefore it was just a piece of litigation …".[256]

However, even if the effect of the activated media pressure was seen to diminish, the claimant solicitor behind it considered it to have been very

---

[252] Respondent 1 – QC

[253] Respondent 14 – claimant solicitor.

[254] Chapter 4 Section 3 – For what purpose(s) is media activated – Use of media as a threat

[255] Respondent 23 – in-house counsel

[256] Respondent 23 – in-house counsel

successful.[257] On the PR side it was noted that activated media would have less effect on an already seriously embattled defendant:

> "If your defendant is already embattled, the chances of throwing something reputationally at them being successful I think are diminished …"[258]

One defence solicitor did see a positive side for defendants from activated media in the balance between settling the case and opening the floodgates to more claims:

> "…I[t']s complicated how to weigh up how many people are out there who may have a claim and may be prepared to claim [who aren't in the current claim]. Are we prepared to risk a settlement? Or do we go for a settlement with enough "successful" claimants so as to reduce the size of a future group. This is an example of where a high level of publicity before the group closes is a positive thing to ensure you capture [as large a number as possible].[259]

In looking at the effectiveness of media activation, it is worth noting that different media will have different impact and in that regard one of the PR respondents made some interesting comments about social media and traditional media.

The respondent saw social media as a much better, easier and more effective way of reaching potential claimants than traditional methods:

> "…the days of putting ads in magazines or ads in newspapers are long gone, and there's a very fundamental way of structuring and the best way is through Facebook for example, you're much more likely to reach that audience and to know you've reached them through platforms like Facebook in particular but also Twitter … the other advantage to this is our assignment can be driven through our website which is not particularly novel but nonetheless that side of the process will be directly linked to those other platforms that we're on; so the link between perhaps seeing an ad in the newspaper perhaps calling a number and perhaps giving a few details, seems quite flimsy versus we know the audience that we're targeting, we can be relatively well focussed on ensuring that they see it through the Facebook or Twitter accounts or whatever platform they might be on and we can make a

[257] See below - Chapter 4 – Section 8 – 'Has activated media attention impacted on a decision to settle?'

[258] Respondent 24 – PR

[259] Respondent 9 – defence solicitor

> very clear and explicit link between that platform and the website where they can enter [their] detail[s]"[260]

This issue of targeting was very much central to the furore over the use of Facebook data by Cambridge Analytica. Irrespective of the complex issues of consent regarding the use of and access to data, what is clear is that it is the desire and ability to target particular groups, in that case US voters, that was so important. A Guardian article stated in a summary of allegations against Cambridge Analytica that it was alleged that:

> "The data analytics firm used personal information harvested from more than 50 million Facebook profiles … to build a system that could target US voters with personalised political advertisements based on their psychological profile."[261]

Commenting on an advertising perspective, in a campaign regarding a GLO where the respondent said advertising would be used, the respondent said:

> "…no-one, well hardly anyone is putting advertising in newspapers any more because the money is far better spent on Facebook, because Facebook can tell you that [so and so] saw that ad whereas the Times can say, well [so and so]'s class of person may have seen and if you're an advertiser 'half my budget works but I don't know which one', well Facebook will tell you which one, which half."[262]

This respondent intended in their campaign to make careful use of social media alongside traditional media:

> "In terms of applying pressure on the corporate in terms of profile [it is stronger than traditional media]; … I think in our specific case because it's tech related … well we're doing this in conjunction with what we hope is lots of articles in the Times and the FT and other publications as well (that we will brief in and tell journalists that we will [activate] …); and I think that cleanest link on the digital side is that participation route I think it will be much [more effective] … you need to be careful not to overstate it, I think in the digital realm … you can apply enormous pressure through that platform because you can very quickly and through the right circumstances get hundreds of thousands if not

---

[260] Respondent 25 - PR

[261] Carole Cadwallader and Emma Graham-Harrison 'Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach' (The Guardian 17 March, 2018) https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far - accessed 29 April, 2018

[262] Respondent 25 - PR

> millions of people kind of you can create a viral firestorm on social media platforms …"[263]

They took a sophisticated and analytical approach to how social media should be used:

> "Facebook is very much about going to the public about participation but for example the strategy on Twitter is very much about reaching key influencers, and so high profile people with a lot of followers whose followers are high profile in themselves such that it is the example if Paul Staines (Guido Fawkes) tweets something about something you know that everybody in Westminster is going to see it or if Adam Boulton tweets about something you know there's a class of person that's definitely going to see that and pay attention to it so in that regard Twitter for example is much less about reaching the public and participation and more about getting inside a certain sort of influential bubble of people. It's more effective for raising awareness among people who will then put pressure on the corporate."[264]

In a discussion on the narrowing of circulation of newspapers, even that the same respondent thought could be seen as a plus in so far as the papers may become more read by those deliberately choosing to subscribe to them:

> "…if you subscribe to the FT that's an almost hermetically sealed group of people who are interested in that … newspapers are turning into their own little bubbles of subscribers because they haven't got the advertiser base to reach the mass audience any more or the sales so actually they're just one more little bubble and an effective Twitter bubble or a Whatsapp group or whatever can be more effective because you have a well-defined audience who all think in a similar fashion, whatever, so I think it has radically changed …"[265]

And in the same way, he said:

> "…if we want to reach people between the ages of let's say 20 and 35 who are predominantly urban and have a high income then at the push of a button we can do that through Facebook both in terms of advertising but also in terms of content so it's just a far more effective way to do it and that's only going to accelerate as these things become more sophisticated."[266]

Although his colleague cautioned that:

---

[263] Respondent 25 - PR

[264] Respondent 25 – PR

[265] Respondent 25 - PR

[266] Respondent 25 - PR

> "I don't think it will fully replace media because I think credibility is such an important piece on the digital side people still view certain things that come through on digital they're not sure they're credible … but as the next generation come through and is less familiar with that [publication's] brand then that will become less important."[267]

However, he again put the counter-argument, which confirms the views about social media impact discussed in Section 6 of Chapter 1, that some are not so concerned with brands of publication but with confirmation of their own views:

> "…when it comes to information, surprisingly few people care about the brand, they care about whether it confirms their bias already – whether they like what they've seen so it's that's the bit that's interesting …"[268]

A final interesting point on the effectiveness of use of social media made by the same respondent is that whoever wants to publish their material or make their campaign prosper, does not have to seek the attention of a journalist or the permission of an editor to do so.

Has activated media attention impacted on a decision to settle? - "A Clear case of media over merit"[269]? This issue of the impact of media on decisions to settle was the key issue and, whilst a number of respondents initially answered by saying it was not a factor, the overall answer from the responses is clearly "yes", media attention does impact on the decision of a corporate defendant to settle. However, defendants and defendant lawyers were anxious to stress that it was seldom if ever the only reason and that its impact varied very much from defendant to defendant. Some claimant lawyers were clear that media pressure leads to or assists settlement in one way or another but some of the claimant lawyers were cautious on the point, explaining that in some cases these days the media attention can be double edged and can lead a defendant to dig its heels in and fight all the more.

One claimant lawyer said:

> "Of the cases, I think virtually all of them have resolved pre-trial; in a number of them there have been preliminary issues that have gone to contested hearings …. Aside from that the vast majority have settled or been discontinued for one reason or another".[270]

---

[267] Respondent 25 - PR

[268] Respondent 25 – PR

[269] Respondent 2 – PR

[270] Respondent 20 – claimant solicitor

Another was even clearer, of his 10 or so group litigation cases, "None have gone to a full trial".[271] These two responses were typical.

One of the QC's was very clear. He discussed the point at length beginning by talking about one case where settlement had clearly been impacted by media activation:

> "[activated media attention] Can do [have an impact on a decision to settle]; one very clear case where it did – there it had an effect on [the] defendant's banks; not unique. Settlement is almost never solely driven by merits; media is one of the factors (financial, reputation, media, public discussion). Publicity is a major factor in settlement."[272]

He went on to discuss other cases:

> "…in other cases, reputational damage dictates the result, they need to settle – for example, they can't be seen to be litigating against blind, deaf, children."[273]

The same QC took as read the assumption by claimant solicitors that media activation would lead to settlement. Discussing the changes in costs regime, post Jackson and its impact on the profitability of cases, he said that:

> "The new costs regime makes them [claimant solicitors] a bit more careful … Therefore there is much less ability to profit therefore less willingness to take [cases] on if they don't think they'll win, but what won't [274]change is their assumption of reputational damage leading to a settlement."[275]

Looking at the claimant solicitor side he continued:

> "When they decide which cases to invest in, there is no doubt that an important part of the decision making is the extent to which the defendant will be influenced by reputational damage that the case will bring."

Whereas from the defendant side:

> "In the dynamic of deciding to fight or settle a key factor will be the various risks involved and at the top of the agenda is uncertainty and that they hate most of all. Litigation is uncertain enough as it is and if [you] throw into the mix how the litigation is portrayed in the media it becomes incredibly

[271] Respondent 11 – claimant solicitor

[272] Respondent 1 – QC.

[273] Respondent 1 – QC.

[274] Respondent's emphasis

[275] Respondent 1 – QC.

> uncertain and extraordinarily difficult to predict. If the company is alleged to have harmed people, the publicity will be bad anyway even if the allegation is wrong it will gain media attention."[276]

Cleary recognising the impact of media, one of the PR respondents was equally clear in discussing the advice to settle that she might give:

> "[Sometimes] I will advise that a case "from a reputational point of view [is] too dangerous to fight – a clear case of media over merit".[277]

Some of the defendant respondents wanted to make it plain that activated media did not impact on the decision to settle. One said clearly

> "[activated media was] not a major factor; other factors were more significant – for example cost of disclosure; costs [generally]; evidential issues; prospects of success;"[278]

Another was initially at pains to make a similar point "Activated media had no impact on the decision to settle; [we] always said we would settle for the right figure"[279], but then went on to admit that "… when the actual decision to settle was made it may have been impacted by media." He also commented that some clear effect was evident:

> "[An] effect of activated media impact was constant friction between business people and the legal team about the fact that it was being heard in England and not [overseas]."

That had been in a case that had arisen overseas but where the legal action was in London and the activated media attention was all in the UK.

Similarly, one of the defendant solicitors initially said, "Reputation not usually a factor in that kind of decision; I don't think you can let it be...", but then went on to say "I could see how it could become an issue for some people and for some clients …"[280].

One of the in-house counsel also began by saying that there was

> "…not an enormous amount [of impact from the media pressure] and the reason for that was that after about early 2014 ironically because the case

---

[276] Respondent 1 – QC

[277] Respondent 2 – PR

[278] Respondent 3 – in –house counsel

[279] Respondent 5 – in-house counsel

[280] Respondent 21 – defence solicitor

> had had so much press coverage, in particular in the trade journals, we felt that it was yesterday's news …"[281]

However, again he stressed that the impact of the media pressure was much reduced because they had taken steps to join a number of co-defendants in the action with the result that he added:

> "I would imagine [the media impact would have been far greater if we hadn't done that] it would have been concentrated on us as a company and I think it could have been very very serious for us – it could have been terminal."[282]

He then went on to say that he felt there was an impact on the level of settlement:

> "I think the media attention might have indirectly impacted the level of settlement; the levels of settlement were generous and I think that the media attention gave confidence to the claimants' representatives …"[283]

It should be noted that in this case it is clear that the media was activated by claimant lawyers; as it happened one of the claimant law firms that was engaged in activation of the media was a respondent in this research as was one of the law firms acting on the defence side.

It became clear that those that did acknowledge an impact from activated media, considered that it would vary from defendant to defendant; for example those with consumer brands may be more susceptible:

> "[It] depends who you are. The public are more interested in consumer brands – [not so much] in a manufacturer of wing nuts. Not necessarily the effect on the brand in that year; it's about the long term health of the brand..."[284]

One of the claimant solicitor respondents felt that the effect of media was very much dependent on the sensitivities of the defendant:

> "In some cases media has influenced the making of settlements and their amounts; but those cases have been very much dependent upon the sensitivities of the defendant, and who in actual fact is paying."[285]

---

[281] Respondent 23 – in-house counsel

[282] Respondent 23 – in-house counsel

[283] Respondent 23 – in-house counsel

[284] Respondent 5 – in-house counsel

[285] Respondent 12 – claimant solicitor

He had said that in a certain series of cases the media involvement had not led to settlement but that in another it had a mild influence:

> "…in terms of [the CCC cases], I don't think any media involvement assisted or contributed or in any way induced settlement … but there are other cases for example [DDDs] in the [CCC cases] at that time were that much more sensitive as [a charity] to not want a huge amount of media involvement but it only had a mild influence in terms of settlement."[286]

That, however, was the same respondent who is quoted above as giving a clear example of where the very threat of media attention had brought a defendant to a very quick settlement.

A number of respondents said that defendants are influenced by media but not as the only factor:

> "Do companies settle earlier and/or at a higher level because of media coverage? I'm absolutely sure that in a lot of instances across a lot of industries the answer to that is yes, but not convinced that's the only factor and it's dangerous to say that."[287]

This was echoed by a defendant solicitor respondent who acknowledged the differences and went on to discuss where media had a clear impact on settlement:

> "The larger corporation is used to media pressure and to media criticism… Media is not so significant for the bigger corporations; they settle more on the basis of risk [of losing] on the merits and on costs … It is different for the smaller corporate defendants; they are a bit more exposed to media pressure. E.g. in a specific case, the defendant … needed finance and therefore required the financial community to be confident and believe in them; and the media pressure there was a very important factor in reaching a settlement. Media was not more important than the merits but was a contributor; was definitely a material factor."[288]

Media not being the only factor in the decision to settle was endorsed by a solicitor with both claimant and defence experience:

> "Have experienced where the impact of the media has had an influence on a decision to settle rather than fight. Not the driving factor because one imagines that it's human nature that if you can get away with a good financial deal based upon damages that's something vaguely binary for the CFO to understand whereas the potential impact on share price or potential impact on reduced markets etc is something which is far more, and also

[286] Respondent 12 – claimant solicitor

[287] Respondent 5 – in-house counsel

[288] Respondent 9 – defence solicitor

> they're all temporary and things may change, so it has an impact but it's not the driving force."[289]

Another respondent was quite adamant that they would not allow media coverage to influence them although they had in the past:

> "We took a clear strategy decision – In the past we may have settled and in one case we did and are still paying the price; therefore a very clear view that will not settle if the merits are poor and will deal with the media as a separate issue … [We] don't allow media to influence decisions as litigators."[290]

To an extent, this was supported by one or two of the claimant solicitor respondents who considered that the effect of media activation was not as strong now as it once was, specifically in the case of large corporations. For example:

> "I've found that any real influence is waning; whilst I can think back to the 80's and 90's where I think the media played a part in certain cases, transport disasters in particular bringing pressure on a defendant to come to the table or do something. It may just be the type of cases I've been involved with; large corporate entities who seem to be able to ride it out and take all sorts of crap." [291]

However, he added that he would still use it: "I still use it where I can because you never know…"[292]

A defence solicitor also noted that in his view, activated media could be counterproductive:

> "…sometimes the media attention stiffens the resolve of the defendant not to settle because they don't want to be seen to bend to the pressure; therefore can be counter-productive; it limits the options of the defendant but in the other way [direction]."[293]

Another who said he had used media a lot echoed this thought:

> "It can encourage a defendant to settle but it can also encourage a defendant to dig in their heels … different defendants will think differently, and the media are a very big part of that; some go into their shell and tell you to

---

[289] Respondent 10 – claimant and defence solicitor

[290] Respondent 6 – in-house counsel

[291] Respondent 11 – claimant solicitor

[292] Respondent 11 – claimant solicitor

[293] Respondent 9 – defence solicitor

> ****** off, others obviously very wary about the impact of media and are keener to settle but … it can be a double edged sword."[294]

One claimant solicitor was at pains to point out that the issue of using the media for pressure was not as simple as some think:

> "…publicity might be a factor in getting them to settle cases; but I wouldn't over state that; clients often think that if you get something in the media the defendant will fold but that's just not the reality of it."[295]

Whilst one claimant lawyer was careful to say that media impact would not be the main reason to settle:

> "…I think it is fair to say that concern about a company's reputation and the damage that has been done is something that has been taken into account but certainly I can't think of any case where that would have been the main driver for settlement."[296]

Another claimant lawyer took a different view:

> "...no doubt that if there is a media storm it will put pressure on the defendants to do the right thing and settle cases rather than fight them; because you can embarrass them."[297]

A further claimant solicitor felt there was an impact from media on settlement and on timing but not on the amount of the settlement[298]. Whereas another felt activation of media helped move "partly towards settlement and partly towards improvement of settlement terms" but of the case he was then dealing with he said of his media activation:

> "I'm not saying it'll mean we'll definitively win our case, I'm not saying we're going to get the greatest deal anyone's ever gotten but I think without it [media activation] we wouldn't be in the position we're in."[299]

That the defendants are reticent to admit the effect of media on their thinking about settlement was supported by a number of respondents, among them a claimant solicitor:

---

[294] Respondent 14 – claimant solicitor

[295] Respondent 20 – claimant solicitor

[296] Respondent 13 – claimant solicitor

[297] Respondent 7 – claimant solicitor

[298] Respondent 18 – claimant solicitor

[299] Respondent 19 – claimant solicitor

> "A defendant will always say they're not sensitive to publicity; in reality I think a lot of defendants are, hence clients get asked to enter confidentiality agreements in a lot of cases. As to going beyond that … it's difficult really to determine what's in the defendant's mind when they're evaluating at what level to pitch their offers. I certainly think it plays a part in the thinking of a lot of defendants …"[300]

One of the QCs dismissed the idea that the defendants will not be "blackmailed" even if they start out with that resolve, he said:

> "...in approximately half the cases, the initial reaction was 'Publish and be damned we're not going to be blackmailed, we're simply not going to be bullied' and that was the talk from the board which I began to doubt; I thought it was a very brave and honourable thing to start with but bit by bit people get worn down; almost every one sets out saying 'We're not going to be blackmailed' and then as damage is caused and embarrassment is caused and the work force gets disillusioned there is damage to moral, there is damage to business interests and there's cross contamination, commercial contamination, that's the sort of thing that does happen and to that extent it works because people who orchestrate the publicity know that however much they may say they are unaffected, [they aren't unaffected]."[301]

One of the defence solicitors expressed a similar view but in a case where liability had been admitted:

> "I think [media was part of the reason for the settlement in the CCC case] and the reason is that DDD had already admitted liability so letting the story just run on and on and on wasn't in anyone's interest; some money had to be paid so it was either pay it sooner or pay it later and the later it gets paid the more of a story it's allowed to become and the more expensive it is."[302]

Another of the solicitors who had done both claimant took the view that:

> "Media can have a disproportionate effect and if I were a claimant law firm I would use the media as much as I could and I'd coordinate the media more with hearings and other matters and I would try to keep it in the broadsheets …"[303],

and one of the PR respondents regarding one particular case observed:

---

[300] Respondent 15 – claimant solicitor

[301] Respondent 8 - QC

[302] Respondent 28 – defence solicitor

[303] Respondent 10 – claimant and defence solicitor

> "…the multijurisdictional [case] settled and partly because of the media coverage … we got feedback to say "yeah yeah they hated that and that's what brought them to the table."[304]

As a general point she said on media pressure:

> "I would say that when we get the feedback, we're told it's the principal reason [for settlement];"[305],

although as observed above, it would be in the interests of a PR enterprise to be positive about the success of their work. Again, as already observed, it is possible that there may be a temptation for claimant solicitors not to be completely open as to why they activate media and as to what they get from it, and similarly there may be a temptation for the defendant side not to want to fully admit its effect. However, even taking that into consideration, the above responses give a clear indication that activation of media as a strategy in group litigations does have some significant impact on various aspects of settlement decisions, including in some cases the decision to settle itself.

SECTION 3 – CONCLUSION

As set out in Section 1 above, this Chapter set out to look at whether and the extent to which:

(i) pre-trial media attention is activated on behalf of the claimant side;

(ii) whether such activation impacts the corporate defendants in those cases;

(ii) if any such impact is a factor in influencing decisions to settle such cases irrespective of legal merits; and

(iii) if any such influence may result in unfairness or an effective denial of or interference with the exercise of the right of access to justice for such defendant corporations.

To do that it was necessary to answer the key questions which appeared in the Topic Guides and which were included in the Data Analysis Matrix.

The initial conclusion from the data is that it contained a wealth of information with which to address those questions as well as the other issues flagged in Section 7 of Chapter 3.

From the data, it is clear that there had invariably been media attention in the group litigation cases in which respondents had been involved. There was a lot of data

[304] Respondent 24 - PR

[305] Respondent 24 - PR

supporting the contention that there was activation of media, almost as a matter of course, and that the main actors in such activation were the claimant law firms. The data disclosed that defendants were reticent about becoming involved in a media battle and tended to want to avoid media exposure.

The views from the data on accuracy of the media were varied as were those on the extent to which activated media attention had impacted on a decision to settle, but there was sufficient data to establish not only that defendants were impacted by activated media but that activated media can and does have an impact on decisions to settle. Again, as indicated in Section 7 of Chapter 3 the data was helpful in providing information in regard to activation of media as to who it was done by, which media were used, how media is activated and to what purpose. On the important question as to what characteristics of media coverage enabled defendant counsel to conclude that it was activated by claimant lawyers, there were clear descriptions of the use of quotes by the lawyers and the content of the coverage which gave clear indications of its origins; this was in addition to the clear information from a majority of the claimant side lawyers that quite openly stated that they activated media and to the equally clear information from the PR respondents that they were engaged to do just that on behalf of claimant lawyers.

On the issues of the timing of activation and the question of engagement by the defendant with the media, there was much useful data. As to the former it was clear that activation was often designed to coincide with preliminary hearings on the case in question for maximum input and there was discussion of whether or not claimant lawyers “planted” sound bites and particular information in hearings or in documentation to be produced at hearings just so that it could be picked up by the activated media. As to the latter, the general conclusion that, rightly or wrongly, most defendants tended to avoid engagement with the media was clear.

The data from the interviews was very clear on a very large number of issues so it was not a difficult decision to proceed as intended to use extensive quotes from the data in this Chapter. In a lot of cases, the quotes are powerful and clear enough to speak for themselves in answering the questions and they also support the conclusions that will be based on them.

The ultimate purpose of addressing the above questions and the other issues raised in Chapter 4 on the basis of data from the research was, as set out in Section 8 of Chapter 3, to address the six research questions set out in Section 1 of Chapter 3 and as signposted in Section 8 of Chapter 3. Those issues are addressed in the next chapter, Chapter 5 and in particular in Section 2 of Chapter 5.

CHAPTER 5

CONCLUSION

SECTION 1 - RESEARCH ISSUE AND PROCESS

This thesis set out to look at the activation and use of the media in association with group litigation in England. It specifically considers the use of media activation as a weapon in the armoury of claimant lawyers. The thesis aims to assess the impact that this may have on the corporate defendant. The objective is to discover whether it may force them towards a settlement they may not otherwise have made or on terms or at a time when they may not otherwise have made it. If so, the argument queries whether that may amount to a denial or limitation of a right of access to justice.

The Introduction in Chapter 1 and the Literature Review in Chapter 2 discussed the issue of access to justice and it was established that a corporation does have a right of access to justice in the same way that individuals do. Little attention has been paid in the literature to rights of access to justice for corporations, the vast majority of the literature focussing on the individual and then most often on the claimant side[1].

Chapters 1 and 2 described the background to the research issue and the relevant literature. They look at the introduction of the formal GLO, changes and developments that have affected the legal profession, regulation of the legal profession and changes in the legal costs regime, the legal aid regime and litigation funding that have affected the approach to group litigation, its availability to claimants and its viability as a commercial enterprise.

There appeared to be no research directly on the effect of media activation on corporate defendants in group litigation cases, but items of relevance to the research issue and literature on related and connected topics were reviewed.

In Chapter 3, the research issue was crystallized into six research questions as follows:

1. to establish whether there is media activation in connection with group litigation and if so, who are the activators and to what purpose are they activating the media;

2. can activated media be distinguished from media attention at the instigation of a journalist or the publication;

[1] See Appendix 3 – list of articles on Westlaw taken at random on 4 August, 2017 – the first 20 articles found by searching with the key words 'access to justice', the extracts for all of which disclose that they look at access to justice in one way or another from the claimant perspective.

3. what, if any impact does it have on corporate defendants (e.g. does it affect reputation?);

4. is the impact of media on reputation an influential factor in the settle or fight decision for corporate defendants facing group litigation;

5. if so, does it represent an influence in the legal process which has, or could have, the effect of preventing access to justice for such defendants; and

6. can it lead to settlement on terms that do not properly reflect the potential strength of the defendant's case?

Whilst the relevance of media on corporate defendants is to some extent apparent in the literature, despite searches there seemed to be no research that specifically analysed or discussed the impact of media activation on defendant corporations in group litigation cases. It was therefore not possible to conduct this research only by looking at what others had written or found about the issue. Answering the research questions required direct information, where available, from legal professionals involved in the practice of group litigation as claimant and defendant representatives.

Interviews were conducted with practitioners involved in group litigation (as described in Chapter 3, group litigation being regarded for these purposes as any collective or multi-party action involving 10 or more claimants) on both the claimant and the defence side. In addition, as a possible check on the views of the protagonists, some useful interviews were conducted with journalists and some with PR professionals and one with a retired judge.

As described in Chapter 3, a total of 29 interviews were conducted; a breakdown of the composition of those interviewed is set out in Chapter 3 and a summary of results is set out in the Data Analysis Matrix at Appendix 6, the results of the interviews being discussed in detail in Chapter 4.

SECTION 2 – SUMMARY OF FINDINGS

The interviews provided information to answer to the questions posed in Chapter 3 and below are succinct answers to the six research questions taken from the findings and the discussion of the findings in Chapter 4.

1. to establish whether there is media activation in connection with group litigation and if so, who are the activators and to what purpose are they activating the media;

It is clear and certain that there is activation of media in connection with group litigation cases. As discussed in Chapter 1, group litigation has many facets that attract media attention, including the numbers of claimants involved, the profile of many of the defendants (always corporations or bodies corporate such as local

authorities or the NHS or the MOD and no record of any individual defendants) and the fact that the subject matter, such as the MMR vaccine, the Hillsborough disaster or an aircraft or cruise vessel accident is of wide public interest. However, in addition to that general interest there is from the qualitative data clear and unequivocal evidence that media attention is sought, courted and activated.

The interviews disclosed that the "activators" with regard to group litigation include pressure groups such as particular interest groups, trades unions or NGOs and sometimes claimants, but in the main are claimant lawyers and law firms and/or PR firms working on their behalf.

The purposes and aims stated by claimant lawyers for media activation were various. Motivations included recruitment of claimants for current and future cases, locating or attracting witnesses, advertising for the GLO and for the claimant law firm itself, satisfying overseas claimants that the case was proceeding through the English courts and providing an element of validation for claimants who felt they needed a public statement to be made. However, it was also very clear from the data that a major or principal purpose was to put reputational pressure on the defendant. As was noted in Chapter 1[2], none of the purposes stated by claimant lawyers other than the exertion of reputational pressure on the defendant requires the inclusion in media coverage of strong statements containing unproven allegations; the exertion of such pressure is certainly enhanced by their inclusion. This pressure was used in order either to increase the likelihood of settlement or to affect the timing or the level of settlement or in securing to increase the amount of damages in the event of trial. The application of reputational pressure on the defendant through media exposure was a compelling motivation and even the threat of such exposure was in some cases found to be effective in assisting the claimant lawyers to reach the aim of settlement favourable to their client.

The conclusion on the question of motivation for activation of media is that it very much includes the aim of either threatening or causing actual reputational damage to the defendant in the hope of the defendant settling the case as early as possible. This would include cases where a defendant on the merits of the case may not have otherwise sought a settlement at all and cases where a settlement at an earlier stage or on more favourable terms might otherwise be achieved. The impression given was that the motivation to threaten or cause reputational damage was actually greater than the claimant lawyers admitted to and that is very much supported by information from the PR interviews. It may be fair to observe that the PR respondents may have had an interest in claiming success for the party they supported in multi-party litigation but it is submitted that would not go as far as an inaccurate imputation of motive on the part of the claimant lawyers. In addition to the interviews themselves that impression was supported by the writings already

[2] Section 7, Access to Justice, under 'The Potential for Unfairness and Prejudice to the Right of Access to Justice'

referred to of Day et al[3] and Beke[4], Haggerty[5] and Coffey[6]. This was considered also to be reflected in the research in the responses from defence lawyers as to the effect of media activation on their clients' decisions to settle or their decisions as to when or at what level to settle. It was considered from their tone and the way that they answered questions that the in-house lawyers in particular were reticent about bluntly admitting that they are influenced by media in regard to the issue of settlement and that is perhaps not surprising but it was considered that the responses on both the claimant and defence side support the conclusion that there was an impact (see also below).

2. can activated media be distinguished from media attention at the instigation of the journalist or the publication;

Answers to this question given by both claimant and defence lawyers were very clear. Firstly, the claimant solicitors were candid about their activation of media and up to a point candid about the reasons for it. Secondly, the defence lawyers observed clear hallmarks of claimant lawyer involvement either by information displayed on claimant law firm websites, or because of quotes from the lawyers and the lawyers specifically being identified as the source or by the inclusion of information that can only have come from the claimant side ("the journalist is only ever as good as his information"[7] and "there's always been big footprints left in terms of quotes and details that could only have been provided by the claimants' lawyers"[8]).

Often the stories were directly attributed to the claimant law firms or based on press releases sent out by the claimant law firm. A relationship to pre-trial correspondence was also observed. An example was also given of cases where documents from the litigation had been used in disclosures to the press. As one of the journalists said, "The claimant lawyers are not going to talk to us just because they want to help us, they do so because they see an advantage to their clients."[9]

---

[3] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier, 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[4] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0

[5] James F. Haggerty, 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7

[6] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100

[7] Respondent 1 - QC

[8] Respondent 10- claimant and defence solicitor

[9] Respondent 22 - Journalist

Indeed we have the confirmation that claimant lawyers cultivate their friends and contacts in the media, an example being:

> "[I] Have my own personal media contacts; across the board [TV, radio, press]; built up over the last 20 odd years."

It is therefore clear both from defence side observation and claimant side answers that this issue is an aspect of media reporting in a way that is quite different to regular reporting by journalists finding a case to be of interest to their readers. The conclusion is that in these cases the media are being courted and fed as part of an orchestrated campaign. As one of the journalists put it:

> "…publicity is certainly a weapon that can be used and you would have thought that many defendants will settle an embarrassing claim because they don't want adverse publicity which could damage their business and if it's a group claim, the more publicity, regional publicity, local publicity the more reason to settle…"[10]

3. what, if any impact does it have on corporate defendants – does it affect reputation;

It is certain that activated media pressure impacts corporate defendants from a reputational perspective; what is not so clear is the degree of that impact. The phrase "it doesn't have to be your fault to be your problem"[11] from an in-house counsel was a comment on media pressure which helps to illuminate the path to the conclusion that there is an impact on corporate defendants, in effect, as was discussed in Chapter 4, compelling action and a response of some sort from them. The actual impact and level of impact cannot be assessed in any general way; it will vary from case to case and from corporation to corporation. In part it will be linked to that company's conscious or unconscious "litigation reputation". Some defendants are more susceptible and sensitive than others with perhaps a private school facing allegations of child abuse at the most sensitive end of the scale and tobacco or oil companies, much more accustomed to negative publicity, at the other. There was a recognition among the defence side and the claimant side that even the very allegation is damaging and that once the allegation has been made it is very difficult if not impossible to get rid of the effect of the "mud" sticking even if the allegation is untrue[12]. As is clear, right from the examples given in Chapter 1, many of the allegations made in activated media are completely unproved, but they are stated as if they are fact so it is not hard to see that the impact on the corporate defendant will be considerable.

There was also a feeling that the corporate defendant may not be fairly dealt with

---

[10] Respondent 22 - Journalist

[11] Respondent 5a – in-house counsel

[12] Respondent 19 – claimant solicitor "once allegations are made it's very difficult to get rid of them even if they're not true"

by the media, often given very little time to respond even to articles that had been a considerable time in the making on the claimant side. Several of the respondents expressed the view that as defendants they cannot win against the media[13] and that view was echoed by the claimant side as well which was clearly ready to exploit it.

These observations clearly run counter to the admonitions in the SPJ code[14]:

> "Provide context. Take special care not to misrepresent or oversimplify in promoting, previewing of summarizing a story"; and
>
> "Diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing."

and the NUJ admonition that a journalist "Strives to ensure that information disseminated is honestly conveyed, accurate and fair."[15]

It was equally clear that the claimant side who are using the media see a demonstrable effect on the reputation of the defendant and regarded their use of media as highly successful in bringing, for them, a desirable conclusion to the litigation.

4. is the impact of media on reputation an influential factor in the settle or fight decision for corporate defendants facing group litigation;

5. if so, does it represent an influence in the legal process which has, or could have, the effect of preventing access to justice for such defendants; and

6. can it lead to settlement on terms that do not properly reflect the potential strength of the defendant's case.

There is no question that some corporate defendants settle to avoid the reputational damage; others may dig their heals in and the media pressure may add to their resolve not to be pushed into a settlement. The responses included the observation that the claimant side make an assumption that reputational damage will lead to a settlement and from the research, that assumption seems to be well founded. Defendants are unlikely to admit openly the full impact and effect of media pressure though they clearly recognise it and comment on it. Claimant solicitors would not

---

[13] Respondent 14 – claimant solicitor "Defendants [are] on a hiding to nothing"

[14] Society of Professional Journalists – SPJ Code of Ethics – September, 2014 - http://www.spj.org/ethicscode.asp - accessed 25 July, 2017 – referred to in Section 7 of Chapter 1 under "Media Ethics"

[15] National Union of Journalists – NUJ Code of Conduct 2011 – https://www.nuj.org.uk/about/nuj-code/ - accessed 25 July, 20172017 – referred to in Section 7 of Chapter 1 under "Media Ethics"

activate media if it did not benefit them and their clients in some tangible way, and although they evince a range of reasons for doing so, it is clear that the pressure on the opposition is the most important.

Reputational damage was never admitted as the sole reason for settlement but was always, if present, an important factor. Many aspects and many factors were involved in a decision to settle, not least the merits of the case, the evidence and the costs and degree of management time and resource required to properly defend a case. Reputation was one of them and for some defendants it was a major factor. There was one comment as well that a defendant may be advised (by a PR adviser not a lawyer) that a case may simply be too dangerous to fight from a reputational point of view; in similar vein was a reference that a corporate defendant could not, from a reputational point of view, be seen to be litigating against the most vulnerable such as the blind or the deaf or children[16].

Therefore, though other considerations were always said to be present, to the question 'can activated media pressure impact a decision to settle', the answer is most assuredly "yes".

Again, what that impact is will be highly variable but respondents' comments included references to settlement itself and also to the timing of settlement and the quantum.

SECTION 3 – CONCLUSION

The conclusions of the research are clear from the findings that media is being activated by claimant lawyers involved in group litigations. It is clear also that it has an impact on corporate defendants and that it influences their decisions regarding settlement. The absolute extent of that influence was not quantifiable from the research but it is clear that it is a major factor in decision making regarding settlement in varying degrees depending on the case itself and the characteristics of the defendant. The research appears to show that, whilst the impact of activated media attention does not amount to an absolute denial of a right of access to justice it does amount to a significant limitation on a right of access to justice and as something which could, for a corporate defendant, make actually using a right of access to justice counter-productive. In Section 3 of Chapter 2[17] reference was made to an article of Anthony Barton in which he said "Legal rights are only meaningful if they can be asserted"[18] and it was observed that it is no benefit to a corporate defendant to have rights of access to justice if external factors effectively deter or prevent recourse to them.

---

[16] Respondent 1 – QC "they can't be seen to be litigating against blind, deaf, children"

[17] Legal Aid and the CFA

[18] Anthony Barton 'Access to Justice: Balancing the Risks' (Adam Smith Institute 2010) http://www.adamsmith.org/sites/default/files/resources/access-to-justice.pdf - accessed 28 May, 2014

The importance of the conclusion is that it demonstrates that an extra-judicial process is being routinely used and exploited by claimant lawyers alongside or prior to the judicial process. All the claimant lawyers who commented on the issue considered it to be a legitimate course of action; some because they felt the odds were stacked against claimants, some because they simply saw it as an inevitable part of the process, as indeed did some of the defence lawyers.

It was apparent that those activating media were skilled in directing their salvos to the publications that would have most impact on the corporate defendants and the people and organizations that matter to them. TV and radio were included as vehicles in media activation and, despite comments that the traditional newspaper is diminishing in terms of circulation, it is still referred to by and feeds other forms of media and its brands are important in conveying reassurance to readers. In addition, social media was observed to be an increasing and very powerful medium for those activating media and the power and influence of that medium was described as increasing with great potential for those exploiting it. The comments on targeting, as illustrated in the Cambridge Analytica/Facebook furore are also relevant here[19].

The question this conclusion raises though is: is activation of media actually a legitimate course of action; should it be permitted and if not how can it be restricted or prevented?

This in turn leads to the issue that activation of media as part of the armoury of claimant lawyers and therefore as an inevitable part of the process[20] of the conduct of group litigation thereby becomes an issue of professional conduct and ethics which needs to be considered.

SECTION 4 – PRACTICAL IMPLICATIONS

What the Research Shows - As set out in Chapter 1, Timothy Dutton QC was reported in The Law Society Gazette in regard to the Leigh Day disciplinary hearings as saying that "the idea that a press conference is an adjunct to litigation [and] something that will put pressure on your opponent is frankly disturbing"[21].

The research for this thesis shows that there is a common practice among claimant lawyers in group litigation using the media, among other things, to put pressure on defendants and this leads to the question of the acceptability of the practice.

---

[19] See above Chapter 4 Section 2

[20] See "An Essential Part of the Process" – Chapter 4 – and e.g. "I was aware of the need to use the media" – Respondent 17 – claimant solicitor

[21] John Hyde 'Leigh Day: tribunal hears of 'orchestration' of defence' (Law Society Gazette – 1 June, 2017) https://www.lawgazette.co.uk/news/leigh-day-tribunal-hears-of-orchestration-of-defence/5061328.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 June, 2017

From the research it can be said that it is known that such pressure on the defendant will influence and impact on decisions to settle. True it is only one of the influences among those of costs, and management time and effort in mounting a defence. However, unlike those it is a pressure and an influence that results from deliberate action as part of a planned strategy to augment and accompany, or it may be said, subvert, the judicial process. This action is often carried out in the hope that in fact the judicial process itself will never be called on because the defendant will have in effect surrendered by agreeing to a settlement.

Matters for Concern - There are two principal elements as to why this should be a concern; the first is that this is the deliberate exertion of pressure outside a judicial process and therefore outside the realm of the rules of procedure that are designed to make the judicial process fair and evenly balanced. The second is that it is conducted by lawyers themselves who see it at the lowest as an adjunct to the judicial process and at the highest as a replacement for it. There are therefore serious ethical issues involved.

Looking at the ethical considerations from the perspective of the professional rules, there is now no direct prohibition on this type of activity for either solicitors or barristers. As we are mainly here concerned with the activity of solicitors, the question is should Rule 1.02 (You must act with integrity), Rule 1.03 (You must not allow your independence to be compromised) and Rule 1.06 (You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession) be brought to bear more generally in relation to this kind of practice in the way the SRA attempted to bring them to bear in the Leigh Day disciplinary proceedings. Alternatively, should the conduct rules in England, particularly for the SRA revert away from the modern outcomes focussed model back to the more specific model, as discussed in Chapters 1 and 2; and/or should the rules perhaps go even further, more in the style of Rule 3 of the American Bar Association Model Rules of Professional Conduct[22]? Given the conclusion of this thesis that the media is being used in a way which is at a minimum prejudicial to the exercise of a right of access to justice by corporate defendants, it is concluded also that the present outcomes focussed approach[23] is too vague at least in this instance and a much more specific approach is required if this behaviour is to be curbed. As noted in Chapter 2[24] the SRA rules under the Code of Conduct are not wholly irrelevant to this issue and the three used in the Al Sweady case (Rule 1.02 (You must act with integrity), Rule 1.03 (You must not allow your independence to be compromised) and Rule 1.06 (You must

[22] American Bar Association – Model Rules of Professional Conduct – August 2005 - https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html - accessed 26 June, 2017

[23] As referred to in Section 7 of Chapter 1 under “Regulation for Lawyers” - SRA Handbook - Code of Conduct 2007 - Rule 11 - Litigation and Advocacy - Guidance Notes 11 and 21. (2007). Retrieved from http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule11.page - accessed 25 February, 2015

[24] Section 5, under “Applicable Regulatory Principles”

not behave in a way that is likely to diminish the trust the public places in you or the legal profession)) can be said to provide the appropriate ethical base, but they are non-specific. Not only are the SRA rules non-specific on the issue of communications with the press, the idea of having to work allegations under various headings under the 2007 SRA Code of Conduct[25] as was done in the Leigh Day SRA disciplinary case is less satisfactory than having specific applicable rules such as the American Bar Association Model Rules or indeed a return to the approach expressed in the older Guidance Rules 11 and 21 under the pre-2007 SRA Code of Conduct.

Extension of Lawyers' Obligations - In Chapter 2 the changes in approach to regulation were discussed not only from the perspective of the more outcomes focussed approach but also from the perspective of the development observed by Paterson and others of a change outside the scope of the regulations themselves "to the centuries old belief that lawyers' obligations were confined to their clients"; he alluded to a "trend to extend the legal obligations of lawyers to others including … even an opposing party in litigation."[26] This was further explored in Section 5 of Chapter 2[27] where it was seen that however much this expansion is developing it is not as of now reflected in either the SRA or the BSB Codes of Conduct. However, it does go hand in hand with the first of the Legal Services Board's Regulatory Objectives being "protecting and promoting the public interest".[28] From the references to the literature in Chapter 2, it is clear that this expansion of lawyers' obligations is directed to the vulnerable, including disappointed beneficiaries under a negligently drafted will, witnesses and even an opposing party in litigation[29]; that part of Chapter 2 also noted the criticism of counsel for the accused in the Milly Dowler trial in 2011 for his treatment of the victim's family in the witness box.[30] So, it may be difficult to argue that this extension of obligation could include benefitting a corporate defendant. However, the point has already been made that corporations too consist of people and many others, for example suppliers, contractors and those with pensions invested in them are dependent on them. Similarly Boon and Levin, in looking at obligations owed to corporations acknowledge that account has to be

---

[25] E.g. as was done in the Leigh Day case of the press conference referred to in Section 1 of Chapter 1: Rule 1 with regard to the press conference "Improper allegations at Press Conference" under Rule 1.02 (You must act with integrity), Rule 1.03 (You must not allow your independence to be compromised) and Rule 1.06 (You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession)

[26] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P43

[27] Under "Obligations to Third Parties"

[28] The eight Regulatory Objectives - Legal Services Board 'Regulatory Objectives' http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014

[29] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P43

[30] Ibid – P44

taken of the issue that the corporation is itself made up of "members, shareholders [and] employees"[31]. They further discuss under "Duties to the public at large" raising the issue of whether, in the light of the US Savings and Loan scandal and the Enron collapse, duties of candour are owed to "shareholders, employees and pensioners"[32]. We saw in Chapter 2 that Boon noted that obligations to third parties are controversial in that such obligations potentially cut across the duties owed to clients[33]. However, he also points to lawyers' obligations to opposing parties in litigation under the CPRs[34] and under the judges' obligation of "active case management", ensuring not only that lawyers follow the rules but the "spirit of the rules" which would militate against abuses of process, the taking of "unconscionable advantage of the other side", the "prevention of prejudice to the other side" and the obligation to be "fair"[35].

Although those controls referred to by Boon relate to the conduct of court proceedings, it may seem not unreasonable to consider an argument that the strategy of claimant lawyers of activating media to the prejudice of the corporate defendant (outside the scope of the rules of procedure that apply within the framework of the litigation) is a breach of an obligation of proper conduct owed by a solicitor to an opposing party in litigation. Further, it may be arguable that such strategies are not in the public interest, when there might be no opportunity to challenge allegations presented in the media. The applicable professional Codes of Conduct are not designed to be effective in achieving an objective such as protecting and promoting the public interest in this regard.

Professional Codes of Conduct - The Codes of Conduct of the SRA and the BSB are, as referred to in Chapter 2[36], designed to prevent dishonesty and deception and they were used in the SRA action against Leigh Day et al in regard to the Al Sweady press conference[37]. However, from the way they had to be used in that case, it is considered that the Codes are not drawn in sufficient detail or in sufficiently exact terms to be applied to the activation of media as considered in this thesis.

---

[31] Andrew Boon and Jennifer Levin 'The Ethics and conduct of Lawyers in England and Wales' (2nd 2008, Hart Publishing) – ISBN 978-1-84113-708-7 – P 287

[32] Ibid P296

[33] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P231 – referred to above in Section 5 of Chapter 2 - under "Obligations to third parties"

[34] Civil Procedure Rules 1999

[35] Andrew Boon 'Lawyers' Ethics And Professional Responsibility' (Bloomsbury 2015) – ISBN 978-1-84946-784-1 – P210

[36] Section 5 of Chapter 2 – under "Applicable Regulatory Principles"

[37] See Section 1 of Chapter 1 – under "Unproven Allegations Stated as Fact – Examples from GLOs"

Inequalities of Arms - It is evident from the research that there is felt to be a disparity in power in terms of the media between the claimant and the defendant which perhaps explains why claimants are more ready to use the media.

The media are a tremendous force in our society and the more recent advent of social media has the possibility of affecting large numbers of targeted individuals. Media can clearly be used as a force for good within the legal sphere as a means of obtaining justice as occurred in the Thalidomide case when a group of parents, unsophisticated in the use of the law and with very limited resources, were met by the unequal force of a large corporation and had only the press to speak out for them. However the media can also be misused and there is a danger that lawyers can be involved strategically in such misuse of the media, unfairly making unproven suggestions, sometimes without any proof or even physical possibility of proof, to even out the imbalance between the parties. The imbalance of power for claimants before the courts needs to be addressed, but the imbalance of power in the media can be taken advantage of sometimes in an unfair and unethical way by claimant lawyers. This thesis has dealt with the latter issue, how lawyers' misuse of the media can be carried out in an unethical way. In these circumstances it is those on the defendant side that consider themselves disadvantaged – as we have seen, in Galanter's terms, the RP becomes the OS for these purposes.

The evidence was clear that the defence are in the main given very little media space and it seems are often intentionally "ambushed" with a short time to respond to articles or pieces that may have been prepared with the claimant lawyers over a considerable time. It is perhaps for this reason that the defence are often reluctant to engage and use the media themselves since there is a strong perception that media are more likely to favour the claimant story – it is, after all, said to be more interesting than a denial from the defence side. Attacking big business or institutions may sell more papers or attract more public interest - whether the allegations are, or are not, found to be correct subsequently. In addition therefore to the issue of professional rules of conduct, there is the overall question of fairness to the defendants; as well as the question of whether the practice is ethical in a professional regulatory sense, is it ethical in a moral sense?

In order to answer that question account should be taken both of the position of the defendant corporation and of the justifications put forward by claimant solicitors in regard to their activation of media in order to pressurize defendant corporations with the aim of getting or improving the terms of settlements.

However unbalanced the system of justice is for those without funds in terms either of that lack of funds or in terms of the application of rules of procedure or the behaviour and tactics of some defendant lawyers[38], it does not seem sensible to

[38] An example of this was given in Chapter 4, a small claimant law firm on a no win no fee basis struggling to finance a group action against a group of large and wealthy corporate defendants who could afford to "make 7 or 8 applications and fail on each one" – (Respondent 19 – claimant solicitor) alongside comments on there being a significant imbalance between the power of the claimant and that of the corporate defendant.

create or permit an imbalance outside of the system in the opposite direction. The rules should enable and provide more equality of arms, and prevent unprovable allegations reaching the public from overzealous complainant lawyers, who have much to gain from unethical behaviour. The comments of Galanter[39] and Genn[40] that in multi-party litigation, the lack of balance between the impecunious or otherwise under-resourced claimant and the perceived rich and powerful corporate defendant is already to an extent reversed were also noted in Chapter 2[41]. Galanter's observation was noted that class actions, (multi-party actions) were:

> "… a device to raise the stake for an RP, reducing his strategic position to that of an OS by making the stakes more than he can afford to play the odds on, while moving the claimants into the position in which they enjoy the RP advantages without having to undergo the outlay for organizing."[42].

Can it be said that it is a professional responsibility and in the interests of the client for a claimant lawyer to activate media in order to create pressure on the defendant so as to foreshorten proceedings, and/or to get a good, better, earlier settlement and to save costs? Observations of imbalance between the claimant and defendant have been discussed in Chapter 4. Changes, such as a victorious claimant now having to find the premium for ATE cover and having to pay success fees from damages have also been discussed. The "unfair balance"[43] perceived between the power of insurers and the resources of claimant lawyers and the "inequality of arms" commented on by one of the QCs[44] have also been noted, leading to the view that, as that QC put it, the media is being used in an effort to level the playing field. Certainly one of the journalist respondents thought that putting pressure on the defendant through the media was a "proper thing to do". He observed as set out in Chapter 4, that "the defendant is the one with the money and the defendant has the resources so it's a question of a balance and you could say [activating the media is] the small claimants redressing the balance"[45].

The answer however, has to be that deliberate activation of the media to exert pressure may not be fair and/or may not be used fairly with accurate factual material. If so, it is not justified and it should not be permitted by rules of ethical conduct; it ought to be a clear breach of well-defined rules of professional

---

[39] Marc Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (Volume 9:1 Law and Society Review, 1974)

[40] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6

[41] In Section 2 – under "The Balance of power"

[42] Ibid P50

[43] Respondent 18 – claimant solicitor

[44] Respondent 1 - QC

[45] Respondent 22 – Journalist

conduct. Such rules would not necessarily need to prevent publicity for the purposes stated by claimant lawyers other than that of exerting pressure on a corporate defendant[46] but would need to be designed to prevent the gratuitous repetition of sensational headline grabbing unproven allegations and especially the publication of such allegations not as allegations but as apparent statements of fact. To that extent such regulation would need to address issues of content and timing of statements and releases via all forms of media.

To the extent that there are indeed inequalities in the litigation process, they should be dealt with by clear rules of court which correct any perceived unfairness. But such inequalities themselves do not justify recourse to an illegitimate strategy of use of unproven allegations as to either fact or liability. One might as well say that falsification of evidence is legitimate if it foreshortens the proceedings, and/or gets a good, better, earlier settlement for the clients or saves costs. It is submitted that such well-defined rules of professional conduct are all the more important given that neither the current professional rules nor existing protections in the form of defamation law and sub-judice rules give adequate protection to the corporate or any other, defendant in such circumstances.[47] Beginning from the unequivocal and unqualified statements as to the guilt of corporate defendants emanating from claimant lawyers that are not even framed as allegations, it is not acceptable that claimant or defence lawyers should have the freedom to make such public statements regarding the cases in which they are involved, whether or not it is part of any concerted media campaign to win or improve a settlement.

In addition, such rules are all the more necessary given the development of the legal profession in incorporating different forms of practice since the Legal Services Act, 2007, for example permitting Alternative Business Structures including multi-disciplinary partnerships, the advent of publicly quoted law firms[48] and with the advent of the newer forms of litigation funding changing the priorities and business models of claimant law firms such that their interest in winning compensation for their clients becomes paramount to their own profitability or even survival[49].

That is not to say that there are not imbalances or shortcomings in the court system that need to be resolved; some of these were noted in the literature review[50] and some by respondents as discussed in Chapter 4[51]. That is not what this

---

[46] For example recruitment of claimants for current and future cases, locating or attracting witnesses, advertising for the GLO and some measure of marketing for the claimant law firm itself

[47] See below, Section 5

[48] See above, Chapter 2 Section 3 - Changes affecting legal professional practice

[49] A discussed in Chapter 1, Section 3

[50] In Section 2 of Chapter 2 under “Pressure applied by Defendants”

[51] Section 2 “Discussion of Responses: 6. Is media activation ethical, reasonable, legal? under “Claimants at a disadvantage in the court system”

research has been about but to the extent that such imbalances and shortcomings exist they are themselves access to justice issues and are themselves also worthy of examination in terms of rules and procedures and the conduct of claimant lawyers in running cases, (as is referred to in Chapter 2 as being pointed out by Genn[52]) and also in terms of the approach taken by claimant lawyers with regard to settlement being an alternative to litigation rather than a product of it (again as noted by Genn[53]) and as similarly noted above in this section, in regard to the use of media by some claimant lawyers not as an adjunct to litigation but as a replacement for it.

The Need for Regulation - Even if, as respondents have suggested, the newspaper media no longer has the impact that it once had; even if some corporate defendants are becoming more savvy in use of the media and/or more resistant to pressure, there is still huge power in the hands of the media and therefore at the disposal of the claimant lawyer that activates them. With the continuing development of social media and the skills with which to exploit it, this issue is likely to become more not less serious.

As we have seen from cases like Charlie Gard and Alfie Evans, the observations of one of the PR respondents[54] the use of traditional media in combination with skilfully targeted use of social media can have a very major impact, spreading a particular message or point of view very powerfully and with great rapidity. Claimant lawyers are able to make use of this effect in the activation of media and where this is done unfairly, effectively in such a way as to apply pressure and cause reputational damage to a corporate defendant, it could lead very rapidly to intolerable and unjustified pressure on such a defendant.

It is recognised that the aim of use of media for proper advertising of group claims and actions is entirely legitimate and that it is in the interests of both claimants and defendants; if there is to be a claim, let it be as complete as possible so that it can be dealt with as one proceeding rather than a continual series of separate proceedings which is after all part of the whole reason for having procedures for group actions. Such advertising and publicity not only brings the claimants together but this research shows is also widely perceived to be effective in obtaining corroborating and additional evidence. To that extent claimant solicitors seeking publicity is justified and proper. But a code of practice or professional regulation needs to be developed to prevent that being turned into campaigning against the corporate defendant in order to cause reputational damage with the major aim of forcing or improving a settlement. Such an aim, it is submitted, runs counter to the "overriding objective" as is discussed in Section 5 below.

---

[52] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P123

[53] ibid

[54] Respondent 25 – PR

However, even taking account of any legitimate use of media, there is a conflict of interest that arises and particularly so where claimant lawyers have free rein in what is said to the media and when. The dangers are exacerbated by their own interest in publicising themselves, so as to attract further cases, and in the possibility that their case may be overstated in an effort to win a no-win no-fee case and/or to avoid having to expend the normal costs of litigation and the larger ticket items like the cost of expert evidence. The general policy that all are entitled to justice including access to lawyers has been undermined by the reduction in scope and availability of Legal Aid, but this should not turn lawyers who should be dispassionate and who owe a duty to the court, themselves into becoming "bounty hunters".

A further risk in lack of control may be that if the activation of media by claimant lawyers is not subjected to some level of control, the suggestion from the research is that at least some of the defendant corporations will begin more and more to realise the importance of making their own stand in the media and that could lead to out and out trial by media, including in social media and with it Lord Taylor's fear of a threat to the Rule of Law[55], will come to fruition. That may also lead to a situation where the corporate defendants with the most economic power and the most sophisticated PR machines will create a new imbalance between them and the claimants in a situation which is far away from the CPRs and management by appointed judges. The aim of any new control should in part be to correct the situation, commented above, where the research showed a tendency to regard the media campaign as an alternative to litigation and in Genn's words where "negotiation and settlement [are seen] as an *alternative* to litigation, rather than as the *product* of preparing for litigation."[56]

New Regulation - It is therefore suggested that new regulation is necessary and it would need to be adapted by each of the SRA and the BSB to their own situations. It would need to be designed to curb the excesses of activation of the media while at the same time preserving the Article 10 rights of lawyers involved in multi-party litigation in regard to legitimate use of media. Those legitimate aims, as disclosed by the research may include recruitment of claimants for current and future cases, locating or attracting witnesses or corroborating witnesses, advertising for the GLO, advertising for the claimant law firm itself, satisfying overseas claimants that the case was proceeding through the English courts and providing an element of validation for claimants who felt they needed a public statement to be made, or assisting in raising funding. Such regulation would further need to avoid interference with the Article 10 rights of journalists and of the claimants and

---

[55] " 'trial by television' then ceases to be an admonitory slogan and becomes a real and dangerous threat to the Rule of Law." Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014 – see above Section 5 of Chapter 2

[56] Hazel Genn 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6 – P123 (emphasis from the publication)

defendants who themselves are involved in the litigation.

It is suggested that any new regulation would need to be more specific than the Codes and would therefore need to be a rule under one of the SRA Core Principles or the BSB Duties – for example, perhaps SRA Core Principle 1.06 (behave in a way that maintains the trust the public places in you and in the provision of legal services) although arguably Core Principles 1.01 (uphold the rule of law and the proper administration of justice), 1.02 (act with integrity) and 1.03 (not allow your independence to be compromised) are all also relevant. Specifically, it is suggested that a new regulation should apply to multi-party litigation; it may have some application in unitary actions but they have not been considered fully in the research or otherwise in this thesis.

To distinguish the type of media activation to be covered by a new regulation from the legitimate aims of media activation and to avoid stepping on Article 10 rights, a new regulation would have to be aimed specifically at the lawyer and the lawyer's organisation (including its partners, employees, consultants, trainees, support staff and so on), as distinct from the media, the parties to litigation, or other interest groups or interested parties. It would need to be directed at activation that the lawyer knows or reasonably should know will be disseminated by means of any public communication or media and which is intended or may have as its effect a negative impact on the reputation of an opposing party or which may have a substantial likelihood of causing or heightening public condemnation of such opposing party or which may otherwise have as its effect the exertion of pressure on or harassment of such party in regard to the litigation[57] if it has certain content.

The type of content that a new regulation should be aimed to discourage would be statements that contain any:

(i) allegation that is not clearly explained as an allegation that requires to be proved;

(ii) speculation or exaggeration or which is in nature sensationalist or is intended purely to be shocking;

(iii) expression of the Lawyer's personal opinion as to the merits of their clients' case;

(iv) assertion or estimate as to the amount of compensation claimed or which potentially may be awarded;

(v) facts which are likely to be in issue in the proceedings and which are not

[57] This approach, the examples of statements listed (i) to (vi), the "permitted" statements numbered (i) to (vi) and the "permitted" response by defence lawyers, are based in part on the content of ABA Model Rule 3.6 et seq; it should be noted that the Model Rules are Models provided by the ABA; the extent to which they have been enacted with or without amendment by individual States' Bar Associations and/or if enacted, the extent to which they have been enforced, has not been investigated as part of the thesis.

proven or which are not capable of proof; or

(vi) release of evidence which is not yet before the relevant court or which the Lawyer knows or reasonably should know is likely to be inadmissible.

It is conceded that the use of PR consultants or the litigants themselves or other interested parties could be used to circumvent such a regulation. However, an obligation on the lawyer not to assist or procure, and to use reasonable care in preventing, clients or others who may have any interest in the matter in question from making statements that are not permitted under the rule or which are or may be contrary to any Guidance Notes that may be issued to accompany the rule, should have the effect of discouraging deliberate circumvention or flouting of the regulation.

An approach such as that taken by the ABA would go further and might say for example that notwithstanding the content of the rule, lawyers may, provided that the rule is complied with, make statements that specify:

(i) the claim, the offence or defence involved and, unless prohibited by law, the identity of the party(ies) involved;

(ii) any information contained in a public record;

(iii) that an investigation of a matter is in progress;

(iv) the scheduling or result of any step in litigation, including any applicable deadlines;

(v) a request for assistance in obtaining evidence or corroboration or other information necessary for such litigation;

(vi) an invitation for potential claimants to join the claimant cohort in multi-party litigation.

Similarly a defence lawyer, provided that the rule was not breached, would be specifically permitted to make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by that lawyer or that lawyer's client. A statement made pursuant to such a provision should be required to be limited to such information as is necessary to mitigate the adverse publicity.

Needless to say, in the making of any statement such as addressed by such a new regulation, lawyers would have to have regard for the application of other applicable Core Principles/Duties and rules that may have application, including without limitation those referred to above.

SECTION 5 - ASSESSMENT OF RESEARCH AND THE LITERATURE

This section will pick up some of the threads from the literature review in Chapter

2, in relation to relevant findings and conclusions from the research.

Section 2 of Chapter 2 began with some observations as to the fact that the issue of rights of access to justice for defendant corporations was largely under researched despite the fact that the influence of media on defendants is clearly acknowledged in the literature. Examples were given of Day et al in their writings on their practises in regard to the media relating to their legal practice[58], Beke talking about the issue of "pressure leverage"[59], Stapely discussing the "considerable latitude to the news media in reporting the background to a sensational case"[60] and the House of Lords in their unanimous decision in Sunday Times v The UK[61] finding that:

> "…the projected article was avowedly written with the purpose and object of arousing public sympathy with, and support for, the claims that were being made and in order to bring pressure upon Distillers to pay more."

The relevance of media to the position of the corporation as a defendant in group litigation is very much confirmed by this research and it is considered that this research can form the beginning of a discussion on the impact of media attention and activation in regard to such defendant corporations recognising, from the research, that this undoubtedly can have an adverse effect on their position and/or their rights as litigants.

Sections 1 and 2 of Chapter 2 also included consideration of the Woolf Report on Access to Justice and referred to the "the overriding objective ... to deal with cases justly"[62]. It is submitted that the actions of claimant solicitors in activating media to bring pressure on corporate defendants is counter to the overriding objective and actually hinders and in some cases prevents its being met. It was also noted that Lord Woolf had spoken in his report that:

> "…because the lawyers will often be taking the initiative in multi-party actions, there are potential conflicts between their interests and those of group members ... The opportunities for self-interested behaviour are generally greater in group litigation than in ordinary litigation …"[63]

---

[58] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier. 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

[59] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0 – P 24

[60] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X – P54

[61] (1979-1980) 2 EHRR 245 – 26 April, 1979 http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015

[62] The Woolf Report - Section I Overview paragraph 8

[63] Ibid – Section IV, Chapter 17 para 1

and the responses in the research do indeed indicate that those actions of claimant solicitors in activating media are illustrative of that conflict occurring in group litigation cases. To that extent the practice of activation of media by claimant lawyers in group litigation is to be deprecated to the same extent as noted by Lord Taylor in regard to the 'activation of public interest' by defence lawyers in criminal appeal cases[64].

In Section 2 of Chapter 2[65] Lord Woolf's reference to "prompt dismissal" was made in the context of Article 6 ECHR and it was noted that if media activation led a corporate defendant to seek an early settlement in order to protect or limit damage to its reputation, irrespective of the Article 6 considerations[66], a case may not progress beyond the very initial stages and the issue of prompt dismissal would never arise because the court would never effectively be seized of the case. The responses to the research indicate that this is a real issue and that there are instances where a proper trial of the issues will not be reached, at least in part due to activated media pressure.

The issue of Articles 6 ECHR (Right to a Fair Trial) and Article 10 ECHR (Freedom of Expression) had been examined in Section 2 of Chapter 1 and the tension between the two had been noted and likened to that between the tension in the US Constitution[67] between the First Amendment (Freedom of Religion, Press and Expression) and the Sixth Amendment (Right to a Speedy Trial, Confrontation of Witnesses). Both the cases of Sunday Times v UK (Series A No. 30)[68] and Steel and Morris v UK[69], the so called "McLibel" case, were discussed. It was noted that in the McLibel case allegations had been presented as fact:

> "… in the case under review the allegations had been of a very serious nature and had been presented as statements of fact rather than value judgments."[70]

---

[64] As noted in Chapter 2, Multi-Party Actions, Media Coverage of Proceedings- Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

[65] Under "Prompt Dismissal, the Individual and the ECHR"

[66] "Right to a Fair Trial"

[67] http://www.usconstitution.net/const.pdf - accessed 7th October, 2014

[68] (1979-1980) 2 EHRR 245 – 26 April, 1979
http://www.hrcr.org/safrica/limitations/sunday_times_uk.html - accessed 3 August, 2015

[69] Steel and Morris v The UK [2005] – ECHR
https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – accessed 06 January, 2019

[70] Steel and Morris v UK [2005] ECHR - ECHR Registrar's Press Release 15.02.2005
https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – P4 – accessed 06 January, 2019

It had been recognised by the court that "… in a campaigning leaflet a certain degree of hyperbole and exaggeration could be tolerated, and even expected …"[71] but noted that serious allegations had been stated as fact much as is in issue in this thesis. Steel and Morris had won their appeal, but whilst that confirmed their Article 10 rights, the decision owed more to their Article 6 rights and the fact that they had been denied legal aid and had not therefore had the opportunity of a fair trial. There were additional points of interest. One was in regard to the importance of the corporate position:

> "… in addition to the public interest in open debate about business practices, there was a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good."[72]

In addition, the ECtHR noted that:

> "The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they acted in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism …"[73]

The Sunday Times case, was a clear exposition of Article 10 rights but unlike the type of public statements that are in issue in this thesis, Murray Rosen in his Report on the Sunday Times case[74] had observed that on one side of this case was "… an eminent newspaper endeavouring to publish careful, balanced and unquestionably accurate articles, researched beyond reproach."[75] It was also clear that the campaign that was in issue was one that was run by the newspaper itself and not one that had been activated by claimant lawyers.

In Section 2 of Chapter 1, it was noted that Pugh had made the point that a case which the lawyer takes on hoping that the defendant will settle at an early stage, has virtually no chance of success" [76]. It was noted that this was clearly at odds with other suggestions in the literature that that is precisely what practitioners actually do. It is clear from the data that that is very much what at least some claimant lawyers do with the aim of cornering a corporate defendant by reputational pressure

---

[71] Ibid

[72] Ibid

[73] Ibid

[74] Murray Rosen 'The Sunday Times thalidomide case: Contempt of court and the Freedom of the Press' (Writers and Scholars Educational Trust in association with the British Institute of Human Rights – November, 1979)

[75] Ibid paragraph 1.08, P4

[76] Charles Pugh and Martyn Day - Chapter 5, Pp 30 to 31

into an early settlement (prior to the spending of real resources on evidence gathering and scientific work.

Beke, among others, referred to what he called the "Agenda Setting Theory" saying that the press has the ability to give special matters prominent attention and that they set the key areas [of the agenda];[77]. Bacquet too talks about the "agenda-setting function" of the media[78] and Lord Taylor referred to the press as a "shaper of public opinion" [79]. This combines with the power of the newer social media arena to provide an environment in which once something is said it becomes more or less indelible. In Section 6 of Chapter 2, reference was made to Levick and Smith's statement that "Judgement [by those exposed to media] is nearly instantaneous, often unforgiving, and increasingly permanent"[80] which rings true with the example given in Chapter 4 of the claimant solicitor's view that "once allegations are made it's very difficult to get rid of them even if they're not true[81]. All of this contributes to the view of power wielded through the media that the research discloses is the objective of the claimant lawyers concerned.

Beke[82], Haggerty[83] and Coffey[84] all talk of the "court of public opinion". It is clear that the public does not reach its conclusions and form its opinions in the disciplined way that a court would and it is not a legitimate practice to use the media to make damaging and unsupported allegations against a defendant in the hope of creating sufficient pressure to force a settlement.

---

[77] "…the media does not tell people what to think about the issues but what issues they should be thinking about" - Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0 - P7 referring to McCombs M. E, Shaw D, L (1972) The Agenda Setting Function of Mass Media - Public Opin Q 36: 176-187)

[78] In her thesis on her study of the coverage of the Second Intifada - Sylvie Bacquet – 'Press Coverage of the Second Intifada (September 200 – April 2002) – Impressions of media bias' , Saarbrucken, 2011 - VDM Verlag Dr Mueller GmbH & Co KG - ISBN 978-3-639-32178-4 P 104

[79] Lord Taylor 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

[80] Richard S Levick and Larry Smith 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526 – Introduction Pxviii

[81] Respondent 19 – claimant solicitor

[82] Thomas Beke, 'Litigation Communication: Crisis and Reputation Management'1st edn, Springer, 2014 ISBN 978-3-319-01872-0

[83] James F. Haggerty, 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7

[84] Kendall Coffey 'Spinning the Law – trying cases in the court of public opinion' (Prometheus Books 2010) ISBN 9781616142100

From the research, it is clear that few of the respondents considered the media to be accurate and many considered them to be unfair in their approach. Criticisms ranged from over simplification[85], to unbalanced reporting[86], "Dumbing down of the true position"[87], lack of fair representation[88], salacious reporting[89], inaccurate reporting[90] and, unfairness[91].

In Section 5 of Chapter 2[92] reference was made to Lieve Gies' observation[93] that there was a tendency of the media to over simplify and sensationalise; she had noted that on this basis a tension between the law and the media was created[94]. It was noted in that Section that the sense from the literature where use of the media for strategic ends by lawyers was being discussed[95], was that this may be one area where those tensions were turned into a synergy. This did emerge as a theme from the data in that it was apparent that the fact that the media is often "simplistic, misleading and superficial"[96] was an advantage where the aim was to create reputational pressure on a defendant.

---

[85] "Media looks for soundbites but cases are very complex" Respondent 1 - QC

[86] "problem is where it's unbalanced like winning 9 out of 10 issues and the release from [C lawyers] was of a life changing historic ruling on the one point they did win on and that became the story" Respondent 5 – in-house lawyer

[87] Respondent 6 – in-house lawyer

[88] "the holistic situation of rounded representation of a fair description is terrible; really, really bad – shocking; and the press attention to the defendant side just bears no resemblance to reality; you only get one side of the story. There is no fair summary of what's going on; it's often very biased and one-sided" Resondent 9 – defence solicitor.

[89] "[media coverage] has become increasingly more salacious and less informative." Respondent 12 – claimant solicitor.

[90] "Increasingly less accurate – more emotive and less investigative these days" Respondent 18 – claimant solicitor.

[91] "on the whole I think it was more unfair than fair" Respondent 23 – in-house lawyer; "I don't think they use fairness as an arbiter. I don't think they have any qualms about taking sides." Respondent 24 – PR; I would say that the reporting is unfair and it's erroneous…" Respondent 28 – defence solicitor.

[92] Under 'Media coverage of proceedings'

[93] Lieve Gies 'Law and the Media: the future of an uneasy relationship' (GlassHouse – Routledge-Cavendish 2008) ISBN 9781904385332

[94] Ibid – P3

[95] E.g. Levick & Smith as referred to in Section 6 of Chapter 1 and with particular regard to the Daimler/Chrysler research they refer to.

[96] Lieve Gies 'Law and the Media: the future of an uneasy relationship' (GlassHouse – Routledge-Cavendish 2008) ISBN 9781904385332 – P2

There were also both in Chapters 1 and 2 comments as to the freedom of the media and the reluctance of governments to interfere with the freedom of the media[97]. Lord Taylor came down on the side of preservation of the freedom of the press[98]. Whilst he hoped "that editing standards would aim at accuracy and fairness" he also noted that nevertheless "circulation battles between rival newspapers tend to drive standards down". The data seems to support the contention that media of all kinds is far from fair and balanced, that it does thereby lend itself to the aims and objectives of those who cultivate and activate it with a particular strategic aim in view. It is this that may lead to a conclusion that it is therefore incumbent on the legal profession to control the use of the media by claimant lawyers rather than trying in any way to control the media. To try to control the media would be to trespass into a different area which would raise legitimate concerns relating to freedom of speech and expression.

It was further discussed that the neither the current laws nor the current professional regulatory environment does anything to curb the activation of media by claimant solicitors. The era of "Outcomes Focussed Regulation" was discussed and it was observed that in this era, the specific rules which may address such an issue appear to have no place. It was further noted that this was to be particularly regretted given that the issue had been examined as long ago as 1996 for the ACLEC Report. Although that report had focussed on comments of lawyers during proceedings, it was noted that it had concluded, as for example had Sue Stapely in her book[99], that "The law of contempt does not constitute an effective control on the media" and it had recommended that regulations be brought in to address the issue of lawyers' comments to the media. Support for that position and the idea that any such regulation should also address pre-trial activation of media by claimant solicitors is repeated.

The conclusions reached in this thesis relating to the shortcomings of the current approach to regulation in the legal profession were foreshadowed by the references to Paterson's scepticism about the move to "principle-based" regulation as a form of "light-touch" or "risk-based" regulation that he had noted was "less than spectacularly successful in policing bankers prior to the credit crunch"; in turn, although perhaps harsh it also brings to mind his reference to Lord Hunt's observation that the "principles-based approach does not work with individuals who have no principles."[100]

---

[97] E.g. Lord Taylor in 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

[98] "Although many sins and calumnies are committed in its name, freedom of expression must surely be maintained…"

[99] Sue Stapely 'Media Relations for Lawyers' (The Law Society 1994) ISBN 1 85328 291 X

[100] Alan Paterson – P33 referring to Lord Hunt, Legal Services Regulation Review (Law society, 2009), (http://www.legalregulationreview.com/site.php?s=1) now available at

Haggerty claims that his work in litigation PR "…helps clients and their lawyers resolve their legal disputes in a more favorable manner….getting the legal dispute over with (and with it as Lincoln said, all of its fees, expenses, and waste of time) and getting back to more important things – matters that are at the core of our business, professional, and personal lives"[101]. That could perhaps be legitimately said about methods of alternative dispute resolution but does not seem to be appropriate given the degree of prejudice to the corporate defendant and to the judicial process itself that may be occasioned by claimant-activation of the media.

"Settlement blackmail" was an issue referred to in Section 5 of Chapter 2 with reference to an article by Christopher Hodges[102] regarding the US class action system. It was suggested there that activation of the media on behalf of claimants adds a further dimension to "settlement blackmail" and it is concluded that that has been borne out by this research.

There was also reference to the relationships between claimant lawyers and the media and to an article by Neil Rose in the Law Society's Gazette stressing that the most important aspect of contact with the press was the issue of relationships; he spoke about the need build on relationships[103]. It was argued that it was clear from the literature (e.g. Rose's article and Day's and Pugh's books[104]) that use of media by lawyers was not casual or coincidental; it was deliberate, planned and the result of cultivated relationships. Again, it is concluded that this has been borne out by the research and particularly the comments of some of the claimant solicitors.

The conclusion of this research that the activation of media by claimant solicitors does have an impact on settlement decisions was supported by a number of views referred to in Section 5 of Chapter 2. Toby Craig[105] wrote that "Fear of negative publicity can be a significant factor leading to early settlement" and that "Litigation" "…can destroy reputations, regardless of the merits of the claim

---

https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/260035/The-Hunt-Review-of-the-Regulation-of-Legal-Services-NZ-Dec-2009.pdf - accessed 15 June, 2017 - P38

[101] James F. Haggerty, 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7 - Preface P xvi

[102] Christopher Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28

[103] Neil Rose 'How to navigate a two-way street with the Fourth Estate' (2005) Law Society's Gazette, 102(28), 28

[104] Martyn Day, Paul Balen, Geraldine McCool, & Michael Napier. 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651 and Charles Pugh and Martyn Day 'Toxic Torts' (Cameron May in association with the United Kingdom Environmental Law Association, 1992) ISBN 1874698007

[105] Toby Craig, 'Media Handling' (Counsel - May 2008)- Pp 6–8

involved" and it is interesting to note his remark that "Sensational reporting of a claimant's case, before a defence has been put, is often covered more extensively than the defence story or the eventual outcome of the case."[106] This certainly supports the comments made by many of the respondents as to the power of the media and its usefulness to the claimant side prior to trial. From a US perspective Haggerty too was referred to as expressing his belief with regard to litigation "that effective communications techniques can be the deciding factor."[107]

It was noted at the beginning of Section 1 of Chapter 2 that there seemed to be little direct reference to media activation in group litigation cases and on the potential impact of that on a defendant corporation and as to whether it could lead to a potential deprivation of or limitation on a right of access to justice. However, there is much related material in the literature which was of direct relevance to the research being conducted. It is hoped that this research could form the beginning of a discussion on the impact of media attention and activation in regard to defendant corporations in group litigation, its effect on their decision making with regard to litigation and thus the impact on their rights as litigants from the perspective of access to justice.

SECTION 6 - COMMENT ON FINDINGS AND CONCLUSIONS

The main purpose of the thesis was to assesses the impact that activated media may have on a corporate defendant as to whether it may force them towards a settlement they may not otherwise have made, or towards a settlement at a time or on conditions that they wouldn't otherwise have made and in turn whether any such impact may amount to a denial or a limitation of a right of access to justice.

It is considered that the research conducted was appropriate to approach the relevant issues and to draw justified conclusions which are set out above in Section 3 of this Chapter.

However, it is also considered that the strength of the findings and conclusions would have been enhanced by the inclusion of more responses from in-house counsel. The paucity of responses from in-house counsel was due entirely to their failure to respond to requests for interview or in some cases simply declining to be involved.

The total number of approaches made to potential interviewees was 64 but only 29 interviews resulted; the response was particularly poor from in-house counsel where of 22 approached only 4 interviews resulted. That in itself is a shame because the research was directed at the position of their employers and the process, the results and the conclusions should have been of considerable interest to them. It is perhaps not surprising that they were reluctant to engage, after all, no corporate defendant would want to admit that a decision to settle was the result of media pressure but

[106] Ibid

[107] James F. Haggerty, 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7 - Preface P xiv

it is considered that if the research or perhaps further research were done via an association of in-house counsel, perhaps the potential respondents would have had more confidence in the process and might therefore have been more forthcoming. This was attempted (in addition to the 22 direct personal approaches) and the Executive Director of one such organisation was approached on a personal recommendation and with a personal introduction in order specifically to access in-house counsel from their member companies. The response from the Executive Director after some chasing was simply that "the Board does not wish to accede to this request". The Executive Director himself said he would be prepared to share his own personal experiences but after a lot of further chasing, a suitable time for a discussion was never agreed. Similarly, government and NHS counsel declined to participate or simply did not respond. Although it is not considered that this in any way invalidates the results and conclusions of the thesis and whilst they may have been more robust with a better representation of in-house counsel from commerce and from the state, perhaps the silence of these groups is one of the loudest comments regarding the importance and impact of media activation.

Conversely, the PR respondents were very ready to be involved and were particularly informative and forthcoming; their responses, of all of those approached were considered to be the most candid. This in some measure compensated for the paucity of in-house counsel.

SECTION 7 - RECOMMENDATIONS FOR FURTHER RESEARCH

Continuing on the theme of the lack of participation in this research by in-house counsel and lawyers in the government and NHS legal service, further research on the same topic as covered in this thesis could be conducted perhaps on a more formal basis; any such further research would benefit from being sponsored at an official level, perhaps by an association of in-house counsel or perhaps by the Law Society, the SRA or the Ministry of Justice. Such further research could look more closely at the emerging use of social media in tandem with the more traditional forms of media.

An important element of that further research would be to look at the effect of regulation and the possible need for more specific and effective regulation alluded to in Section 4 above with regard to the wider professional obligations owed by solicitors than just to their clients, whether or not there is or should be an obligation of proper conduct owed by a solicitor to an opposing party in litigation and whether or not the activation of media to the prejudice of a corporate defendant is indeed contrary to the objective of "protecting and promoting the public interest"; it is submitted that it is contrary to such objective.

This research did not set out to examine the business models of claimant solicitors who engage in group litigation. Given the changes in the recent past relating to the availability and new sources of litigation funding, the changes in the costs regime post Jackson and the changes in the available structures and financing for the legal profession itself, research into the business models now being employed and in the imperatives involved in those models would be worthwhile. Such research could cover how cases are selected and how they are run, including the

risk profile for the law firm and the potential rewards. An analysis of these factors in the current legal business environment would provide insight into the priorities and drivers for claimant lawyers and how they impact their approach to both their clients and defendant corporations – it would be an examination of the "tension between commercial pressures and professional integrity"[108] as observed by Paterson that was discussed in Chapter 2.

Finally, but by no means least, research is recommended into the perceived imbalances in the court and litigation process that may lead claimant lawyers to seek to redress the balance through use of media as was discussed in Section 4 above.

[108] Alan Paterson 'Lawyers and the Public Good: Democracy in Action?' - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530 – P29

APPENDIX 1
TABLES

TABLE OF ABBREVIATIONS

ABA	American Bar Association
ABI	Association of British Insurers
ABS	Alternative Business Structures (Legal Services Act, 2007)
ACLEC	Advisory Committee on Legal Education and Conduct
ATE Insurance	After the Event Insurance
BSB	The Bar Standards Board
BTE Insurance	Before the Event Insurance
CFA	Conditional Fee Agreement
COBS	Conduct of Business Sourcebook (FCA)
CPRs	Civil Procedure Rules
DBA	Damages Based Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
European Court	European Court of Justice
FCA	Financial Conduct Authority
FSMA	Financial Service and Markets Act 2000
FTSE	Financial Times Stock Exchange [Index]
GLO	Group Litigation Order
HMRC	Her Majesty's Revenue and Customs
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act (2012)
MINELAs	Middle Income Not Eligible for Legal Aid Services
MMR	Measles Mumps and Rubella vaccine
MOJ	Ministry of Justice

NHS	The National Health Service
OS	One Shotter – per Galanter, those who have only occasional recourse to the courts
PR	Public Relations
QOCS	Qualified One Way Costs Shifting
RP	Repeat Player – per Galanter, those who are engaged in many similar litigations over time
SDT	Solicitors' Disciplinary Tribunal
SRA	The Solicitors' Regulation Authority

The Following abbreviations have been used in the text and in the Data Analysis Matrix (Appendix 6) where referring to cases, lawyers and law firms to avoid using the relevant names:

CCC	Cases
DDD	Defendant
FFF	Firms
SS	Solicitors
JJ	Journalists
PR	PR professionals

TABLE OF CASES

A v Hoare and other appeals [2008] UKHL 8, [2008] All ER (D) 251 (Jan)

Attorney General v Times Newspapers Ltd: HL [1973] 3 All ER 54

British Coal Corp v National Union of Mineworkers, unreported, 28 June, 1996

Chzranowska v Glaxo Laboratories Ltd, The Times, 16 March, 1990

Cruddas v Calvert & Others (No.4) [2013] EWHC 2298 (QB)

Davies v Eli Lilley – [1987] 3 All ER 94

Derbyshire County Council v Times Newspapers [1993] A.C. 534

Donoghue v Stevenson [1932] A.C. 562; [1932] 1All ER 1

EETPU v Times Newspapers [1980] Q.B. 585

In the Matter of Alfie Evans No.2 – Supreme Court - 20 May, 2018

Foss v Harbottle (1843) 2 Hare 461

Goldsmith v Bhoyrul [1997] 4 All E.R. 268

Great Ormond Street Hospital v Yates and Gard - Case No. FD17P00103

Jameel & Another v Wall Street Journal Europe (No. 2) [2007] 1 AC 359

Joseph v Spiller [2010] UKSC 53

Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 2 All ER 769

Lownds v Home Office [2002] EWCA Civ 365

Reynolds v Times Newspapers – [2001] 2 A.C. 127

Salomon v Salomon [1897] AC 22

SRA v Day, Malik, Crowther and Leigh Day – Solicitors' Disciplinary Tribunal Case No. 11502-2016 Press Summary – issued 9 June, 2017 - http://www.solicitorstribunal.org.uk/sites/default/files-sdt/SDT%20Press%20Release%20-%209%20June%202017_0.pdf – accessed 25 June, 2017

Steel and Morris v The UK [2005] – ECHR https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-126-1261142-131378&filename=003-1261142-1313783.pdf – accessed 06 January, 2019

Sunday Times v UK Series A No. 30, (1980) 2EHRR 245

Walter Hugh Merricks CBE v Mastercard Incorporated and Others, CAT - Case No. 1266/7/7/16 - http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html – accessed 3 August 2017

Young v Catholic Care (Diocese of Leeds) [2006] EWCA Civ 1534, [2007] 1 All ER 895

TABLE OF STATUTES

	(c. 41)	Chapter 1
		Chapter 2
	s.58A(6)	Chapter 1
	s.58, s.58A, s.58B	Chapter 2
1997	Protection from Harrassment Act	
	(c. 40)	Chapter 1
1998	Competition Act	
	(c. 41) S47B	Chapter 1
	Ss 47A and 47B	Chapter 2
1998	Human Rights Act	
	(c. 42)	Chapter 1
1999	Access to Justice Act	
	(c. 22)	Chapter 1
		Chapter 2
	s.6 and Schd. II	Chapter 2
	s.27	Chapter 2
	s.28	Chapter 2
	s.29	Chapter 1
		Chapter 2
2000	Financial Service and Markets Act	
	(c. 8)	Chapter 1
	Political Parties, Elections and Referendums Act	
	(c. 41)	Chapter 1
2003	Communications Act	
	(c. 21)	Chapter 1
2007	Legal Services Act	

	(c. 29)	Chapter 1
		Chapter 2
	s.1(1)	Chapter 1
	s.1(2)	Chapter 1
	s.8(2)	Chapter 1
	s.12(1)	Chapter 1
	Part 5, Schd 13	Chapter 1
2012	Legal Aid, Sentencing and Punishment of Offenders Act	
	(c. 10)	Chapter 1
		Chapter 2
	s.4(1)	Chapter 1
	s.10	Chapter 1
	s.44	Chapter 1
	s.46(2)	Chapter 1
2013	Defamation Act	
	(c. 26)	Chapter 1
	s.1(2)	Chapter 1
	s.2(1)	Chapter 1
2015	Consumer Rights Act	
	(c. 15)	Chapter 1
		Chapter 2
	Schd 8 s. 5(1)(7)(c)	Chapter 2
	Schd 8 s. 5(1)(10)	Chapter 2
	Schd 8 s. 5(1)(11)	Chapter 2
	Schd 8 s. 6(1)	Chapter 2
	Schd 8 s. 6(8)	Chapter 2
	Schd 8s. 12	Chapter 2

TABLE OF STATUTORY INSTRUMENTS AND RULES OF COURT

TABLE OF FOREIGN AND EUROPEAN STATUTES, RECOMMENDATIONS, REGULATIONS AND RULES

TABLE OF TREATIES

TABLE OF PROFESSIONAL REGULATIONS, CODES OF CONDUCT AND PROFESSIONAL GUIDANCE

2004 Bar Standards Board - Code of Conduct - 8th Edition <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/> - accessed 3 November 2015

2005 American Bar Association – Model Rules of Professional Conduct – August 2005 - https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html - accessed 26 June, 2017

2007 Legal Services Board 'Regulatory Objectives' http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf - accessed 27 January, 2014

2007 Solicitors' Regulatory Authority – SRA Handbook - Code of Conduct - Rule 11 - Litigation and Advocacy - Guidance Notes 11 and 21 http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule11.page - accessed 25 February, 2015

2007 Solicitors' Regulatory Authority - SRA Handbook - Code of Conduct - Introduction to the SRA Code of Conduct, (Solicitors Regulation Authority 2007) http://www.sra.org.uk/solicitors/handbook/code/part1/content.page.– accessed 2 February, 2014 and 25 February, 2015

2009 Legal Services Board - FAQs (January, 2009) http://www.legalservicesboard.org.uk/can_we_help/faqs/#lsbactivities – accessed 1 May, 2015

2010 Legal Services Board – Regulatory Objectives – explanatory pamphlet - <http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf> - accessed 27 January, 2014

2011 Association of Litigation Funders - Code of Conduct. (November 2011) http://associationoflitigationfunders.com/code-of-conduct/ - accessed 3 December 2014

2011 Solicitors' Regulatory Authority - SRA Handbook – SRA Code of Conduct 2011 - http://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 11 November, 2014

2011 Solicitors' Regulatory Authority - SRA Handbook – SRA Code of Conduct 2011 – Rule 1 - https://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule1.page - accessed 25 June, 2017

2011 National Union of Journalists – NUJ Code of Conduct – https://www.nuj.org.uk/about/nuj-code/ - accessed 25 July, 2017

2013 Bar Standards Board – Guidance on Media Comment <https://www.barstandardsboard.org.uk/code-guidance/media-comment-guidance-april-2013/> accessed 11 March 2015

2013 Solicitors' Regulatory Authority Handbook - Code of Conduct – version 8, 1 October 2013

2014 Bar Standards Board - Handbook - (Including 9th Edition of Code of Conduct). <https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf> accessed 26 February 2015

2014 Contempt of Court and Reporting Restrictions: Legal Guidance: (The Crown Prosecution Service 2014) http://www.cps.gov.uk/legal/a_to_c/contempt_of_court/ - accessed 2 October, 2015

2014 Media Comment - Guidance – 'Expressing Personal Opinion to/in the Media' (Ethics Committee - Bar Council October, 2014) <http://www.barcouncil.org.uk/media/313498/media_comment.pdf> - gC22 in Section C2 Ethics - accessed 14 January, 2018

2014 Solicitors' Regulatory Authority - SRA Handbook – SRA Code of Conduct 2011 Version 12, 31 October 2014 http://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 11 November, 2014

2014 Society of Professional Journalists – SPJ Code of Ethics – September, 2014 - http://www.spj.org/ethicscode.asp - accessed 25 July, 2017

2015 Facebook – Statement of Rights and Responsibilities - https://en-gb.facebook.com/legal/terms - accessed 3 December, 2017

2017 Facebook – Community Standards - https://en-gb.facebook.com/communitystandards - accessed 3 December, 2017

2017 The Twitter Rules - https://support.twitter.com/articles/18311- accessed 3 December, 2017

2017 SRA Handbook – SRA Code of Conduct 2011 Version 19, 1 October, 2017 https://www.sra.org.uk/solicitors/handbook/code/content.page - accessed 14 January, 2018

2017 BSB Handbook, Third Edition, updated November, 2017 https://www.barstandardsboard.org.uk/media/1901336/bsb_handbook_version_3.1_november_2017.pdf – accessed 14 January, 2018

2018 Financial Conduct Authority – Conduct of Business Sourcebook 2.2 "Information disclosure before providing services (non-MIFID provisions)" – https://www.handbook.fca.org.uk/handbook/COBS/2/2.html - accessed 17 March, 2018

2018 Ministry of Justice – 'Post Implementation Review Evidence Gathering Exercise: Terms of Reference' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/686576/pir-laspo-terms-of-reference.pdf - accessed 27 March, 2018

(n.d.) Ministry of Justice 'Step by Step Guide to Legal Aid' http://www.justice.gov.uk/legal-aid - accessed 18 January, 2013

TABLE OF REPORTS, CONSULTATION PAPERS AND DEBATES

'Access Denied: LASPO four years on: Law Society Review' (The Law Society June, 2017) http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/ - accessed 3 August, 2017

Access to Justice Action Group, House of Lords Debate - Committee - 6th Day. (December, 2012). <http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2012/01/HoL-debate-LASPO-30-1.pdf> - accessed 21 March 2014

‘Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales’, The Right Honourable the Lord Woolf, Master of the Rolls (July 1996) ISBN-10: 0113800991, ISBN-13: 978-0113800995 - HMSO

Al-Sweady Inquiry Report (MOD and Sir Michael Fallon MP 17 December, 2014) The Report of the Al-Sweady Inquiry – Sir Thayne Forbes – OGL Crown Copyright ISBN 9781474112796, HC 818-I 2014-15 https://www.gov.uk/government/publications/al-sweady-inquiry-report - accessed 29 June, 2017

‘A Strategic Framework for Access to Justice in the federal Civil Justice system: A Guide for Future Action’, (2009) Australian Government Attorney-General’s Depart https://www.ag.gov.au/LegalSystem/Documents/A%20guide%20for%20future%20action.pdf – accessed 12 June, 2017

Bach Commission – ‘The Right to Justice – The final report of the Bach Commission – September, 2017’ http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf - accessed 4 December, 2017

‘Conditional Fee Agreements’ - Select Committee on Constitutional Affairs - Third Report (14 February, 2006) http://www.publications.parliament.uk/ pa/cm200506/cmselect/cmconst/754/75405.htm - accessed 21 March, 2014

DTI - Department for Business, Enterprise and Regulatory Reform (BERR ‘Representative Actions in Consumer Protection Legislation: Responses to the Government’ - Consultation March 2008 URN 08/725 (originally available at http://www.berr.gov.uk/files/file31886.pdf accessed 6 March, 2013 - now available at http://webarchive.nationalarchives.gov.uk/20090609003228/ http://www.berr.gov.uk/files/file31886.pdf - accessed 20 June, 2017)

‘House of Commons – Select Committee on Constitutional Affairs – Fourth Report’ – 16 July, 2004 - https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/391/39104.htm - accessed 12 January, 2019

‘Insurance Industry Ready To Meet The Challenge Of Changes To Legal Aid’ Association of British Insurers, <www.abi.org.uk/Media/Releases/1997/12/Insurance Industry Ready To_Meet_The_Challenge_Of_Changes To Legal Aid.aspx> - accessed 6 August 2012

Legal Services Board ‘Market Impacts of the Legal Services Act 2007 - Baseline Report - (Final)’ 2012 https://research.legalservicesboard.org.uk/wp-content/media/Impacts-of-the-LSA-2012-Final-baseline-report.pdf – accessed 27 January, 2014

Lord Chancellors’ Advisory Committee on Legal Education and Conduct (ACLEC) ‘Lawyers’ Comments to the Media’ (May 1997) (“The ACLEC Report) – Lord Chancellor’s Department.

Lord Hunt, Legal Services Regulation Review (Law society, 2009), (http://www.legalregulationreview.com/site.php?s=1) now available at https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/260035/The-Hunt-Review-of-the-Regulation-of-Legal-Services-NZ-Dec-2009.pdf - accessed 15 June, 2017

Lord Irvine - Statement - on improving access to justice - HL Debate 4th March, 1998 - http://hansard.millbanksystems.com/lords/1998/mar/04/legal-aid - accessed 23 October, 2012

Lord Leveson ‘An Inquiry into the Culture, Practices and Ethics of the Press – Report’ (November, 2012) (“The Leveson Report”) - The Stationery Office Ltd., ISBN 9780102981063

‘Ministry of Justice – Legal Aid Statistics in England and Wales – Legal Aid Agency 2012-2014 – 24 June 2014’ -

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf - accessed 12 January, 2019

Ministry of Justice Civil Justice Reforms - Main changes – (updated Friday 7 November, 2014). http://www.justice.gov.uk/civil-justice-reforms/main-changes - accessed 8 November, 2014

Ministry of Justice - Civil Justice Reforms - Personal Injury Claims.– 2014 - http://www.justice.gov.uk/civil-justice-reforms/personal-injury-claims - accessed 30 January, 2015

Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' Consultation Paper (CP 12/10 - CM 7967 November, 2010). http://www.official-documents.gov.uk/document/cm79/7967/7967.pdf ISBN 9780101796729 - accessed 3 February, 2014

Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response' (June, 2011) - www.justice.gov.uk/.../legal-aid-reform-government-response.pdf - accessed 19 January, 2013 – now availbale at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf - accessed 20 June, 2017

Ministry of Justice, 'Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's recommendations – The Government response', Policy Paper (Cm 8041 29 March 2011) ISBN 9780101804127, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf - accessed 22 May, 2014

'Review of Civil Litigation Costs - Preliminary Report' Lord Jackson (May 2009) ISBN: 9780117064034 - TSO

'Review of Civil Litigation Costs - Final Report' Lord Jackson (December 2009) ISBN: 9780117063761 - TSO

'Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs' Lord Jackson (Judiciary of England and Wales 31 July, 2017) https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf - accessed 3 August, 2017

'Sustaining New York's and the US's Global Financial Services Leadership' Bloomberg M, and Schumer C, (New York City Government, 2007) http://www.nyc.gov/html/om/pdf/ny_report_final.pdf - accessed 10 June, 2017

'Tackling the Compensation Culture: The Legal Aid, Sentencing and Punishment of Offenders Bill - Improving the system for all.' Association of British Insurers (September 2011) <www.abi.org.uk/~/media/Files/Documents/Publications/ Public/Migrated/Motor/Tackling the compensation culture - the legal aid sentencing and punishment of offenders bill.ashx> - accessed 6 August 2012

TABLE OF REGISTERS

Group litigation orders - Register. (2014). from http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders - accessed multiple times – last accessed 28 December, 2017

Group Litigation Orders – Register - https://www.gov.uk/guidance/group-litigation-orders - accessed multiple times; last accessed 13 May, 2018

Group Litigation Orders – Register – Defining Issues - https://www.gov.uk/guidance/group-litigation-orders#defining-issues- accessed 17 March, 2018

TABLE OF LECTURES AND CONFERENCE PAPERS

Neuberger LJ 'From Barretry, Maintenance and Champerty to Litigation Funding' - Harbour Litigation Funding, First Annual Lecture, Gray's Inn - (8 May 2013) https://issuu.com/harbourlf/docs/harbour_first_lecture/11 - accessed 15 August, 2013

Taylor LJ 'Justice in the Media Age' (Address as Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium - University of Hertfordshire on 15 April, 1996) http://scholar.google.co.uk/scholar?hl=en&as_sdt=0,5&cluster=6791206594680137745 – accessed 27 January, 2014

Neuberger, LJ. 'Welcome Address to Australian Bar Association Biennial Conference' 3 July, 2017 https://www.supremecourt.uk/docs/speech-170703.pdf - accessed 6 July, 2017

TABLE OF REFERENCE WORKS

The Oxford Dictionary of Phrase and Fable – Knowles E, ed - Oxford University Press ISBN 9780198602194 Hardcover - The Published Page Bookshop. (n.d.) http://www.abebooks.co.uk/Oxford-Dictionary-Phrase-Fable-Elizabeth-Knowles/8762218093/bd – accessed January 27, 2014

Collins English Dictionary – Online (2013 and 2014) http://www.collinsdictionary.com/dictionary/english/globalization - accessed 16 June, 2013 and27 January, 2014

Oxford Dictionary of Law. (1997) (Fourth Edition) OUP - ISBN 0-19-280066-3

BIBLIOGRAPHY

Abel, R. 'English Lawyers Between Market and State' ISBN: 9780198260349 1st edn, OUP 2004

Attu, L. 'ATE premiums remain recoverable for mesothelioma claims for the time being' (2014) Legal Futures Publishing Ltd, <http://www.legalfutures.co.uk/associate-news/ate-premiums-remain-recoverable-mesothelioma-claims-time> accessed 6 January 2015

Bacquet, S. – 'Press Coverage of the Second Intifada (September 200 – April 2002) – Impressions of Media Bias' , ISBN 978-3-639-32178-4 Saarbrucken, 2011 - VDM Verlag Dr Mueller GmbH & Co KG

Baker, T. 'Burford Capital grows from £80m startup to post record 130% income growth last year' (Legal Business 27 July, 2017) http://www.legalbusiness.co.uk/index.php/lb-blog-view/10538-burford-capital-grows-from-80m-startup-to-post-record-130-income-growth-over-year - accessed 31 July, 2017

Balen, P. ‘Group actions, aims, aspirations and alternatives: a historical global perspective’ J.P.I.L. 1995, Nov, 196-211

Barton, A. ‘Access to Justice: Balancing the Risks’ (Adam Smith Institute 2010) http://www.adamsmith.org/sites/default/files/resources/access-to-justice.pdf - accessed 28 May, 2014

BBC (unattributed) ‘New legal bid in Andrew sex claim case’ (BBC 7 January, 2015) http://www.bbc.co.uk/news/uk-30692699 - accessed 19 January, 2015

BBC (unattributed) ‘Claim UK troops ‘executed’ Iraqis’ (BBC 22 February 2008) http://news.bbc.co.uk/1/hi/uk/7258374.stm - accessed 28 June, 2017

Beke, T. ‘Litigation Communication: Crisis and Reputation Management’ ISBN 978-3-319-01872-0 1st edn, Springer, 2014

Bernal, N. ‘Litigation Funding Report: Broader appeal’ (The Lawyer 6 June, 2016) https://www.thelawyer.com/issues/6-june-2016/litigation-funding-report-broader-appeal/ - accessed 20 July, 2017

Berry, A. – ‘Keystone Law set to become third UK firm to float’ (Legal Week 16 November, 20170 - http://www.legalweek.com/sites/legalweek/2017/11/16/keystone-law-set-to-become-third-uk-firm-to-float/?slreturn=20180021110634 – accessed 21 January, 2018

Boon, A. ‘Lawyers’ Ethics And Professional Responsibility’ (Bloomsbury 2015) – ISBN 978-1-84946-784-1

Boon, A. & Levin, J. ‘The Ethics and conduct of Lawyers in England and Wales’ (2nd 2008, Hart Publishing) – ISBN 978-1-84113-708-7

Booth, J. ‘Exclusive: Rosenblatt appoints advisers as it looks to become the fourth English law firm to float’ (City A.M. 29 March, 2018) http://www.cityam.com/283088/exclusive-rosenblatt-appoints-advisers-looks-become-fourth - accessed 29 March, 2018

Bowcott, O. ‘Lawyers in cases against UK troops ‘knew clienst belonged to Iraqi militia’’ (The Guardian 24 April, 2017) https://www.theguardian.com/uk-news/2017/apr/24/lawyers-leigh-day-cases-against-uk-troops-allegedly-knew-clients-belonged-iraq-militia-mahdi-army - accessed 28 June, 2017

Bowcott, O., ‘Contaminated blood scandal victims allowed to sue government’ (The Guardian 26 September, 2017) https://www.theguardian.com/society/2017/sep/26/contaminated-blood-scandal-victims-win-ruling-to-launch-high-court-action - accessed 17 March, 2018

Browne D QC, Nicklin M, QC, & Jolliffe, V. Article – ‘Cruddas v Calvert & Others (No.4)’ . 5RB website - http://www.5rb.com/case/cruddas-v-calvert-others-no-4/ - accessed 4 April, 2015

Brown, L., Drury, I., (Daily Mail) McTague, T. & Williams A, (Mail Online) ‘Shame of the lawyers: £31million inquiry finds their claims of torture by UK troops were “lies” http://www.dailymail.co.uk/news/article-2877320/Allegations-murder-torture-against-British-soldiers-Iraqi-detainees-deliberate-lies-rules-war-crimes-inquiry.html - accessed 6 June, 2017

Brignall, M. -‘Thousands of drivers suffer loss of power following VW emissions 'fix' (The Guardian 12 July, 2017) https://www.theguardian.com/money/2017/jul/12/drivers-loss-of-power-vw-emissions-fix-class-action - accessed 21 January, 2018

Bryman, A. – Social Research Methods – 3rd edn (OUP 2008) ISBN 978-0-19-920295-9

Cadwallader, C. and Graham-Harrison, E. - 'Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach' (The Guardian 17 March, 2018) https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far - accessed 29 April, 2018

Carlyle, T. Sartor Resartus, and On Heroes, Hero-Worship, and the Heroic (ed Dent 1908) – (Project Gutenberg http://www.gutenberg.org/files/20585/20585-h/20585-h.htm#lecturev -accessed 15 Nov 2015)

Coffey, K. 'Spinning the Law – trying cases in the court of public opinion'(Prometheus Books 2010) ISBN 9781616142100

Collier, D., & Mahoney, J. (1996). Insights and Pitfalls: Selection Bias in Qualitative Research. World Politics, 49(1), 56-91. doi:10.1353/wp.1996.0023

Craig, T. 'Media Handling' (2008) Counsel - May 2008, 6–8

Croft, J, and McGee, P., 'VW faces UK group legal action over emissions scandal' (Financial Times 28 January, 2018) https://www.ft.com/content/1e50e9aa-02a7-11e8-9650-9c0ad2d7c5b5 - accessed 18 March, 2018

Cross, M. 'Solicitors relieved as Jackson rows back from one-size-fits-all costs' (The Law Society Gazette 31 July, 2017) https://www.lawgazette.co.uk/practice/solicitors-relieved-as-jackson-rows-back-from-one-size-fits-all-costs/5062295.article?utm_source=dispatch&utm_ medium=email&utm_campaign=%20GAZ141016 – accessed 31 July, 2017

Cross, M. 'News Focus: Playing the consumer card' (The Law Society Gazette 31 July, 2017) https://www.lawgazette.co.uk/news/news-focus/news-focus-playing-the-consumer-card/5062288.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

Cummings, S. 'Movement Lawyering' – UCLA Public Law & Legal theory Research Paper Series – Research Paper No. 17-43 – 2017 Univ. of Illinois Law Review 1645 (2017) 1645-1732

Day, M., Balen, P., McCool, G., & Napier, M. 'Multi-party Actions: A Practitioners' Guide to Pursuing a Group Claim' (Legal Action Group, 1995 - in association with The Association of Personal Injury Lawyers) ISBN:9780905099651

Dearden, L. "Hillsborough verdict: Emotional families celebrate justice for the 96 after jury rules fans were unlawfully killed" (The Independent undated) https://www.independent.co.uk/news/uk/crime/hillsborough-disaster-verdict-inquest-jury-rules-96-liverpool-fans-were-unlawfully-killed-in-1989-a7001271.html – accessed 10 December, 2018

Dearden, L. 'Hillsborough victims' relatives to launch class action lawsuit against South Yorkshire and West Midlands Police' - http://www.independent.co.uk/news/uk/home-news/hillsborough-victims-relatives-to-launch-class-action-lawsuit-against-south-yorkshire-and-west-a7004901.html - accessed 26 June, 2017

Deer, B. 'Andrew Wakefield - the fraud investigation (MMR)' (briandeer.com n.d.) http://briandeer.com/mmr/lancet-summary.htm - accessed 13 January, 2015

Dehn,C. 'The Woolf Report: Against the Public Interest?'(1995) in Zuckerman A. and Cranston R. (eds) 'Reform of Civil Procedure' Oxford University Press, Oxford, Pp. 413-30. OUP. http://php.york.ac.uk/inst/spru/pubs/758/ - accessed 3 February 2014

Dehn, G. 'Opren – Problems, Solutions, and More Problems' (Journal of Consumer Policy 12: 397-414, 1989 – © Kluwer Academic Publishers) https://doi.org/10.1007/BF00412144 - accessed 13 January, 2019

Dignam, A., & Allen, D. 'Company Law and the Human Rights Act 1998' (Butterworths 2000) ISBN 9781845927608

Doward, J. 'MMR parents win legal victory' (The Observer 26 December, 2004) https://www.theguardian.com/uk/2004/dec/26/health.politics accessed 20 January, 2015

Downey, M. 'Ethical Rules for Litigating in the Court of Public Opinion' (American Bar Association 18 July, 2017) https://www.lawyersweekly.com.au/opinion/9191-trial-by-media-where-should-lawyers-draw-the-line - accessed 26 June, 2017

The Economist (unattributed) –"Do Social Media Threaten Democracy" (The Economist – Leading Article November 4th-10th 2017)

The Economist – (unattributed) 'Bitter End' Review of Jonathan Guinness 'Requiem for a Family Business' Macmillan 1997 - http://www.economist.com/node/107492 - accessed 6 October, 2014

Emberland, M. 'The Human Rights of Companies: Exploring the Structure of ECHR Protection' (Oxford University Press 2006) ISBN:978-0-19-928983-7

Evening Standard (unattributed) 'Fury as human rights lawyers accuse British soldiers of executing up to 20 Iraqi prisoners in cold blood' (Evening Standard 22 February, 2008) http://www.standard.co.uk/news/ fury-as-human-rights-lawyers-accuse-british-soldiers-of-executing-up-to-20-iraqi-prisoners-in-cold-6669022.html – accessed 28 June, 2017

Fouzder, M. 'LASPO Review: MoJ issues terms of reference to gather evidence' (Law Society Gazette 8 March, 2018) https://www.lawgazette.co.uk/law/laspo-review-moj-issues-terms-of-reference-to-gather-evidence/5065176.article - accessed 27 March, 2018

Fouzder, M. – 'MoJ unable to commit to releasing LASPO report this year' (Law Society Gazette 18 April 2018) https://www.lawgazette.co.uk/law/laspo-review-unlikely-to-be-released-this-year/5065714.article?utm_source=dispatch&utm_medium=email&utm_campaign= %20GAZ141016 – accessed 21 April, 2018

Freund, J. 'Litigation Funding – Daily Update' (Litigation Finance Journal 12 July, 2017) https://litigationfinancejournal.com/susan-dunn-harbour-litigation-funding-discusses-global-trends-lit-fin/ - accessed 31 July, 2017

Galanter, M. 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (Volume 9:1 Law and Society Review, 1974)

Genn, H. 'Hard Bargaining: Out of court Settlement in Personal Injury Actions' (Clarendon Press Oxford 1987) ISBN 0-19-825592-6

Genn, H. 'Judging Civil Justice : English legal system' - The Hamlyn Lectures. (Cambridge Universtiy Press 2009) ISBN 9780521134392

Genn, H. 'Judging civil justice'– The Hamlyn Lectures 2008 (Cambridge University Press 2010) ISBN 978-0-521-13439-2

Gertner, N. 'In Search of Balance In Dershowitz v Cassell (9th January, 2105) http://abovethelaw.com/2015/01/in-search-of-balance-in-dershowitz-v-cassell/ - accessed 7 June, 2017

Ghose, K. 'Beyond the Courtroom – A Lawyer's Guide to Campaigning' (Legal Action Group 2005) ISBN 10 190330735X

Gibbons, S. 'Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis' Civil Justice Quarterly, Vol 27, Issue 2 © Sweet & Maxwell 2008

Gies, L. 'Law and the Media: the future of an uneasy relationship' (GlassHouse – Routledge-Cavendish 2008) ISBN 9781904385332

Gilg, J-Y. 'Charlie Gard case decided on basis of evidence, not social media opinions, says Judge' Solicitors Journal 25 July, 2017) https://www.solicitorsjournal.com/news/201707/charlie-gard-case-decided-basis-evidence-not-social-media-opinions-says-judge - accessed 25 July, 2017

Glass, K "This #MeToo stampede threatens to bury the most serious sex allegations" (Sunday Times 22/10/17) - https://www.thetimes.co.uk/article/katie-glass-this-metoo-stampede-threatens-to-bury-the-most-serious-sex-allegations-xqzjzr7r8 - accessed 12/11/2017

The Global Legal Post (unattributed) 'ABA Ethics Committee warns lawyers about commenting publicly on clients' (The Global Legal Post 6 April, 2018) http://www.globallegalpost.com/big-stories/aba-ethics-committee-warns-lawyers-about-commenting-publicly-on-clients-4305962/?utm_campaign=D1_06_04_18&utm_medium=email&utm_source=newsletter_d1 – accessed 8 April, 2018

Greenhill, S. 'Judge in Charlie case attacks social media users 'who know almost nothing' and claimed baby had been a 'prisoner of the NHS' (Mail OnLine 25th July, 2017) http://www.dailymail.co.uk/news/article-4726454/Judge-Charlie-case-attacks-social-media-users.html - accessed 25 July, 2017

Guardian online – (unattributed) 'What the Sun said 15 years ago' https://www.theguardian.com/media/2004/jul/07/press and publishing.football1 - accessed 20 March, 2019

Hanna, M., & Dodd, M. 'McNae's Essential Law for Journalists' (21st edn OUP 2012) ISBN 9780199608690

Harvey, G. (Shepperd and Wedderburn) – "How Law Firms are revolutionising the sector" (Lexology 24 August, 2017) – https://www.lexology.com/library/detail.aspx?g=8d92bf33-6667-4716-b1b2-1105cea0085a – accessed 27 November, 2017

Haggerty, J. F., 'In the Court of Public Opinion – Winning Strategies for Litigation Communications" – 2nd edn 2009 American Bar Association – ISBN 978 1 59031-985-7

Hearn, A. 'Facebook, Google and Twitter to testify in Congress over extremist content' (The Guardian 10 January, 2018) https:// www.theguardian.com/technology/2018/jan/10/facebook-google-twitter-testify-congress-extremist-content-russian-election-interference-information - accessed 17 January, 2018

Higgins, A & Zuckerman, A. – Editorial 'Lord Justice Briggs' "SWOT" analysis underlines English law's trouble relationship with proportionate costs – C.J.Q. 2017, 36(1)

Hocking, R. 'So vast a throng the stage can ne'er contain: litigation involving groups' (Lexology 25 July, 2017) http://www.lexology.com/library/detail.aspx?g=c6990a33-10b0-4763-b313-b1a317dd0436 – accessed 31 July, 2017

Hodges, C. 'From class actions to collective redress: a revolution in approach to compensation' 2009 28 Civ. Just. Q. 28, 41–66

Hodges, C. ‘Collective Redress in Europe: the new model’ CJQ 2010, 29(3), 370-395

Hoover, M. ‘What a Lawyer may say to the Media’ (Bench & Bar of Minnesota – February, 1985) http://lprb.mncourts.gov/articles/Articles/What%20a%20Lawyer%20May%20Say%20to%20the%20Media.pdf – accessed 26 June, 2017

Hyde, J. ‘Slater and Gordon plans UK closures after £493m losses’ (The Law Society Gazette - 29 February, 2016) - https://www.lawgazette.co.uk/practice/slater-and-gordon-plans-uk-closures-after-493m-losses/5053906.article - accessed 19 April, 2018

Hyde, J. ‘Revealed: Jackson’s fixed fees pilot to cap costs at £80k’ (The Law Society Gazette – 20 June, 2017) https://www.lawgazette.co.uk/law/revealed-jacksons-fixed-fees-pilot-to-cap-costs-at-80k/5061636.article - accessed 31 July, 2017

Hyde, J. ‘Leigh Day: tribunal hears of ‘orchestration’ of defence’ (The Law Society Gazette – 1 June, 2017) https://www.lawgazette.co.uk/news/leigh-day-tribunal-hears-of-orchestration-of-defence/5061328.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 June, 2017

Hyde, J. ‘Leigh Day and its lawyers cleared of all 19 charges’ (The Law Society Gazette 9 June, 2017) https://www.lawgazette.co.uk/news/leigh-day-cleared-of-all-allegations/5061472.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 9 June, 2017

Hyde, J. ‘Public satisfied with lawyers – but consumer panel still not happy’ (The Law Society Gazette 18 July, 2017) https://www.lawgazette.co.uk/news/public-satisfied-with-lawyers-but-consumer-panel-still-not-happy/5062076.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

Hyde, J. ‘SRA to appeal Leigh Day tribunal verdicts’ (Law Society Gazette – 14 November, 2017) https://www.lawgazette.co.uk/news/exclusive-sra-to-appeal-leigh-day-tribunal-verdicts/5063687.article - accessed 16 December, 2017

Hyde, J. ‘Slater and Gordon confirms plans to close four UK offices’ - (The Law Society Gazette 29 November, 2017) - https://www.lawgazette.co.uk/practice/slater-and-gordon-confirms-plans-to-close-four-uk-offices/5063905.article - accessed 19 April, 2018

Hyde, J. ‘SRA given five-day July hearing for Leigh Day appeal’ (Law Society Gazette – 12 June, 2018) - https://www.lawgazette.co.uk/news/sra-given-five-day-july-hearing-for-leigh-day-appeal/5066442.article - accessed 25 July, 2018

Jackson, LJ. ‘Fixing and funding the costs of civil litigation’ C.J.Q. 2015, 34(3), 260-266

Jefferson, P. ‘Making History’ (2008) New Law Journal - http://www.newlawjournal.co.uk/nlj 15 February 2008 - accessed 13 June, 2016

Kearney, T. ‘Former coke oven workers win latest round in legal claim’ (Northern Echo 3 February, 2017) http://www.thenorthernecho.co.uk/news/15069942.Former_coke_oven_workers_win_latest_round_in_legal_claim/ - accessed 25 June, 2017

Keating, G. ‘Distributive and Corrective Justice in the Tort Law of Accidents’ (2000) Southern California Law Review, 74(193). http://papers.ssrn.com/abstract=269347 – accessed 3 February 2014

Khiara, R., & Jones, M. ‘The Legal Services Act 2007: the final countdown’ (2011) Journal of International Banking and Financial Law, 26.7, 410

http://scholar.google.co.uk/scholar?q=The+Legal+Services+Act+2007%3A+the+final+countdown+&btnG=&hl=en&as_sdt=0%2C5 – accessed 27 January, 2014

Kirby, D. "Hillsborough Disaster Verdict: Tears of Joy, hugs and a rendition of You'll Never Walk Alone as jury exonerates victims" (The Independent 26 April, 2016) https://www.independent.co.uk/news/uk/home-news/hillsborough-disaster-verdict-tears-of-joy-hugs-and-a-rendition-of-youll-never-walk-alone-as-jury-a7002411.html - accessed 10 December, 2018

Kirby, P., 'Third party funding: access to justice or access to profits?' (Lexology 17 July, 2017) http://www.lexology.com/library/detail.aspx?g=615b011e-2041-4875-a315-9a1aa619b908 - accessed 31 July, 2017

Kirk, J., & Miller, M. 'Reliability and Validity in Qualitative Research' (Sage University Paper series on Qualitative Research Methods, Volume 1 1986) ISBN 0-8039-2470-4

Klimes, M., 'Sipp claims against Berkeley Burke courl top 1,000' (Money Marketing 20 February, 2018 - https://www.moneymarketing.co.uk/sipp-claims-berkeley-burke-top-1000/ - accessed 17 March, 2018

Knightley, P. 'A Hack's Progress' (Jonathan Cape Random House, 1997) ISBN 0-224-04399-4

Levick, R. S. and Smith, L. 'Stop the Presses – The Crisis and Litigation PR Desk Reference' (Watershed Press 2nd edn 2007) ISBN 9780975998526

Lewis, P. " 'Our minds can be hijacked': the tech insiders who fear a smartphone dystopia" (The Guardian 6/10/2017) - https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia - accessed 12/11/2017

Lewis, R. 'Insurers and personal injury litigation: acknowledging "the elephant in the living room" ' (2005) Journal of Personal Injury Law, 1/05(1), Pp1–11

Little, A. 'The Road to GDPR – litigation challenges ahead' (Lexology 12 December, 2017) https://www.lexology.com/library/detail.aspx?g=8c3d939a-2eaa-491a-8447-93ca910d9a6c accessed 13/12/17

Lofland, J. (1971) John Lofland 'Analyzing Social Settings – A guide to Qualitative Observation and Analysis' Wadsworth 1971 L.C. Cat. Card No. 74-149015

Lofland, J., Snow, D., Anderson, L., and Lofland, L. 'Analyzing Social Settings – A guide to Qualitative Observation and Analysis' 4th edn (Thomson, Wadsworth 2006) ISBN 0-534-52861-9

Magillo, M., Schiona, L., & Cullen, T. 'Class Actions in Italy: Recent Developments' 2013 Jones Day Publications. http://www.jonesday.com/files/Publication/b4455abe-2b4d-4ae7-aa25-4812121db83b/Presentation/PublicationAttachment/7d08d564-b343-4c12-ba5b-4c7c802ef6c3/Class Actions in Italy.pdf - accessed 13 January, 2015

McIvor, C. 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) Civil Justice Quarterly, 30(4), Pp 411–428

McSmith, A. (2015, February). Andrew Mitchell "Plebgate" trial: The great British libel casino claims a fresh victim. *The Independent*. Retrieved from http://www.independent.co.uk/news/media/press/plebgate-trial-the-great-british-libel-casino-claims-a-fresh-victim-9891822.html

Millejan – ‘LASPO to be reviewed’ – (NLJ Vol 167 Issue 7768 29 October, 2017) https://www.newlawjournal.co.uk/content/lawyers-welcome-laspo-review - accessed 16 December, 2017

Milmo, C. ‘Al-Sweady Inquiry: ‘Deliberate lies’ – the verdict on claims that British soldiers tortured Iraqi detainees’ (The Independent17 December, 2014) http://www.independent.co.uk/ news/uk/crime/ al-sweady-inquiry-deliberate-lies-made-on-allegations-of-torture-by-british-soldiers-in-iraq-9931724.html – accessed 29 June, 2017

Morgan, T. and Boyle D, ‘Hillsborough compensation: 5,000 affected by disaster could win payouts from police’ (The Telegraph 28 April, 2017) http://www.telegraph.co.uk/news /2016/04/28/hillsborough-ex-south-yorkshire-officers-told-they-did-a-good-jo/ - accessed 27 June, 2017

Mulheron, R. ‘Reform of Collective Redress in England and Wales: A perspective of Need’ (Civil Justice Council, February 2008) https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents /CJC/Publications/Other+papers/reform-of-collective-redress.pdf - accessed 10 June, 2017

Murphy, J,. & Paterson, A. ‘Trial by media: Where should lawyers draw line? (Lawyers Weekly 14 September, 2011) https://www.lawyersweekly.com.au/opinion/9191-trial-by-media-where-should-lawyers-draw-the-line - accessed 26 June, 2017

McVeigh, K. ‘Andrew Mitchell loses Plebgate libel trial’ (The Guardian 27 November, 2014) http://www.theguardian.com/politics/2014/ nov/27/pleb-andrew-mitchell-loses-libel-case - accessed 22 December, 2015

Moorhead, R. ‘A legal rollercoaster’ (2012) New Law Journal 162 (7524) 1004–1005 http://www.newlawjournal.co.uk/nlj/content/legal-rollercoaster - accessed 1 February, 2014

Morabito, V. and Waye, V. ‘The Dawning of the Age of the Litigation Entrepreneur’. Civil Justice Quarterly, *28*(3) 2009, 389–443 - http://papers.ssrn.com/abstract=2083972 – accessed 10 March, 2014

Morrison, S. ‘Alfie Evans latest: Police vow to combat 'highly abusive and threatening' online messages sent to hospital staff’ (Evening Standard 26 April, 2018) https://www.standard.co.uk/news/uk/alfie-evans-latest-police-vow-to-combat-highly-abusive-and-threatening-online-messages-sent-to-a3823891.html - accessed 13 May, 2018

Parry, J. ‘Here's why the Supreme Court rejected the latest Alfie Evans appeal - decision in full’ (Liverpool Echo 20 April, 2018) - https://www.liverpoolecho.co.uk/news/liverpool-news/heres-supreme-court-rejected-latest-14556664 - accessed 13 May, 2018

Paterson, A. ‘Lawyers and the Public Good: Democracy in Action?’ - The Hamlyn Lecturers. (Cambridge University Press 2010) - ISBN 9781107012530

Pickard, J., & Stacey, K. (2013, July). ‘Cruddas wins damages from Sunday Times’. (*Financial Times*. 31 July, 2013) http://www.ft.com/cms/s/0/f81fdd70-f9cf-11e2-b8ef-00144feabdc0.html?siteedition=uk#axzz3WKvZPDCL – accessed 4 April, 2015

Press Association ‘Hillsborough: high court hears damages claim over police 'cover-up'' (The Guardian 24 November, 2017) https://www.theguardian.com/football/2016/nov/24/hillsborough-high-court-hears-damages-claim-over-alleged-police-cover-up - accessed 27 June, 2017

PressGazette (unattributed) 26 July, 2018 https://www.pressgazette.co.uk/bbc-lawyers-will-ask-permission-to-appeal-sir-cliff-richard-privacy-ruling-in-high-court-over-police-raid-footage/ - accessed 28 July, 2018

Pugh, C. and Day, M. 'Toxic Torts' (Cameron May in association with the United Kingdom Environmental Law Association, 1992) ISBN 1874698007

Ratcliffe, R. 'Subpostmasters fight to clear names in theft and false accounting case' (The Guardian 9 April, 2017) https://www.theguardian.com/business/2017/apr/09/subpostmasters-unite-to-clear-names-theft-case-post-office - accessed 25 June, 2017

Reeve, J. 'Client Protection and Access to Justice - consumer, business and practitioner perspectives' Conference paper for 'Third party legal funding and the future of the voluntary code' Westminster Legal Policy Forum – 28 November, 2012

Regan, D. 'Fixed costs: Sir Rupert's swansong?' New Law Journal 14 July, 2017) https://www.newlawjournal.co.uk/files/article_files/006_nlj_7754_comment_regan.pdf - accessed 22 July, 2017

Master Roberts 'Costs budgeting: a mid-term report' J.P.I. Law 2018, 1, 65-71

Robertson, G., and Nicol, A. G. L. 'Media Law' (5th edn Penguin Books, Limited 2008) ISBN 9780141030210

Rogerson, P. 'News Focus: LASPO four years on' (The Law Society Gazette 3 July, 2017) https://www.lawgazette.co.uk/news-focus/news-focus-laspo-4-years-on-the-law-society-review/5061831.article - accessed 31 July, 2017

Rose, N. 'How to navigate a two-way street with the Fourth Estate' (2005) The Law Society's Gazette, 102(28), 28

Rosen, M. 'The Sunday Times thalidomide case: Contempt of court and the Freedom of the Press' (Writers and Scholars Educational Trust in association with the British Institute of Human Rights – November, 1979)

Rozenberg, J. 'Is crowdfunded litigation the future of justice? (The Guardian 25 May, 2015) https://www.theguardian.com/commentisfree/2015/may/25/crowdfunded-litigation-future-justice-crowdjustice - accessed 4 August, 2017

Sainsbury, R., & Genn, H. 'Access to Justice: Lessons from Tribunals' (1995) - "Essays on Access to Justice" ' in Zuckerman A. and Cranston R. (eds) 'Reform of Civil Procedure' Oxford University Press, Oxford, Pp. 413-30. OUP. http://php.york.ac.uk/inst/spru/pubs/758/ - accessed 3 February 2014

Scheingold, S. 'the politics of Rights: lawyers, public policy and political change' (2nd Edn The University of Michigan Press) – ISBN-13 978-0-472-03005-7

Scott, P., Flett, J., & Hodgson, L. 'The adoption of opt-out collective actions in the UK' – (Norton Rose Fulbright – July 2015) www.nortonrosefulbright.com/knowledge/publications/1308/the-adoption-of-opt-out-collective-actions-in-the-UK - accessed 19 October, 2016

Shackleton, J., & Joe, G. – 'Class Actions and Litigation Funding' – (Simpson Grierson 2011) http://www.simpsongrierson.com/litigation-class-actions-litigation-funding/ - accessed 12 October, 2012

Shropshire Star (unattributed) - 'Law firm set to lead fight against Volkswagen over dieselgate' (Shropshire Star 19 January, 2018)

https://www.shropshirestar.com/news/motors/2018/01/19/law-firm-set-to-lead-fight-against-volkswagen-over-dieselgate/#0S47mr4F1LPX7y5o.99

https://twitter.com/claireatki/status/950188869772890112?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.shropshirestar.com%2Fnews%2Fmotors%2F2018%2F01%2F19%2Flaw-firm-set-to-lead-fight-against-volkswagen-over-dieselgate%2F – accessed 22 January, 2018

Smith, A. Wealth of Nations: An Inquiry Into the Nature and Causes of The Wealth of Nations (1776). ISBN: 0-85229-163-9

Smith, Roger 'Reports - The Green Papers and Legal Services' (Modern Law Review Volume 52, Issue 4, Version of Record online: 18 Jan 2011) – accessed 21 January, 2019

Smith, Rebecca – 'Nearly 45,000 UK drivers have now teamed up for legal action against Volkswagen over emissions scandal' (City A.M. 16 November, 2017) http://www.cityam.com/275877/nearly-45000-uk-drivers-have-now-teamed-up-legal-action - accessed 21 January, 2018

Solicitors' Disciplinary Tribunal Case No. 11502-2016 (Press Summary – issued 9 June, 2017) - http://www.solicitorstribunal.org.uk/news/case-no-11502-2016-sra-v-day-malik-crowther-and-leigh-day-firm – accessed 28 June, 2017

SRA (unattributed) SRA News Release 'Professor Phil Shiner and the Solicitors Disciplinary Tribunal' (SRA News Release 2 February, 2017) http://www.sra.org.uk/sra/news/press/shiner-strike-off-sdt-february-2017.page - accessed 28 June, 2017

Stapely, S. 'Media Relations for Lawyers' (The Law Society 1994). ISBN 1 85328 291 X

Stevens, J., & East, S. 'Class/collective actions in New Zealand: overview' (Practical Law blog 1 November, 2016) https://uk.practicallaw.thomsonreuters.com/3-617-6671?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 – accessed 31 July, 2017

Steward, G. (2011). Litigation In-Brief, Conditional Fee Agreements and litigation insurance. Macfarlanes LLP. Retrieved from http://www.macfarlanes.com/media/320447/conditional-fee_agreements_and_litigation_insurance.pdf

Stewart, G., and Colley, J. 'Hillsborough families take 'cover up' fight to High Court' (Liverpool Echo April, 2016, updated 27 June, 2017) http://www.liverpoolecho.co.uk/news/liverpool-news/hillsborough-families-high-court-police-12224665 - accessed 27 June, 2017

Taylor, D. 'BP oil spill: Colombian farmers sue for negligence' (The Guardian 11 January, 2011) http://www.theguardian.com/environment/2011/jan/11/bp-oil-spill-colombian-farmers - accessed 2 December, 2014

Taylor, D. 'Colombian farmers sue BP in British court' (The Guardian 15 October, 2014) http://www.theguardian.com/global-development/2014/oct/15/colombian-farmers-sue-bp-british-court - accessed 2 December, 2014

The Law Society Gazette (unattributed) 'Access Denied: Law Society's 25-point plan to salvage civil justice' (The Law Society Gazette 29 June, 2017) https://www.lawgazette.co.uk/law/access-denied-law-societys-25-point-plan-to-salvage-civil-justice/5061772.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 – accessed 1 August, 2017

Theron, L. – 'Class action litigation: a new frontier' (New Zealand Law Society, Law Talk - Issue 840 – 28 April, 2014) https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-840/class-action-litigation-a-new-frontier - accessed 4 January, 2015

Theron, L. ‘Class actions in New Zealand (2016) (Global Class Actions Exchange web site) http://globalclassactions.stanford.edu/content/class-actions-new-zealand - accessed 31 July, 2017

Tovey, A. ‘VW faces 'super claim' over dieselgate as UK and Netherlands motorists join forces’ (The Daily Telegraph 13 June, 2017) http://www.telegraph.co.uk/business/2017/06/13/vw-faces-super-claim-dieselgate-uk-netherlands-motorists-join/ - accessed 21 January, 2018

Tran, M. ‘MMR Vaccine: lawyers sued for pursuing claim based on link to autism’ (The Guardian 26th June, 2014) - https://www.theguardian.com/society/2014/jun/26/mmr-autism-lawyers-sued-hodge-jones-allen-claim-legal-aid - accessed 20 January, 2015

Tudor, A. ‘Plebgate — how new libel laws have changed the defamation landscape’ (The Times 26 November, 2014) https://www.thetimes.co.uk/article/plebgate-how-new-libel-laws-have-changed-the-defamation-landscape-fkdkh6ks2p9 - accessed 4 December, 2014

Twining, W. ‘Pericles and the Plumber’ - LQR 83 1967, pp 396-426

Van der Luit-Drummond, J. ‘Lord Justice Jackson scales back fixed costs proposals’ (Solicitors Journal 31 July, 2017) https://www.solicitorsjournal.com/news/201707/lord-justice-jackson-scales-back-fixed-costs-proposals - accessed 3 August, 2017

Walters, M. ‘Online court to tackle ‘disenfranchised class’ (The Law Society Gazette 6 July, 2017) https://www.lawgazette.co.uk/law/online-court-to-tackle-disenfranchised-class/5061891.article - accessed 30 July, 2017

Walters, M ‘VW case edging closer as claimants battle it out for lead spot’ (The Law Society Gazette 16 January, 2018) https://www.lawgazette.co.uk/law/vw-case-edging-closer-as-claimants-battle-it-out-for-lead-spot/5064371.article - accessed 19 January, 2018

Webley, L ‘Qualitative Approaches to Empirical Legal Research’ in Cane P and Kritzer H, (eds) ‘The Oxford Handbook of Empirical Legal Research’, (OUP 2010) ISBN: 9780199542475 Chapter 38 927-950

Weinrib, E. ‘Corrective Justice in a Nutshell’ (2002) The University of Toronto Law Journal, 52(4), 349 - http://www.jstor.org/discover/10.2307/825933?uid=3738032&uid=2&uid=4&sid=21103379404527 – accessed 3 February 2014

Wisking, S., Dietzel, K., & Herron, M. ‘Next steps in the evolution of UK Competition Litigation – Survival of the first competition law class action’ (Herbert Smith Freehills Competition, Regulation and Trade E-Bulletin 4 April, 2017 http://sites.herbertsmithfreehills.vuturevx.com/46/13741/compose-email/survival-of-the-first-uk-competition-law-class-action.asp – accessed 30 July, 2017

Woffinden, B. & Plasket, J. ‘Bad Show: the Quiz, The Cough, the Millionaire Major’ 1st edn. Bojangles Books 2015 ISBN 9780993075520

Zuckerman, A. ‘Lord Justice Jackson’s review of civil Litigation Costs - Preliminary Report’ (2009) Civil Justice Quarterly 28(4) Pp 435–447

APPENDIX 2

LIST OF GLOS GRANTED SINCE 2001[1]

2001 Folio 398	Prentice Ltd/Daimler Chrysler UK Ltd	30/04/2001
1	Redbank	10/11/2000
1A	Redbank	13/06/2001
2	Royal Liverpool Children's	12/11/2000
3	Kerr/North Yorkshire Health Authority	18/10/2000
4	Cape plc	03/11/2000
5	Gower Chemicals	18/11/2000
6	JMC Holidays	07/11/2000
7	JMC Holidays / Club Aguamar	08/02/2001
8	McDonalds Hot Drinks	22/05/2001
9	Nationwide Organ	16/06/2001
10	Esso Collection	27/06/2001
11	West Kirby Residential School	27/06/2001
12	De Puy Hylamer	10/08/2001
13	Nantygwyddon	15/08/2001
14	Gerona Air Crash	18/08/2001
15	Longcare	21/11/2001
16	Advance Corporation Tax (ACT)	26/11/2001
17	Lower Lea Special School	12/12/2001
18	Coal Mining Contractors Contribution	07/01/2002
19	Trecatti	26/11/2001
20	Ryanair Agents	17/01/2002
21	Persona	28/01/2001
22	Manchester Children's Homes	12/06/2001
22A	Manchester Children's Homes	01/07/2003
23	United Utilities Sandon Dock	20/03/2002
24	The Deep Vein Thrombosis and Air Travel	08/03/2002
25	Havelock	19/06/2001
26	St Leonard's	12/06/2002
27	Chagos Islanders	03/07/2002
28	Scania 4 Series	22/07/2002
29	Kenya Training Areas	04/11/2002
30	Loss Relief	23/05/2003
31	South Wales Children's Homes (Local Authority)	23/05/2003
32	South Wales Children's Homes (National Childrens Home)	28/11/2002
33	Thin Cap	30/07/2003
34	Controlled Foreign Companies CFC Dividend	30/07/2003

[1] Source - http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders - updated 23 January, 2018 (last updated 17 March, 2018);

35	Franked Investment Income	08/07/2003
36	Kirklees	01/09/2001
37	Park West	04/01/2002
38	Trilucent Breast Implant	01/07/2003
39	Newton Longville	27/03/2003
40	Sabril	04/02/2004
41	Lloyd's Names UK Government	16/04/2004
42	Calderdale	16/04/2004
43	Foreign Income Dividends (FIDs)	20/07/2004
44	St George's	19/04/2004
45	British Telecommunications Pensions Group Ltd	04/08/2004
46	Evolution Films	Pending
47	Staffordshire Children's Homes	11/02/2005
48	Torremolinos Beach Club	21/04/2005
49	Dexion Deafness	28/04/2005
50	DePuy Hylamer	08/08/2005
51	Fetal Anti Convulsant (FAC)	25/08/2005
52	Mogden	21/12/2005
53	Corby	14/02/2006
54	Missing Trader Intra-Community (MTIC) Damages	21/06/2006
55	Lincoln Prison	03/08/2006
56	Parkwood	23/08/2006
57	St William's	05/09/2006
58	Abidjan Personal Injury	12/03/2007
59	VAT Interest Cars	28/06/2007
60	Soviva Hotel	02/11/2006
61	Atomic Veterans	16/07/2007
62	Miner's Knee	21/12/2006
63	St William's	05/09/2006
64	Powertrain	10/10/2007
65	MSC NAPOLI	09/06/2008
66	Ocensa Pipeline	24/09/2008
67	North Wales Children's Homes	25/05/1999
68	Seroxat	29/10/2008
69	Westmill Landfill	27/03/2009
70	Opiate Dependant Prisoners (No.2)	21/07/2009
71	Linkwise	19/06/2008
72	Norton Aluminium	26/05/2010
73	Manchester Children's Homes (No.2)	27/07/2010
74	Stamp Taxes	21/10/2010
75	Iraqi Civilian Employees	12/07/2010
76	Visteon UK Ltd	20/12/2012
77	CF Arch cru	14/10/2013
78	RBS Rights Issue	19/09/2013
79	Lyme & Wood Landfill Group	21/11/2013
80	DePuy Pinnacle Metal on Metal Hip	31/07/2014
81	Construction Industry Vetting Information	10/07/2014
82	Wildriggs Rendering Site	05/05/2011

83	Monckton	11/11/2012
84	Fleetwood	09/12/2012
85	Hafod Landfill	22/10/2013
86	Zimmer Metasul Large Diameter Head and Durom Metal on Metal Hip	03/12/2014
87	Shared Appreciation Mortgages (SAMs)	05/10/2009
88	PIP Breast Implant	03/12/2014
89	SONAE	12/07/2012
90	Recognised Overseas Self Invested International Pensions (ROSIIP)	22/06/2012
91	Winterbourne View Group Litigation	27/02/2013
92	CPT	14/08/2008
93	Construction Industry Vetting Information Group Litigation	08/12/2015
94	Corin Metal Hip Litigation	22/10/2015
95	Royal Mail Group Litigation	22/07/2016
96	The Hillsborough Victims Litigation	23/01/2017
97	The Post Office Group Litigation	21/03/2017
98	The British Steel Coke Oven Workers Litigation	20/01/2017
99	The Chirk Nuisance Group Litigation	22/06/2017
100	Contaminated Blood Products Group Litigation	27/10/2017
101	The Dr Gordon Bates (Deceased) And Barclays Bank Group Litigation	27/05/2016
102	Lloyds/HBOS Litigation	06/08/14
103	The Berkeley Burke SIPP Litigation	23/01/18
104	The Omega Proteins Group Litigation	19/01/18
105	The VW NOx Emissions Group Litigation	11?05/18

APPENDIX 3

ACCESS TO JUSTICE: ARTICLE SEARCH

RESULTS OF WESTLAW SEARCH FOR ARTICLES ON ACCESS TO JUSTICE – 4 AUGUST, 2017

You searched **Journals** for **Free Text = access AND to AND justice**

1. Beliefs, precedent, and the dynamics of access to justice: a Bayesian microfounded model
Citation: A.L.E.R. 2016, 18(2), 272-301
Subject: Torts; Economics
Keywords: Access to justice; Economics and law; Precedent; Torts

2. Access to justice: triage and online facilities
Citation: Fam. Law 2016, 46(Sep), 1174-1177
Subject: Legal advice and funding; Family law
Keywords: Access to justice; Conferences

3. Access to justice - a personal viewpoint
Citation: IDS Emp. L. Brief 2015, 1033, 25-26
Subject: International law; Human rights
Keywords: Access to justice; Disabled persons; Treaties

4. Having a say: "access to justice" as democratic participation
Citation: UCL J.L. and J. 2015, 4(1), 76-108
Subject: Civil procedure; Jurisprudence
Keywords: Access to justice; Democracy; Litigants in person; Socio-legal studies

5. Does the Japanese inclination towards non-litigation hinder access to justice for minority groups?
Citation: I.J.P.L. & P. 2014, 4(3), 221-244
Subject: Human rights; Dispute resolution
Keywords: Access to justice; Japan; Litigation; Minorities

6. Access to justice: assumptions and reality checks in Bangladesh
Citation: I.J.P.L. & P. 2014, 4(2), 161-168
Subject: Legal advice and funding
Keywords: Access to justice; Bangladesh; Politics and law

7. The price of access to justice
Citation: L.S.G. 2004, 101(29), 14
Subject: Legal advice and funding; Personal injury
Keywords: Access to justice; Contingency fee agreements; Personal injury

8. Where are we going with access to justice?

Citation: Nott. L.J. 2003, 12(2), v-vi
Subject: Legal advice and funding
Keywords: Access to justice; Claims; Conditional fees; Risk

9. Commission outlines legislation on access to environmental justice
Citation: ENDS 2002, 328, 52-53
Subject: Environment; Administration of justice
Keywords: Access to justice; EC law; International environmental law; Locus standi

10. Access to justice: consumers and conditional fees
Citation: C.P. Rev. 2000, 10(3), 86-91
Subject: Legal profession; Consumer law
Keywords: Access to justice; Conditional fees; Consumers

11. A closed door policy?
Citation: Post Mag. 2000, Mar 9, 23
Keywords: Access to justice; Conditional fees; Legal expenses insurance; Premiums

12. Access to justice
Citation: N.L.J. 1998, 148(6868), 1858
Subject: Legal advice and funding
Keywords: Access to justice; Court administration; Disabled persons

13. Equal access to justice
Citation: Liverpool L.R. 1997, 19(1), 29-36
Subject: Civil procedure
Keywords: Access to justice; Civil procedure; Disabled persons

14. Access to the courts is a constitutional right
Citation: C.P. Rev. 1997, 7(3), 106
Subject: Administration of justice
Keywords: Access to justice; Courts; Exemptions; Fees; Ultra vires

15. Lord Woolf's Access to Justice: plus ca change...
Citation: M.L.R. 1996, 59(6), 773-796
Subject: Civil procedure
Keywords: Access to justice; Case management; Costs; Germany

16. A response by the Haldane Society of Socialist Lawyers to the Labour Party's consultation on access to justice
Citation: Soc. L. 1995, 24(Sum), 14-16
Subject: Legal advice and funding
Keywords: Access to justice; Labour Party

17. Access to justice: Lord Woolf's interim report
Citation: P.L.I. 1995, 17(7), 110-111
Subject: Civil procedure
Keywords: Access to justice; Civil procedure; Court administration

18. Access to justice

Citation: N.L.J. 1991, 141(6519), 1213
Subject: Legal advice and funding
Keywords: Access to justice

19. Access to justice in environmental matters in Turkey: a case study from the ancient city of Allianoi
Citation: I.J.L.C.J. 2015, 43(4), 424-438
Subject: Planning; Arts and culture; Environment; Legal advice and funding
Keywords: Access to justice; Cultural property; Dams; International environmental law; Planning control; Turkey

20. ECJ rules on access to environmental justice
Citation: ENDS 2011, 435, 63-64
Subject: Environment; Administration of justice; European Union
Keywords: Access to justice; Direct effect; EU law; Environmental law; National courts; Treaty interpretation

APPENDIX 4

DRAFT QUESTIONNAIRE

For

Research into aspects of Group Litigation

Questions:

Involvement with Group Litigation

The Researcher is covered by regulation both as a solicitor and a barrister and confirms the confidentiality of all information given to the research. For reasons of Client Confidentiality you may still wish not to mention specific clients or cases by name, but information on numbers of cases and whether acting for Claimants or Defendants would be very helpful, in answering these questions.

This Questionnaire is designed to be answered by legal professionals who have been involved as principals or as counsel in group litigation for either or both of claimants and defendants and by in-house counsel who have been involved in group litigation in their employing companies.

Group Litigation

~~1. If you are able to give this information, under which Group Litigation Order(s) ("GLO's") were the cases in which you were involved and who were named as the Claimant and Defendant to the litigation?~~

~~*If you are not able to name the GLO's and/or cases please distinguish further answers by reference e.g. to "Case 1", "Case 2" etc.*~~

1. In what capacity(ies) have you been involved in GLO cases? (*as solicitor, partner or associate, counsel or in-house counsel*).

2. In each case was your involvement on Claimant or Defendant side?

3. Briefly, what was the main subject matter of each case and what kind of relief was sought – if damages, if you are able to say, what amount of damages was sought?

4. Which law firms represented which of the parties (or for those in a law firm, the opposing party)?

Settlement

5. Did any of the cases in which you were involved settle partially or completely prior to full trial? If so:

   a. at what stage did the case(s) settle?

   b. what elements did each of the settlements comprise in terms of damages, costs, other terms?

   This information does not need to be specific in terms of amounts, but sufficient to compare the magnitude of the settlement amount and terms against the original claim.

Media

6. Did any of the cases in which you were involved attract media attention?

7. In each case, what form(s) did the media coverage take? Please describe it in some detail including comment as to its general accuracy.

8. In any of the cases, were any steps taken by you or anyone else to activate the media and public interest (at any stage during the proceedings or prior to settlement). If so, please provide brief comments on:

   a. if activated by you, the intention behind such activation;

   b. the form(s) of media activated; and

   c. in your view, the impact and degree of success of such steps.

9. In any cases where there was media interest, did you observe any steps taken by the Defendant in the media to protect or reduce damage to its reputation. If so, please provide brief comments on:

   a. the form(s) of media in which such steps appeared; and

   b. the degree of success of such steps.

Public Relations/Communications ("PR")

10. Did you observe either Claimant or Defendant side employing:

    a. specialist litigation PR practitioners; or

b. any other PR enterprise?

If so please say which and in which cases and provide brief details of:

i. which side(s);

ii. what the PR activities were; and

iii. in your view their degree of success.

If you were acting for a corporate defendant, in each case:

11. Was the outcome of the case one that you would have expected bearing in mind the merits of your client's case and if not, please say in what respects?

12. In your own view, did any media coverage cause either actual or potential damage to the reputation of the corporate defendant and if so, how did or how might that damage have manifested itself?

13. In case(s) that were settled:

a. was any assessment, formal or informal, made as to the effect of media attention and the risk of reputational damage if a full trial were to take place?

b. was the media coverage and any associated reputational damage a factor in any decision to settle and if so how significant a factor was it?

Other Comments

14. Are there other comments that you wish to add, if so please do.

Other Respondents

15. Are you aware of any other law firms, solicitors, counsel or in-house counsel to whom this questionnaire may usefully be sent; if so please specify.

Thank you very much for your time in answering these questions.

APPENDIX 5

TOPIC GUIDES

Semi-Structured Media and Group Litigation Interview Topic Guide – Lawyers/PR

Background/Experience:

1. What is the extent of your experience in GLO cases? No. of cases
2. Have you acted mostly for Defence or Claimants?
3. What types of cases were they – PI; environmental; financial; product liability;
4. Of the cases acting for the Defence how many were corporate defendants?
5. Of all the cases, how many went to full trial and how many settled prior to or during trial?
6. Have you worked as part of a team?
    a. Who has been in the team?
    b. Who were the decision makers in the team?

Media Attention and Activation

7. Has there been media attention in the GLO cases?
8. If so what form has it taken – press; TV; radio; social media
9. Has there been activation of the media by anyone involved?
10. If so, by whom – solicitors; claimants; action groups?
11. Was there any discernible direction or purpose to the activation of the media?

Acting for Claimants

12. Have you engaged in media activation/campaigning in GLO cases?
13. If so:
    a. to what purpose(s): claimant recruitment; exerting pressure on defendant to settle/increase offer; advertising?
    b. How has activation been achieved
    c. In what forms of media
    d. Have media or litigation PR agencies been used
    e. What was the strategy?
14. How successful has such activation/campaigning been?
15. What is the impact of costs implications on the use of media – does it help to make GLO's profitable? Have recent changes to the costs regime under Jackson affected this issue?
16. To what extent are clients involved/consulted/advised of media activation?
17. Is media activation or media relations referred to in the CFA?
18. What is the principal purpose of the media activation? Are there any other purposes?

Acting for Defendants

19. Have you experienced media activation against defendants? (as distinct from media interest to the extent that it can be distinguished?)
20. If so, who were the activators?
21. What has been its impact?
    a. Has it influenced what has been said in court or any position taken in court?
    b. Has the defendant engaged in the media battle or tried to stay silent?
    c. Have media or litigation PR agencies been used?
    d. Has the activated media attention impacted on a decision to settle rather than fight
    e. Has the activated media attention impacted on the timing of settlement
    f. Has the activated media attention impacted on the level of settlement
    g. Have particular sensitivities affected the impact of media attention – e.g. cases against children or disabled/disadvantaged claimants
22. If a decision to settle has been made, who has made it? E.g. legal team or management?
23. How significant in the decision to settle has media been amongst other relevant issues: e.g. financial; management time; precedent setting; legal costs?
24. How is the balance made between the drivers to settle and the fact that GLO's are open-ended? – i.e. the "opening the floodgates" to further claims question.

Other impacts of activated media attention

25. In general how accurate has activated media reporting been?
26. What have been its main areas of focus?
27. Are there other discernible impacts of activated media attention? In particular:
    a. Are judges apparently influenced in any way?
    b. Are insurers influenced?

Other information

28. Any other comments?
29. Are there any other law firms, solicitors, counsel or in-house counsel who may be able to assist with this research?

Semi-Structured Media and Group Litigation Interview Topic Guide - Journalists

Background/Experience:

30. What is the extent of your experience of GLO cases?
31. Have you reported on them?
32. What types of cases were they – PI; environmental; financial; product liability;
33. When reporting on them have you had contact with either of the parties or their representatives?
34. Have the parties contacted you or have you contacted them?
35. Have you been requested/invited to report on group litigation cases?

Media Interest

1. Is it right that GLO cases are more interesting to the media than other cases?
2. If so, what is it about them that makes them so?
3. Is the claimant side more interesting than the defence?
4. If so, why so?

Activation

1. Has there been activation of the media by anyone involved?
2. If so, by whom – solicitors; claimants; action groups?
3. Have you experienced media activation against defendants? (as distinct from media interest to the extent that it can be distinguished?)
4. Have you seen or been involved in media campaigns around group litigation?
5. Was there any discernible direction or purpose to the activation of the media?
6. Does public opinion act on the defendants – cases that settle/ not those going to court.
7. What is your view of the benefit of media coverage
8. Is it necessary?
9. Why is it necessary?
10. What does it achieve?
11. Do defendants ever approach the media?

Imbalance

1. Do you perceive an imbalance initially between the power of the claimant and defendant?
2. Does the media help redress this?
3. Is there a risk that it can over compensate and reverse the imbalance?

Reporting

1. Have your reports been for one publication or multiple?
2. Which publications?
3. Have the publications themselves passed them on?
4. Have you seen things put into court just so they can be picked up as sound bites?
5. Has media attention influenced what has been said in court or any position taken in court?
6. Have you been given briefings by parties or their lawyers?
7. When – on what occasions?
8. Is the timing of articles important?

Other Media and PR Agencies

1. Have media or litigation PR agencies been used? Has there been other media attention in the GLO cases?
2. If so what form has it taken – press; TV; radio; social media?
3. Have particular sensitivities affected the impact of media attention – e.g. cases involving children or disabled/disadvantaged claimants?

Relationships

1. Do you have relationships with lawyers?
2. If so, claimant lawyers or defendant lawyers or both?
3. How have those relationships developed – who drives them, you or the lawyers?

Taking input from lawyers

1. Why do you do it?
2. Is it a help to you?
3. If you take input can you edit/publish as you like
4. Do you see it as journalists being used as puppets – being manipulated?

Other information

4. Any other comments?
5. Are there any other law firms, solicitors, counsel or in-house counsel who may be able to assist with this research?

Semi-Structured Media and Group Litigation Interview Topic Guide - Judges

Background/Experience:

36. What is the extent of your experience in GLO cases? No. of cases
37. What types of cases were they – PI; environmental; financial; product liability;
38. Of the cases acting for the Defence how many were corporate defendants?
39. Is your experience of them at full trial or interlocutory?
40. What proportion settled prior to full trial?

Media Attention and Activation

41. Has there been media attention in the GLO cases?
42. If so what form has it taken – press; TV; radio; social media
43. Have you seen apparent activation of the media by anyone involved?
44. If so, by whom – solicitors; claimants; action groups?
45. Was there any discernible direction or purpose to the activation of the media?

Lawyers

46. Have lawyers engaged directly with the media?
47. Have lawyers apparently used proceedings to feed press/media with "soundbites"?
48. Have counsel complained to you about conduct of the other side regarding the press?
49. If so:
    a. Which counsel
    b. What type of compliant
    c. How have you responded

50. Independently of any complaint or submission, have you ever had cause to comment on press/media activity in the course of proceedings?
51. If so:
    a. On what type of issues?
    b. What kind of direction/ruling have you given?

Acting for Defendants

52. Have you experienced media activation against defendants? (as distinct from media interest to the extent that it can be distinguished?)
53. If so, who were the activators?
54. What has been its impact?
    a. Has it influenced what has been said in court or any position taken in court?
    b. Has the defendant engaged in the media battle or tried to stay silent?
    c. Have media or litigation PR agencies been used?
    d. Has the activated media attention impacted on a decision to settle rather than fight
    e. Has the activated media attention impacted on the timing of settlement

f. Has the activated media attention impacted on the level of settlement
g. Have particular sensitivities affected the impact of media attention – e.g. cases involving children or disabled/disadvantaged claimants

55. If a decision to settle has been made, who has made it? E.g. legal team or management?
56. How significant in the decision to settle has media been amongst other relevant issues: e.g. financial; management time; precedent setting; legal costs?
57. How is the balance made between the drivers to settle and the fact that GLO's are open-ended? – i.e. the "opening the floodgates" to further claims question.

Other impacts of activated media attention

58. In general how accurate has activated media reporting been?
59. What have been its main areas of focus?
60. Are there other discernible impacts of activated media attention?
61. In particular have you been influenced in any way?

Other information

62. Any other comments?
63. Are there any other judges law firms, solicitors, counsel or in-house counsel who may be able to assist with this research?

APPENDIX 6

DATA ANALYSIS MATRIX

	Media attention in GLO's	Activation of media: if so, by whom	To what purpose(s)	Has the defendant engaged in the media battle	How accurate has reporting been	Has activated media attention impacted on a decision to settle
1	In all cases. GLO's very different [from unitary actions]; they start with a public interest, a large number of people involved…therefore the media are interested and impact is greater because it's not just one person complaining. Undoubtedly plublicity is a part of ligitation.	Usually by claimant side: essentially solicitors and action groups: NGOs feed media.	To recruit claimants; serve interests of action group; put pressure on defendant	[That's] decided by factors well beyond the scope of the litigation. Litigation ends in court but publicity carries on well beyond that. It's a battle they can't win anyway. Company can't win a public enquiry type approach.	Often difficult to understand how the reporter saw things, the way they are portrayed; it's very easy to spin and deploy information in such a way that it isn't a true reflection of what happens in court. Publicity is often misquoting and misleading. Media distorts or reports in a particular way so sensitivity is understandable. Media looks for soundbites but cases are very complex.	Can do; one very clear case where it did – there it had an effect on defendants banks; not unique. Settlement almost never solely driven by merits; media is one of factors (financial, reputation, media, public discussion. Publicity is a major factor in settlement).
2	Varies. Some cases get more than others. Pharma cases and anything to do with children get more.	PR consultants – in claimant cases almost invariably instructed by lawyers.	Mobilise sympathy, convey understanding of loss; building awareness in the media; convey that claimants are at a disadvantage.	A lot depends on the profile the company already has. It's … all to do with the individual organisation.	Twitter circulation may lead to wider circulation; big names with large following (1m+) can get to a wide group often on the basis of no real factual information; something just picked up or read which in iteslf may not be factually correct.	[Sometimes] will advise that a case "from a reputational point of view [is] too dangerous to fight – a clear case of media over merit".
3	Some; but particularly at the time of settlement. Some critical of claimant	Law firms that do GLO work are much more media savvy and can	Pressure on defendants; can be critical of claimant	Differences in approaches. Some want to sue or injunct;	-	Not a major factor; other factors more significant – e.g. cost of disclosure; costs [generally];

	lawyers and their costs bill compared to what went to the claimants. GLOs attract more media attention than unitary claims. Individuals against a large corporation will attract media attention.	run a media campaign so as to bring pressure to bear [on defendants].	lawyers on costs; can be critical of justice system – only with a GLO can claimants "have a go" against a large corporation.	others think its better not to engage but let it ride. View was don't go against the media; don't touch an action against them with a barge pole. Corporations "can't control the press"; "can't win against the press"; even if settle they ask why are what are you hiding.		evidential issues; prospects of success;
4	Significant media attention	At the instigation of [claimant lawyers]. Activated by them. Also by [NGO's] Claimant lawyers and [NGO's]. Stories were attributed to [C lawyers] so knew activated by them. Don't think [C lawyer] consulted clients before going to media; a lot of poorly educated [claimants] [a long way away].	Clear aim was to cause as much embarrassment to and concern within the company (i.e. the non-legal part of the company; the boards of directors … and exec committees). Aim clearly to get [Def] to settle for as large a sum as quickly as possible. Secondary impression was that it was partly for the benefit of … clients to show them … [that the case was before the English courts]	Engaged with journalists; provided them with a [defendant's] view that was different from what [claimant lawyers] were saying. Tried to get the non-left wing press interested. On balance surprised that a company as big as [D] was surprisingly unable and unwilling to use the media. Did at one stage join battle when wanted to make known the settlement offer because were pretty sure [C lawyer] wasn't telling his clients [what was on offer].	When there was a preliminary hearing when [Def] won say 5 out of 6 points, [C lawyers] issued a big splash on the 6th point ignoring all the others. Often clear a lot of preparation on the C side and [D] would get a call from the Guardian at 4:00pm saying they were going to press at 9:00pm and can they have a comment; so [D] given limited time to respond. That was always the case. Media reporting was accurate reporting [C] side; several column inches of [C] side with a [D] denies at the end; always one side of the claim not the other; on settlement claimed amount much bigger than [D] had offered initially but ignored fact that [D] had made an even bigger offer in between; also omitted that	Effect of activated media impact was constant friction between business people and legal team about the fact that it was being heard in England and not [locally]. Had agreed that local subsid would submit to English jurisdiciton if head office company taken out of case – on balance of media exposure that was the right thing to do [as opposed to letting H/O company be sued and H/O arguing on corporate veil]. Activated media had no impact on the decision to settle; always said would settle for the right figure. But when actual decision to settle was made it may have been impacted by media. Some judges may be influenced by media attention and some may not; depends on their political leanings and what papers they read.

					[C] had accepted to reduce to a far fewer number of claimants than started with.	
5	Always – to a varying degree. Journalists love litigation; not just because of courtroom dramas; public like them; it's like sport there's a clear outcome with a winner and loser and very often the media like to tap into easy narratives, David v Goliath etc. Lack of trust in corporations and claimants interested in generating maximum publicity.	Media activation is immediately obvious in GLO cases; by typically claimants attorneys; in some cases, even the very allegation itself is damaging. You can tell it's by C lawyers because typically they will send out a press release; they send out on newswires and publish on their web and intranet site and on their social media channels. Some media (not the wires) would contact you before they run the story. Tier 1[1] outlets will always contact and ask for a comment; they will usually send the C lawyer press release and say they have spoken to [C lawyer] who said x, y and z. They give limited time to respond.	To attract more claimants; (often a race by C lawyers to sign up claimants); to try to create reputational damage for the defendants to encourage them to settle faster and higher. Will seek to get publicity where the litigation is taking place so as to inflict reputational damage; communincating not to their clients but to a public that's of interest to the Def. It's a tool towards achieving a settlement. Also to enhance [C lawyers] brand.	Traditionally would have said 'write what you like we don't comment'. We have moved to a position of saying if you're going to write it'd be nice if you spoke to us as well so we can have some input and an opportunity to balance; and there are situations where we go beyond that by saying if this is going to happen can we talk to you first. A lot of corporations are having to accept that the media is going to be activated so they need to be a bit more active [themselves].	They have accurately reported what they've been told by both sides and have been broadly fair; problem is where it's unbalanced like winning 9 out of 10 issues and the release from [C lawyers] was of a life changing historic ruling on the one point they did win on and that became the story. Tier 1 media have an interest to produce something in a reasonably balanced way to their readers but there's a huge amount of media that doesn't take any step to present itself as balanced; a huge amount of dedicated new sites for environmental views or x, y or z. Our [D] side of the story isn't generally the one that the public is interested in. Media want to sell papers so they present what's of interest to their readers; so Guardian articles aren't the same as FT. More responsive to information that falls within that ball park.	Depends who you are. Public more interested in consumer brand – [not so much] in a manufacturer of wing nuts. Not necessarily the effect on the brand in that year; it's about the long term health of the brand. Not always clear why public likes one brand or another. Effects on reputation that are down to litigation may be no greater than those from other areas, like a consumer or a reulatory issue. Do companies settle earlier and/or at a higher level because of media coverage, I'm absolutely sure that in a lot of instances across a lot of industries the answer to that is yes, but not convinced that's the only factor and it's dangerous to say that. It's not so much to gather the group because [foreign claimants of that type] don't read the Guardian; not to influence court [because we don't have juries and judges too good] therefore primary reason is to influence the D in terms of the timing and the amount of settlement; wouldn't go so far as to say it denies access to justice but in the sense of a potential use

[1] Tier 1 – national press and national TV

						of the media to influence the ultimate outcome [of the litigation] to somewhere different from where it would have been on the legal merits alone.
5a				Referred to "Litigation Brand" – what kind of a company do you want to be known as – one that caves, one that fights everything all the way, like Exxon, like the Tobacco companies; or more likely one that pays when it's wrong but not when it isn't. It's not about avoiding negative publicity but are we going to be seen as a faucett. It doesn't have to be your fault to be your problem		
6.	Yes in GLO cases; Guardian articles, letters, statements, radio, TV, interviews outside court.	Activation by claimant solicitors – absolutely no doubt about it whatsoever; can look at their websites; actively putting out statements and commentary; threatenting law suits they're going to bring. All lawyer led. Wide network that [C	Purpose of media activation … is purely to create leverage; leverage to force us to settle; it's their biggest weapon. In both these cases, the underlying legal merits of claims are weak for them so they counteract by creating leverage in the media.	In general the media doesn't change our approach but as a D you have to be aware that things will get distorted and have to modify what you say accordingly; can't say it dictates what we do and from a legal point of view we need to make certain points	Almost without exception reports were very very inaccurate. Dumbing down of the true position. They report what was said but it isn't the truth.	We took a clear strategy decision – In the past we may have settled and in one case we did and are still paying the price; therefore a very clear view that will not settle if the merits are poor and will deal with the media as a separate issue. Don't allow media to influence decisions as litigators.

		lawyers] are plugged into; human rights groups and some journalists interested in their side of things and they can bring in others; not so much NGOs. Included an academic related to [C lawyers] raising a question at the AGM as to why the case was being fought and not settled. Some claimants involved in media activation – gave interviews. In other case, claimants not involved and weren't aware; didn't even know what had been claimed on their behalf. One thought his personal claim must be for all of the Group. One law firm has a distinct model; huge media furore assuming and banking on the fact that the [D] will settle rather than face the trauma of a trial. When did actually have to go to trial they were badly prepared. But they all play the media card. In slightly	What they want is to create enough of an uncomfortable position that D's just say they'll throw in the towel and settle because it's easier and less of a headache. They target [media activation] at certain times; maximum opportunity to create pressure was at the beginning and the end [of the proceedings] and they wanted straight away to talk settlement. They target at times when a D will cave. Not aware of any media activation in the places where the claims arose. Is place of claim. Here because we are here not because court is here. They think in our back yard that will have the maximum impact and they chose to bring the claim here.	but have an eye to the distortions. As a D have sought to put D's side of the story out. Often in response to approaches from journalists as opposed to activley putting a statement out; don't often put press statements out unless it's required by reporting obligations but do prepare Q and A's. Not proactive unless something published is really outrageous; need to avoid fuelling the fire but if there is somehting that really needs correcting then they'll do it.		Effect on non-legal [personel] is negilgible; with well worked Q and A's, position papers and comms plans in place. Media doesn't act as a pressure [on decision makers in ltigation] to do what they otherwise wouldn't. has to be managed; but managed as distinct from being an influence.

		different ways but playing it effectively. What they do really amounts to blackmail; the extent to which they are relying on creating an unfair media storm to leverage cash out of [D's] even when it's not justified is bringing in the US style of things.				
7.	Very much so. If they involve children, possibly a connection with public authority figures and possibly corruption, it has all the ingredients of a red hot story. All formats; some local others national	Yes, very much so, yes I do deploy the media myself. Talked to the client and said you don't have to be named but I want to tell your story to the [*named newspaper*] give them an exclusive.. "top solicitor appeals for witnesses" – glamorises it a bit. [it became a GLO] another 10 to 20 people came forward.	We wanted to find corroborative witnesses; using publicity openly to get other witnesses that [defs] are aware of but don't want to tell me about – ([defs] often play the data protection card and say they can't provide details when they actually want to hid evidence). In several ways can help group litigation. If a story's in the newspapers it will exert tactical pressure on the defs to do the right thing; has an impact on the way defendant solicitors behave; they've told me so. [defs] know that if they do the wrong thing I'll be	-	usually find that the reporting is accurate; surprised at how skilled they are at acquiring a huge amount of detailed evidence on very short notice and reporting it accurately. The only time I've noticed it to be inaccurate has been tabloid journalism; they tend to be worse at it. I think it's probably because they're more sensationalist; they're less involved with the details of the evidence and the effect of the evidence.	..no doubt that if there is a media storm it will put pressure on the defendants to do the right thing and settle cases rather than fight them; because you can embarrass them.

			making a story out of it and trying to embarrass them … "…. I don't want this to turn into a media storm …" they know that if they annoy me and if they behave improperly then I'll try and do that. Newspapers can help you; they are investigating too for different purposes. Using the media is of vital importance on many levels. I might put out a tweet and it might be seen by a witness; that's a form of media. part of the goal is to get business; to achieve a tactical advantage and to obtain evidence to win the case.			
8.	Cases have attracted media attention.	Nothing was as orchestrated as it was [in CCC case]. Certain firms see the media as being a legitimate piece of their armoury and the see it as perfectly legitimate; they don't see any professional objection. They'd say it was a perfectly legitimate tactic to use. Where	Two drivers: one is publicity for the lawyers; one is maximising potential leverage for the client. The [FFF firm]'s of this world see themselves as Human Rights lawyers and they think that attracting publicity for the firm and individuals is good in itself; I think that is	…engaging with the media depends on the firm. …internal PR departments … deal with [media] very well. Those who use outside PR consultancies usually live to regret it.	[CCC case] was the worst in terms of the most intense, unhelpful, inaccurate media coverage. The more orchestrated, it almost speaks for itself, the more partisan, the less objective and the less well informed and the less informing the media coverage will be; where there is a genuine public interest that	...in approximately half the cases, the initial reaction was publish and be damned we're not going to be blackmailed we're simply not going to be bullied and that was the talk from the board which I began to doubt; I thought it was a very brave and honourable thing to start with but bit by bit people get worn down; almost every one sets out saying we're not going to be blackmailed and then as damages are caused and embarrassment is

		[coverage] has been national [rather than local], it's almost always been orchestrated. [CCC case] …. was a big story in its own right long before the lawyers got involved.	very secondary to the interests of their client. Other firms …certainly say "I'm going to get a better deal for my client out of this so I'm entitled to resort to the media…. The motive is that if we frighten DDD sufficiently about what we're going to say about the CCC behaviour they will see political and commercial interest in settling at a higher figure; they will give these people more money than they would if they weren't being frightened. That's the best example I would give – the DDD CCC case.		has not been provoked by self-interest by lawyers but a genuine public interest because of a tragedy that has really sparked the public attention, like the [CCC case]…..you don't need to whip people up. …if something's happened a long way away, where nobody would know anything about it at all but for the publicity that is driven by the lawyers, that tends to be more misleading and more deliberately so.	caused and the work force gets disillusioned there is damage to moral, there is damage to business interests and there's cross contamination, commercial contamination, that's the sort of thing that does happen and to that extent it works because people who orchestrate the publicity know that however much they may say they are unaffected, [they aren't].
9.	There was media attention in all cases. In pretty much all forms inc TV programmes, documentaries, drama documentaries, print, local news, social media.	There has been activated media; know that because there are a handful of journalists who they see reporting cases from time to time in a particular way and assume, on good grounds, to assume that they are fed by claimant lawyers. Those are at the Guardian and the Independent; if they	See 2 reasons: 1. Lots of cases with groups of overseas clients, therefore publication in England isn't going to attract more clients; it's to put pressure, moral pressure on defendants, stakeholders and shareholders; pressure to get a settlement. 2. Other reason is in UK	By and large they don't engage in the media battle. But it has changed over the years; in the old days they would say they would take no part in it; they would wait for the court hearing and be of the view that the judge would be annoyed if they were seen to have been engaging in an open	In general the representation of specific facts is accurate. But the holistic situation of rounded representation of a fair description is terrible; really, really bad – shocking; and the press attention to the defendant side just bears no resemblance to reality; you only get one side of the story. There is no fair summary of what's going on; it's often very biased and one-sided.	Media campaigns have been largely unsuccessful; key driver is to bring the defendant to the table; The larger corporation is used to media pressure and to media criticism. It is different for the smaller corporate defendants; they are a bit more exposed to media pressure. E.g. in a specific case, [where] defendant …… needed finance and therefore required the

		write a story, it's strongly believed to have come from claimant lawyers. Often [FFF firm] but they are all at it. Can see the same on law firms' web sites; that's one of the bases for the assumption that it originates from them. Can also see it in pre-action correspondence – e.g. "We are happy to deal with this on a confidential basis and if it doesn't settle it's in our clients' interests for this to be aired".	based cases, can attract clients. [CCC] is an example... Effort to attract clients; the primary purpose [of publicity] there is to attract clients not to put pressure on defendants. Moral pressure on the corporate defendant; because they have a preferred position of corporate governance and Human Rights policies and no-one likes allegations being made against them. Stakeholders – include shareholders, customers and employees, government authorities and Human Rights organisations; e.g. UK national central point for Human Rights [Equality and Human Rights Commission]; Companies don't like this coverage because it gets noticed by people who will be active [and influential].	argument; but now would say if there were points that they needed to get across then they would want to say something; they wold have to try to ensure accuracy and that any comment wasn't damaging [to the case] but, yes they would [engage]. It seems that the corporates on the whole think that engaging won't change anything and that it's not worth engaging because it wouldn't do any good. Therefore there is not that much engagement [by corporate defendants].		financial community to be confident and believe in them; and the media pressure there was a very important factor in reaching a settlement. Media was not more important than the merits but was a contributor; was definitely a material factor. Media is not so significant for the bigger corporations; they settle more on the basis of risk [of losing] on the merits and on costs. However, sometimes the media attention stiffens the resolve of the defendant not to settle because they don't want to be seen to bend to the pressure; therefore can be counter-productive; it limits the options of the defendant but in the other way [direction].

			Settlement – the perceived object of the media pressure is to force a settlement. Once in settlement mode the use of media is to improve [the settlement]; but in own experience, once in settlement mode it settles quickly therefore once there the pressures decrease. It is really to bring them to the table.			
10.	All 3 of them; in all forms.	In all 3 media attention has been activated. For CCC case and the current one there's always been big footprints left in terms of quotes and details that could only have been provided by the claimants' lawyers. In CCC case that was the closest degree of liaison between the law firm and the press in that there was a close relationship with a Guardian journalist … and he (a) would attend hearings and (b) be told about hearings and (c) would be given skeletons etc in	Principal aims of activation of media, to increase the risks, financial risks to a company. ...in the current litigation……one of the objectives is to have various councils not employ [field of business] companies in what they would consider to be these practices [practices]; and the more they can publicise the claim and the impact on individuals, the greater the ability to mobilise local councillors to vote in favour of policies that would require signing up to	Corporate defendants have tried to engage in the media battle but always, on a failing side; … because the impact is minimal because it doesn't make an interesting story to people that read newspapers. The … cases are so nuanced that except in the clearest circumstances, getting your message across that a claim is exaggerated, false in many respects is just too difficult and is just not of any interest to most journalists … it's just too hard a story to tell and it's just a bit	not very accurate; media willing to take the claimant side unnecessarily and it's no criticism if you're a claimant lawyer especially in a group action you want to put your claims as high as possible because the individual underlying claims are probably not worth millions but you need to put them as high as possible to encourage others to join and because of proportionality issues; and journalists are not particularly willing to engage in the nuances; they're clearly unwilling or unlikely to challenge what a claimant law firm is saying and then when they're presented with an alternative position by defendants, it's seldom ever a	Have experienced where the impact of the media has had an influence on a decision to settle rather than fight. Not the driving factor because one imagines that it's human nature that if you can get away with a good financial deal based upon damages that's something vaguely binary for the CFO to understand whereas the potential impact on share price or potential impact on reduced markets etc is something which is far more, and also they're all temporary and things may change, so it has an impact but it's not the driving force. It can probably have an impact on the level of settlement a small impact, but again I think GCs have to (a) how they'd normally look at it and (b) how it would be

		advance (d) you would have the timing of articles to coincide with hearings; that made it pretty obvious. In the current case you have press articles which have contemporaneous or parallel union press releases at the same time which suggests there was an active degree of collusion as it were. Also understanding from talking to the PR consultants that that's how the press works, that it's only on few occasions that you would get a consistent coherent and ongoing interest from a journalist. In this case.. a combination [of lawyers and union].	various compliance codes or whatever.	dull … . It's just too difficult; journalists have a short attention span, they have too much to think about and you can't just express something and it doesn't make good copy. Have seen PR involved; generally hopeless. There's very little one can do; there's a conflict between the lawyers wanting to say nothing … in case it's wrong and then will be used back against you in the court potentially which is a worry … as against the media people wanting something short and pithy … all have large elements of nuance which are just difficult to get across … its' difficult to get across in 3 lines. Few media firms that understand the complexities of the issues which go on in litigation, which is unsurprising because lawyers, or most lawyers, don't understand the issues that go on in terms of liaison with the press.	one line winner takes all. Most defences are based on jurisdictional limitation issues; they're seldom based on causation issues or liability issues;	explained to a CFO it's so much more binary to say, this was the level of claim, this is our assessment of the claim on a legal basis and this is where we think we can settle it. That's more persuasive than saying there's also all these other impacts, albeit they'd always be mentioned. The CFO as a pure guess would be saying what are our immediate savings on this claim as opposed to going to trial, what's the likely outcome and what's the likely cost to get us there. The power of the media is greatest at the start of a case because that's when you get the attention of the Board and the management and everything else and if I were a claimant lawyer I would start off any group action with a huge fanfare and try and focus the first 2 weeks on relatively full on reporting about it with a view to trying to get perhaps these companies that aren't faced with group actions on a regular basis worried and concerned and settle. Media can have a disproportionate effect and if I were a claimant law firm I would use the media as much as I could and I'd coordinate the media more with hearings and other matters and I would try to keep it in the broadsheets and I would ignore blogs and tweeting but that probably shows my age –

						albeit the age of the people in the chair.
11.	Has been media attention in all cases I think. All types of media; much larger growth of social media in the last few years.	More often than not I've courted the media deliberately although I think over the years' I've found that any real influence is waning; whilst I can think back to the 80's and 90's where I think the media played a part in certain cases, transport disasters in particular bringing pressure on a defendant to come to the table or do something. It may just be the type of cases I've been involved with; large corporate entities who seem to be able to ride it out and take all sorts of crap. And I think that our court system isn't effective enough. So the media is not having the impact that I think it may have had once upon a time. I still use it where I can because you never know…… … in America it's a combination of things; … it's not just the level of damages, that's	Money talks; the old horny theory was supposed to be that if you could affect a share price that was far more potent than anything else; if you affected a share price, they'd come and settle. The share prices don't seem to move that much and the reality is that the companies are so big.. … you use the media for different reasons; one of the reasons you use them in the early stages is to shake the trees and find out how many cases are out there.. Use of media is an early way of gaining traction and finding out what cases are there, secondly once you know you've got a case and you think there are more out there, it's a way of generating more cases, clearly when a GLO starts you're required to advertise anyway,		never had a complaint with the press; been very very lucky. That's not to say it won't go wrong at some point; I can think of one occasion I wasn't terribly impressed with the journalist but in fact they got slapped down by their own media team and we spoke to them the position was resolved. But I would say that 99.9% of my experience with the press thankfully to date has been very satisfactory.	I've found that any real influence is waning; whilst I can think back to the 80's and 90's where I think the media played a part in certain cases, transport disasters in particular bringing pressure on a defendant to come to the table or do something. It may just be the type of cases I've been involved with; large corporate entities who seem to be able to ride it out and take all sorts of crap. And I think that our court system isn't effective enough. So the media is not having the impact that I think it may have had once upon a time. I still use it where I can because you never know…… … in America it's a combination of things; … it's not just the level of damages, that's clearly part of it but …their actual way of litigating where you have depositions; in Britain we never get to the decision makers or the people that are involved in dodgy dealings unless and until we can get to the court room and get them in the witness box; …; in the depositions in the States, you can go and get hold of the head of safety or the Chief Exec and you can make them very uncomfortable early on by waving documents at them … that

		clearly part of it but …their actual way of litigating where you have depositions; in Britain we never get to the decision makers or the people that are involved in dodgy dealings unless and until we can get to the court room and get them in the witness box; …; in the depositions in the States, you can go and get hold of the head of safety or the Chief Exec and you can make them very uncomfortable early on by waving documents at them … that is a part of it; … also … although … they have class actions …, many cases are brought in many jurisdictions even … that's a resource issue to even the biggest defendant when it starts having to report; … it's a series of things added together none of which on their own are the sole reason why cases get to trial quicker and therefore settle…it's [not] just a question of cases settle more in the US, cases get to trial more often which is what it is that causes	certified by the court and there are some cases where you think that adverse publicity might embarrass the defendant into engaging with you that may be blocked by reason of their insurance company of course but that's another reason for doing it			is a part of it; … also … although … they have class actions …, many cases are brought in many jurisdictions even … that's a resource issue to even the biggest defendant when it starts having to report; … it's a series of things added together none of which on their own are the sole reason why cases get to trial quicker and therefore settle…it's [not] just a question of cases settle more in the US, cases get to trial more often which is what it is that causes someone to consider settling.

		someone to consider settling.				
12.	oh yes, very much so all the way through. …was a considerable volume of media involvement not least because of the involvement of [famous name/celebrity]	2 sides to activation; positive media courting by claimants and parties … [incl] interested parties or meddling parties equally and positive media courting by solicitors. the former… that was a very powerful tool and oft used by claimants to get a matter moving, to reveal …. the extent of the scandal and perhaps to neutralise and make transparent to the light of day, the often spin put on it by [defendants]. [now] a less powerful tool. some firms of solicitors are very media savvy, they court the media; we've never courted the media. I have always preferred ….to run group litigation without the gaze of the media. it's very powerful this socio dynamic issue …. "the compensation culture". It's not about damages; not about	..the claimant who gets involved [with the media] truly seeks justice. The agitator seeks revenge… [claimants] thought, to shine a light into this darkness so in a way, in their naïve sort of sense, nobody would have to go through that again.can[t think	they tend to take a much more … reactive rather than proactive approach; their approach is very much about damage limitation; [where] a child dies in the hospital and there's a PR press conference and they use the phrase 'lessons have been learnt; we're sorry, we messed up, lessons have been learnt'; because it's a fatal injuries act claim and these are limited; now, when the individual hasn't died, there is no 'we are sorry, we messed up, lessons have been learnt'. Blank silence, why because now there's a dependency claim which is going to cost them millions.	Over the last 2 decades [media coverage] has become increasingly more salacious and less informative. I think it is very much something that is worked on the basis that it sells newspapers. I think that over the last few years certainly, the reporting has been more to do with the outing of celebrities; has become celebrity dependant. We have found it incredibly difficult even when we have occasionally advised the media of forthcoming hearings, to get anybody to turn up bar some junior junior junior reporter.	In some cases media has influenced the making of settlements and their amounts; but those cases have been very much dependent upon the sensitivities of the defendant, and who in actual fact is paying. in terms of[the … cases], I don't think any media involvement assisted or contributed or in any way induced settlement…. but there are other cases for example [….] [defendatns] at that time were that much more sensitive as a […..] to not want a huge amount of media involvement but it only had a mild influence in terms of settlement. we did a claim which was quite old and didn't have great prospects of success if the truth be known, against [……], they were absolutely media shy and I think that the threat of media involvement and attention brought them to the settlement table very quickly. We didn't deploy the media but I think they were very conscious …… so there was an impact on its existing operation.

		restitution; it's not about reparation; it's about "compo", … all … tainted with the same implied tar that they're only in it for the money.				
13.	There has been media attention in all of them almost inevitably in all forms; In some cases it's gone beyond that to interest by parliamentarians and government and we've sometimes been required to meet with government to explain why for example why [the client] has settled cases in the US and not in the UK. So we've had to explain the differences in litigation and why it's appropriate in one situation and not in the other.	As well as activation by solicitors, also aware of activation sometimes by individual claimants … in some of the cases … patient groups … have gone to the media and presented their position through representatives of those groups, NGO's sometimes are involved in these sort of cases, and there are cases of documents from the litigation then being used in disclosure to the press; the law firms representing the claimants are quite savvy with the press and have good connections with journalists over the years and are able to get a story out in the Guardian or the Times they can do that without too much trouble.	In those sort of cases the claimant lawyers are using media to put pressure on the government to put pressure on our client to do in the UK what they've done in the US. …pressure on defendant and government; large claimant law firms have a reputation as standing up for the down trodden or those who wouldn't otherwise have access to justice who have suffered at the hands of large corporations; they want to maintain their reputation and being publicly associated with group actions helps with that. More specifically, when the cases start and groups are proposed the lawyers are looking for more clients and that's another reason	… differs from one to another; it comes down to the personality of the lawyers; a lot of lawyers will prefer not to engage with the media but I've seen everything from "no comment" to bringing in advisers and actually developing a media strategy in order to not only counter that of the claimants lawyers but even to better them.	… when I first started in these cases I was shocked and appalled but over the years have got used to the idea the media reporting in general is pretty inaccurate. So whether it's more inaccurate in these cases I don't know but the short answer is the reporting isn't particularly accurate and it tends to present the claimants' point of view.	I can't think of any case where the impact of the media would have been the main reason to settle; but I think it is fair to say that concern about a company's reputation and the damage that has been done is something that has been taken into account but certainly I can't think of any case where that would have been the main driver for settlement. I have seen the timing [of settlement] not being so much driven by media coverage but because of the reputational damage that would be caused were the litigation to advance to a further stage, namely where confidential information about the company would enter the public domain.

			why the media attention is sought. Objective of pressure on the defendant one is that it can maintain a pressure on management in the hope that eventually they break [and reach a settlement] and then in negotiations there may be media coverage putting the defendant in the worst possible light and maybe including that an offer is derisory in the hope of achieving a better level of settlement.			
14.	Media attention in those UK cases; in all forms; each case is different. The first big group action was about Leukaemia around Sellafield then I expanded out to the other nuclear facilities in Britain and that had absolutely all forms of media you could possibly imagine including a drama documentary … ; each case is different but most of them have been of interest to all sorts of media.	In all of those cases pretty much I've engaged with media myself.	… the media is a powerful ally for claimants …. … first … it ensures that it brings the case to the attention of the senior people within the defendants;… that is quite important because often things can get stuck with in-house counsel, or stuck with the solicitors and having the ear of the people who make the decisions in a company is … quite significant; is an important benefit.	Defendants on a hiding to nothing. Nearly always the claim is by individuals who've suffered injury or loss at the hands of some relatively big organisation and therefore the sympathies of the media and the public will tend to be with the individuals rather than the company. … in the old days when I first got going when the use of the media was very limited, they would tend to always	…quite mixed but often rubbish; all journalists are total lazy bastards. You have to write much of the story for them; … if you can get a good journalist that's actually prepared to do some work, they can be really valuable, but … that's probably 10% of them; probably 90% just simply take the press releases, do a tiny bit of additional ringing round a couple of people see what the press release is for the defendants and then write the story; or often just go on cuttings from the past.	It can encourage a defendant to settle but it can also encourage a defendant to dig in their heels. … different defendants will think differently, and the media are a very big part of that; some go into their shell and tell you to bugger off, others obviously very wary about the impact of media and are keener to settle but … it can be a double edged sword.

			Second … by putting the case out there you gain the benefit that usually it means that journalists become interested in the case and that they will do some of the investigating for you. That is significant; you're putting additional resources. Because we are acting for the claimant, mostly the media is on our side. ...third issue is that it also encourages witnesses to come forward. I think we have been one of the pioneers of using the media to the benefit of claimants over the years; and that's been very largely a success. There's obviously some downsides, not least as we see now, but I think that is small compared to the success to the claims that we have brought.	go into their shell, but … as time has gone on, the defendants have become more sophisticated … PR agencies have become more sophisticated in saying 'it's much better that you actually are making some of the key points you want to make, you can't just assume you're going to have a trial one day because often these cases settle, and therefore putting out your side of the story is quite important' … they don't want to say too much, that I can totally understand but they want to say enough to show that they've got some side to their case.		
15.	Typically there has been media attention to the	I have been significantly involved in	Objectives … often … because there is a	Defendants stay out of the media battle generally. It varies but	Generally very good; sometimes some of the detail gets lost, some of the	A defendant will always say they're not sensitive to publicity; in reality I think a lot of defendants are,

	cases I've been involved in. it has been in all forms, press, TV, radio.	liaising with the press and activating them. Certainly claimants themselves have also done this. Have my own personal media contacts; across the board [TV, radio, press]; built up over the last 20 odd years.	story … of interest to the public, where people may not be aware of their rights , may not be aware of the potential to claim… it's educating them; it's flagging up the possibility of …being able to get or being entitled to damages… That's the primary focus for it. … a secondary one in terms of the promotion of the firm's name itself…	often they'll make no comment or a very very brief comment. They certainly won't go out and court media attention in the sorts of cases that we're dealing with. … those claims that have merit are unlikely to be one which a defendant would want to have any additional publicity brought to. They'd rather bury it if possible. Sometimes it's not possible; something like [ ] or [ ] those very high profile incidents it's impossible for a company not to make some comment but it's much more reactive whereas from our side it's much more proactive.	reporting nuances aren't 100% accurate… Most of it is broadly accurate and some of it is very accurate – there are some really really good journalists, very bright people who research stories very well and come up with some really very incisive and very accurate descriptions on some pretty complex issues, and some very complex issues. I think generally the quality is very good; but there is a range as you would expect and they've all got target audiences which they have appeal to and therefore tailor what they're saying accordingly.	hence clients get asked to enter confidentiality agreements in a lot of cases. As to going beyond that, part of the negotiation process, its difficult really to determine what's in the defendant's mind when they're evaluating at what level to pitch their offers. I certainly think it plays a part in the thinking of a lot of defendants; not something the insurers are quite so influenced by unless they think that there's potentially a lot of people out there who might bring claims and by not having publicity, they're preventing further claims against themselves. I think activation of media can assist in bringing pressure to bear on defendants; again it very much depends on the circumstances, the nature of the defendant and the nature of the incident… … defendants who are particularly looking to ensure they don't get bad publicity and are keen to preserve their reputation are much more sensitive to these kinds of issues and therefore anything around children or vulnerable individuals or particularly bad oversight management something which might have repeat effects where they might be looking at the tip of an iceberg in terms of potential claims then common sense would say they're going to be much more sensitive in terms of how they deal with those cases and

						more proactive in how they deal with those cases; I think media activation can help [get to a satisfactory conclusion for the client]. I can't think of a case where it's hindered, so yes I think it can help in terms of putting a bit of pressure on a defendant.
16.	There has been media attention in cases I've handled.	We do get the impression that media attention has been activated; we get that a lot. It will be [activated] by solicitors because they'll be quoted in it. A solicitor will be identified and their firm will be identified… From our perspective we regard it as inappropriate; there shouldn't be that sort of attempt to effectively wage litigation through the media. Have seen participation by individual claimants in media activation, it's either taken the form of a written record of a discussion, typical	…adverts in publications such as the prison paper Inside Times have been quite significant in effectively inviting people to come forward. It's effectively an attempt to generate business. … this particular firm have managed to put things in the paper, they have actually and have had TV interviews as well, for their clients, they have done it in the context of matters leading up to trial; I don't mean immediately prior to trial but leading up to trial and they could be perceived as an attempt to put pressure on the defendant organisation, in	Haven't seen defendants engaging with the media the same way that claimants do, not in our area. It does happen in other areas; the most obvious example … is the NHS Litigation Authority's attempts to expose the way in which certain claimant firms have been generating clinical negligence claims and taking far more in costs than damages putting in extortionate bills; periodically they will have something put in the papers about that particular issue. …periodically they put something in to complain for example about claims settling at a limited figure and	Factually, generally [the coverage] is accurate; they can't really afford not to be accurate. It's more a case of the angle from which it is written.	…there are plenty of other cases where individuals make allegations and you delve into their history and there are so many inaccuracies, inconsistencies, lack of credibility; in all conscience the only basis on which you could say the claim would be successful would be that the claim would cost more to defend successfully than it would to settle now. That can happen. Media doesn't really help that happen; I can't remember a case where we've sat round the table and said 'this is going to be all over the papers, we've got to get rid of it; or that we've felt that the coverage that's already been in the media necessarily creates a greater burden upon us to settle it. In cases where there isn't an insurer, clearly the organisation concerned is investing its own time and its own money and is the decision maker so it will ask for advice; it will or will not take that advice depending upon what its objectives happen to be in dealing

		journalistic article, and/or an interview which might be uploaded onto the paper's web site for example.	particular the defendant's representatives, to encourage them to settle. It could be perceived that there is an attempt to try and influence the organisation to then put pressure on the legal representatives to say 'can you please make this go away for us'.	bills coming in at 6, 7 8, 9, 10, 15, 20 times as much.		with the claim. I suspect the reputational issues are more likely to have an impact in cases like that, depending on the organisation that you're dealing with but I suspect on balance they may.
17.	There has been media attention in the cases I've dealt with.	I was aware of the need to use the media and I was happy to use [x]; if you wind him up, off he'll go and do it and he does it well. So it was a bit unusual in that respect, I had the benefit of having [x] so I didn't have to do it myself but I would prep him and make suggestions as to what we should be doing in terms of the media. NAPAC have commented on and supported litigation I've been involved with but they've never got involved directly.	…in group actions it was useful to get claimants and witnesses to come forward; … in a business sense it was very important to have that media profile because people would read about the media and it … in the print media, certainly not the internet and people read things in the [local paper] … and make a phone call and that would turn hopefully into a case or a witness. .. we'd had to use the media to announce cut-off dates… … we mentioned the abuse, we mentioned	You don't hear much from the defendants. Defendants keep fairly quiet in my limited experience	When I read the media I've very critical and I rarely get hot and bothered; it's reasonably accurate.	In terms of pressure on the defendant, I don't actually think it does; I don't think the media attention has had an influence on the desire to settle. […this is just a complete guess and I'm thinking of the trials I've had and it was a high court judge and I think he was mindful that there was real pain in the claimants and real wrongs in the past and I think he did make a real effort to be fair because I think judges can sometimes be a bit anti-claimant but I think this judge was playing a really straight bat; he was pretty good and I'm sure the media did have an influence yeah.

			the police investigation and we also mentioned that well-known football manager… a bit mischievously… what we said was absolutely truthful; we said allegations had been made against him, I think we said that there was no conviction… what we said was absolutely truthful; we said allegations had been made against him, I think we said that there was no conviction… Allegations used as a headline. there was a real need to create a whole image of the home that disappeared after 2008; …they're business motives really, to keep the cases in the public eye and to attract clients; that's the principal objective to most solicitors. we use the media not only to get claimants but for other claimants to support the existing claimants and to create pressure on the defendant. I was never really one for using the media to			by May of that year we were in the Court of Appeal before the Assistant Master of the Rolls and other Appeal Court judges, a top line up if you like of Appellant Judges, and we got there in 2 or 3 months and think that's because of the political or media pressure that they could see that this was an important issue that needed to be dealt with quickly, so that appeal was expedited, there's no question about that.] I don't know if insurers are influenced; I'd like to know; if I thought they were, then I'd use the media more.

			create that much pressure… I know other people have. Most high profile lawyers do that. ..people often phone I and say 'I saw this in the paper I didn't know people had been abused in that Home I thought it was just me' – so it helps them to come forward.			
18	..the involvement of the media is terribly important or was terribly important but also a very delicate balance; you had to be very careful but I would not have succeeded in my aspect of the CCC cases for example, without YY of the Sunday Times because, … the media can be terribly important. in [one case] we were almost there and one particular firm of lawyers was being amazingly difficult and I arranged for him to be met by the media as he came out of my office to be questioned about what was going on and undoubtedly the use of the media was actually	It was clear to me, even in my [FFF firm] days, that the balance of power between the world's insurers and their lawyers and individual solicitors acting for what are now called claimants, was an unfair balance. … quite often important area was the pressure by shareholders on the board. So it isn't a soft woolly, it was a fairly hard-nosed view, I am going to hit your profits if you don't do the right thing. We were able to involve the press.	let me start by saying clearly the media perceived me and people like me as being on the side of the angels and the righteous. When you have injured people, against corporations I had an unfair advantage. And rightly or wrongly, I believed that provided I behaved properly, honestly and didn't say things that were incorrect, then responsible members of the media, would make up their minds … it's a balance between being frank and honest with them … respecting the confidences that the defendant lawyers … placed in you	there have been a number of very good silks who invariably acted for defendants, who recognise that they may be able to redress the balance somewhat and they often would be involved in the drafting of the media statements that were made in the preliminary hearings that were going on and they weren't just there to do defamation read.	Increasingly less accurate – more emotive and less investigative these days.	Yes – on settlement, on timing of settlement but not so much on amount.

	very very important - but actually quite a dangerous ally to have. ..obviously you couldn't trust them totally, but the media and the pressure … there is no doubt that pressure on people like [ZZZ] to do the right thing is best exerted by the media rather than by the lawyers.	your choice of people was terribly important and that had to be built up over a considerable amount of time …don't underestimate how powerful your local media can be even in getting work into you. I suppose we didn't need that, but what we did need, was to be sure that we had responsible reporting and that they could be trusted so that when you said "this is off the record" it was off the record.	because to get these cases settled, did require not just being right or wrong in the law but actually getting the sympathy is probably the wrong word but at least the recognition that if the cases could be settled they should be settled. to get [them – the media] on your side and when you wanted them to, not to go off at a tangent, but actually insofar as editorial freedom could be compromised, to talk to you before they wrote any of their articles. quite often important area was the pressure by shareholders on the board. there is a tremendous amount … the pressure that can be exerted …also public sympathy, and also I suppose the knowledge that judges and others, given that we don't have a jury system, would probably read the Telegraph or the Times,			

			, and the other side of the thing were changes, changes in the law, nearly every case that I was involved in produced changes. … it's also had a sort of peripheral benefit on both sides in improving the expertise of the people who come and give evidence.			
19	There has been media attention in this case; this case has featured in the Guardian, the Times, the Telegraph, all of the various left leaning papers like the Socialist News, all the trade magazines, construction news, and it's even appeared in the Financial Times, Russia Today has done a piece, because there's an Irish angle the Irish TV and radio stations have featured it so yes, it's attracted a lot of media attention. All forms of media.	Absolutely there has been activation of the media on the claimant side. The activators have been claimants, solicitors and unions… I have used the media. … if I think it would assist our case to have it ventilated in the public sphere I have no problem in ringing up outlets and telling them what we have; those outlets would be people we have relationships with … once allegations are made it's very difficult to get rid of them even if they're not true … if I thought it would give	The main objectives [of activating the media] …. these companies are most worried about corporate reputation … it is a lever to ratchet up a little bit of pressure on them. … if they're on the 3rd page of the Financial Times linked to this, there are a lot of people reading that who are very influential and possibly have roles in the decision making process surrounding the awarding of contracts, so if reputational damage is done it could affect their ability to obtain contracts in the future.	I think their attitude to this case is "the less said about it the better" It was all of them [defendants] together. They issued a public statement and also a letter that went to every MP in parliament They've engaged less than us. I wouldn't say they haven't engaged but it's fair to say they've engaged a lot less than we have and a bit more selectively.	The media reporting has been generally accurate, but not completely inaccuracy [can be] more down to the sources rather than the journalists	[Activation] moving partly towards settlement and partly towards improvement of settlement terms. If we hadn't initiated our claim and drawn attention to it I'm not sure those other things would have happened; they might have but I can't say for certain they would have so – I'm not saying it'll mean we'll definitively win our case, I'm not saying we're going to get the greatest deal anyone's ever gotten but I think without it [media activation] we wouldn't be in the position we're in.

		us a strategic advantage, [I] would make sure something was referred to in court or was placed into a witness statement so it would get it into the public sphere, definitely… We have been activating the media but it's fair to say that our clients at times are driving it rather than we are; one or two in particular.	… the more that's written about what they have been doing, the more they have to lose in that, the allegations even those that have been admitted in this case are pretty shocking … Activation of media gives us the ability to potentially cause reputational damage to the defendants and it gives us a pressure point where the court process doesn't always give us the same pressure point because there are costs pressures on us for any fights we take to the courts whereas the same pressures don't apply to us in the general public sphere, the media sphere			
20	There has been media attention in the cases I've handled and that's because of the nature of the work that we do; being abuse work, it attracts public interest; it's high profile…. Coverage is press, TV, radio, everything certainly, I should say	I get involved in activation of media myself. We do, it's both proactive and reactive it's fair to say. we have very strong links with the media	As far as abuse work is concerned, the reality has been that the media come to us so whilst no doubt we have some commercial reasons for or we benefit commercially from publicising our cases, the reality is that that's not something that we've	Defendants will on the whole will … be approached by the media; … the institutional defendant who … are employing the individual and they're being sued because they're vicariously liable they will sometimes engage with the media,	…some of [the coverage] is accurate, some of it isn't… in general media reporting often is very good at conveying the general tone of a case but obviously, because of space and complexity and the requirements of the readership or viewers it doesn't address the forensic	Of the cases, I think virtually all of them have resolved pre-trial… I'm less convinced of the value of publicity for the purpose of pressurising people into settlements. It may be relevant I suppose, … involving private schools, schools that are reliant, their income stream is reliant on getting parents to pay to send their kids there and publicity around

	here I'm talking about coverage of the allegations [as distinct from the group action itself]; Some attracts national coverage, some attracts regional coverage … …think it's true to say that particularly now with abuse related stuff, it tends to hit social media first so survivor groups tend to try to publicise cases through social media before they go to what used to be called the mainstream media. Arguably in some ways social media is more main stream now but that would tend to be their route. We have a lot of contacts in the press and broadcast media and we know how the media operate and we know that sometimes bits of the media will cooperate with each other so their might e.g. be a story that we would share with the Times and the BBC and the BBC Today programme would run with it first thing in the morning and that coincides with a bigger	we get approached all the time …the media find out about a particular case involving allegations of abuse they … contact us to find out whether we've got any cases and so a lot of it is reactive. … where things are happening in the case or we want to highlight a particular issue, we are proactive … are certain circumstances in which you would seek publicity for the litigation per se, so e.g. if there is cut-off date or something like that you would be seeking publicity in respect of the litigation specifically; it's more the case that we would be seeking to highlight something which would fit in with our broader campaigning agenda so e.g. with our abuse cases we've done a lot of public campaigning around public reporting. …we would probably be criticised if we didn't publicise [a deadline]	necessarily had to be proactive about doing for that purpose – not in my particular area… We don't just do group actions in relation to abuse In terms of generating witness evidence, to substantiate allegations, that's not a primary driver with abuse cases, … in …product liability …it may well be that in something like that in order to substantiate the litigation it's necessary to get witness evidence to make out the case and in those sort of instances it's possible that we might publicise for that reason but you'd have to talk to my colleagues on that. …initially … there was probably an element where you could sort of hope to put some pressure on the [defendants] by publicising what you were doing, I think now that there are so many organisations have been tainted by allegations of child	sometimes not. I couldn't say there's a consistent way that defendants deal with that and I think my sense is that some of them get quite experienced media advice and some of them don't. I don't know if insurers play a role in that; I'd be interested to know. Having dealt for a number of years with [ ] it's never been entirely clear to me to what extent decisions about how to handle publicity about cases are, …dealt with by or determined by insurers or [ ] or a mixture of both; it's very unclear actually…	nuances of cases that are important in legal terms. the media's assumption … partly just their assumption but also maybe they want to present it this way because it's more interesting for their viewers is that … we have to prove that the organisation had some sort of knowledge or was negligent in some way … reporters are generally interested in what does the [*organisation*] know and when did they know it and what evidence have we got of that and there's an assumption that that's what we've got to prove … but we no longer do … the issues … revolve much around does this come within the ambit of vicarious liability, did the abuse fall within the scope of vicarious liability, and what are the issues in terms of time limits, limitation; …; the media tend to be interested in the issue of corporate or organisational failure. Where did the organisation fail on this; what did they know; was there a cover up; that kind of issue … [it's a more emotional aspect] and it fits in with a lot of the public discussion and concern that's out there around whether organisations have dealt with allegations properly or whether they've covered them up, does there	abuse allegations is not something they want. It would be true to say in those sort of circumstances that publicity might be a factor in getting them to settle cases; but I wouldn't over state that; clients often think that if you get something in the media the defendant will fold but that's just not the reality of it.

	more detailed piece in the Times, that kind of thing can happen	There will occasionally be activation by claimants… In terms of pressure groups, yes that can certainly happen, certainly in the abuse world you get survivor groups who are of varying sizes and more or less organized and some of them will actively seek out media publicity for cases.	abuse and [ ]has faced so many of these allegations, that it's not quite water off a duck's back to have another bit of media about it but it's almost a bit like that. I'm less convinced of the value of publicity for the purpose of pressurising people into settlements. It may be relevant…[in cases] involving private schools, schools that are reliant …on getting parents to pay to send their kids there and publicity around abuse allegations is not something they want. It would be true to say in those sort of circumstances that publicity might be a factor in getting them to settle cases; but I wouldn't over state that; clients often think that if you get something in the media the defendant will fold but that's just not the reality of it.		need to be more accountability around that and do we need mandatory reporting of abuse and those kinds of things.	
21	There has been media attention to the group actions that I've been	Certainly, absolutely have observed activation of the media	…very clearly to encourage claimants who are not yet aware	Ongoing attritional reputational damage [is the risk of not	[Defendants do prefer to remain quiet] I think there is a fear of involving oneself in	Reputation not usually a factor in that kind of decision; I don't think you can let it be. I could see how it

	involved in – yes. All forms, radio, TV, press, social media.	by those involved with the case. Typically by firms of claimant solicitors…	they've got a claim to come forward and have it investigated … Putting pressure on a defendant is] not a primary motivation of that kind of media activation… it might then later down the line be used for that if people don't think things are going very well for them or being managed very well. …inspection of documentation and it really was dragging on …nearly 18 months in the end actually, and reasonably understandable frustration meant that some of the claimant solicitors felt "well, we need to pull a few levers here; we need to put the trust under some pressure" so they went out with headlines about this delay to settlement – it tends to be in response to an obstacle that they don't like. [So they are then using it to bring some pressure to bear on the defence side] – precisely. It's rarely directed in relation to a specific case, I've always seen it directed more	dealing with the media issues] and it's hugely important and I'm really focusing a lot now on NHS clients for whom reputation is enormously significant… Absolutely [there is severe risk if they don't do that] the risk is almost irretrievable reputational damage..	the press because you're almost giving fuel to the story and quite often the view is "best to keep quiet, give no comment and hope the whole thing will just go away".	could become an issue for some people and for some clients but they'd have to be properly advised at this stage because the difficulty is you could end up settling 400 cases on the basis that you just want them off your books and you don't want anyone to ever know about them; you can pay anybody off if you want so the question is where are we drawing the line here; and I don't ever allow the decision to be one about reputation. if you wanted to use the reputational damage card against a big insurer in this context, you'd actually have to do it outside of the media it would be the threat because once you've done it and gone to the press, it's too late now because they haven't got anything to lose any more.

			towards a generic issue…			
22	Group actions are more attractive [to media] in the sense that they involve more people and more money and the more people who benefit, then in principle the more newsworthy it is. … the individuals concerned are not really important as individuals, to us the readers, we're more interested in them as a group and the more people there are, the more money there is at stake, the more damage has allegedly been caused so more people is more interesting is the rule of thumb	Am aware of activation of media by claimant lawyers, yes, they will send round press releases. They will provide press releases to me sometimes, it all depends it's up to them but certainly claimant lawyers wish to publicise their claims.	I see a benefit in publishing those claims; put it another way, if there wasn't, they wouldn't. The claimant lawyers are not going to talk to us just because they want to help us, they do so because they see an advantage to their clients. It would be improper to act otherwise to be honest. In other words, they think publicity is going to help their claims. I think that's right, yes up to a point because public opinion can support a claim so right in the sense that if their calculation is correct "is that a proper thing to do" probably yes, if you're acting in the best interest of your clients and you think the best interest of your clients involve publicity because that will put pressure on the defendant to settle then it's a legitimate and appropriate thing	… on the whole defendants are not very keen on talking to the media, not very keen on using the media, not very keen on responding through the media and there are various reasons for that but occasionally you might well hear from the defendant side rather than from the [claimant side]; … there's always something a defendant can say, indeed the less they have to say the more important it is they should say it; but whatever it is there's always something they can say even if it's only sorry. But it's certainly more interesting to hear from the claimants and the defendants tend to assume that there's absolutely nothing they can say, as I say I think that's wrong, and there's no point in engaging; quite apart from the fact that their corporate structures are such	Not asked	Not asked

			to do on behalf of your clients, so yes, it probably is the right thing to do on the whole. … on the whole defendants don't want bad publicity… publicity is certainly a weapon that can be used and you would have thought that many defendants will settle an embarrassing claim because they don't want adverse publicity which could damage their business and if it's a group claim, the more publicity, regional publicity, local publicity the more reason to settle and provided this isn't blackmail, provided this is genuine claimants who have genuinely suffered bringing a genuine claim against a responsible defendant then encouraging the defendant to settle out of court is an appropriate thing to do.	that they tend not to want to speak or it's too complicated to get permission or nobody wants to take a decision to do so – they're not really geared up to it but sometimes they do;		

23	.. yes,.. there has. Sometimes in the national papers often in the left wing papers such as the Morning Star and the union web sites and there's been a lot of attention in the trade press … the House of Commons set up a select committee to investigate all of this so because of that investigation that also added to the fuel of publicity.	A lot … was driven by the unions for political reasons so they were whipping up media interest … [ ] support group … were very very vocal in trying to promote demonstrations and media coverage … … we believe that they [FFF firm] were leaking to the media… [FFF firm] were quite happy to give interviews to the written media largely; but since before I got involved in this case I've always thought that [FFF firm] were quite keen on publicity just in terms of being group litigation people so it came as no great surprise to find their name cropping up.	In "winding up the media" I think they were seeking to partly achieve a tactical advantage in advertising the claimants' case; I think partly they were seeking political advantage in the terms of either pressing for and investigation, and they still are pressing for a public enquiry so it was a mixture of motives really… … I think that [pressure towards a settlement] must have been part of it …	we appointed an external media consultant to advise the 8 of us… … very much instructed [PR] to have a reactive role not a proactive role; we didn't want to be seen to be campaigning (a) in the sense that the media were "agin" us, but (b) because we thought that way it would actually minimise publicity to the extent that it's possible to do so [PR] would report into the GCs group with proposals for reactive statements for questions and answers and that type of thing and so the GC group would then approve or amend the proposal that the media group would put up for consideration. … after each CMC, whether we "won" or "lost", there were leaks to the media to say that we'd lost and we didn't react to those because it didn't really matter…	I think [the media reporting] was largely – it was more inaccurate than accurate… … the rest of it was slanted either to generate a story, or in the case of people like the Morning Star and the Socialist Worker, for political reasons and that once you have a few grey hairs you begin to accept that's the way the world operates so on the whole I think it was more unfair than fair. But there were a couple of examples, notably the BBC, and also interestingly the Guardian who were relatively objective…	… not an enormous amount [of impact] and the reason for that was that after about early 2014 ironically because the case had had so much press coverage, in particular in the trade journals, we felt that it was yesterday's news really and as the case wore on there was media coverage but it tended to diminish a bit because everyone reading the trade press certainly had got bored because there was nothing new coming out… … we felt that the media wasn't going to force us to settle the case other than in terms of when it was commercially appropriate to do so … … [As a sole defendant that could have been] very different indeed. I would imagine [the media impact would have been far greater if we hadn't done that] it would have been concentrated on us as a company and I think it could have been very very serious for us – it could have been terminal. [The compensation scheme and the Part 20's took the wind out of the sales of the media campaign] that was certainly the plan and I think it worked. [we'd have suffered far worse if we hadn't done that] I think I agree with [that].

						I think the media attention might have indirectly impacted the level of settlement; the levels of settlement were generous and I think that the media attention gave confidence to the claimants' representatives; this is just a sense, I don't know this but because they'd had 3 years of media coverage they felt pretty up to the fight and I think that induced a higher level of settlement than we needed to have paid; I know that we did settle at amounts which were higher than counsel said we would go down for in court and part of that was I think bullishness on the part of the claimant's representatives induced by the media coverage.
24	Yes - It can be all [types of media – TV, radio, press (local, national) social media……]	[Respondent] Instructed by the claimant lawyers; but the litigation funders do sometimes they will take a view, yes, ok it's part of the cost of the case and they'll take a view and say we'll spend £50,000 on PR; anything we can do to shorten the amount of	…was to provide general awareness of the case, and also then to build media pressure on the defendants. The intention on all of them was to procure settlement; to try and see whether there would be pressure for settlement.	It does vary – I'd say if you're looking at percentages, more than 80% would just give a very anodyne "we'll defend it" or "the claim has no merit and we'll defend it" and I think there's absolutely room for a much greater fight back and it's quite funny to get defendants to	I think they're probably quite accurate but they're probably not full. I don't think they use fairness as an arbiter. I don't think they have any qualms about taking sides.	multijurisdictional one settled and partly because of the media coverage …we got feedback to say "yeah yeah they hated that and that's what brought them to the table" [Media pressure] can work;

		time our money is tied up then	the idea is that you publicise the claim get media column inches coverage so that public opinion is sufficiently powerful or an irritant so that there's additional pressure aside from the usual litigation [pressure]; … if their wider stakeholders and constituents know the case is going on then it might be embarrassing for them, it might have given them an extra incentive to settle, rather than thinking the case was going to be behind closed doors and no-one was interested ultimately, you're trying to reach the decision makers at the top of the tree at the defendant entity and so other things may just be additional irritants but they're still quite useful because if you're trying to get to the staff of the entity, who are their greatest ambassadors but who can also be their greatest critics internally and you	understand and overturn that hurdle; they think that if they don't say anything it'll go away and that the articles will be shorter and actually and the truth is they can then only turn it into a big mud fest but by the same token it does diminish what the claimant is saying about them, otherwise if they don't there's a vacuum there to be filled by the claimant; if I'm working for a claimant I'm not worried about a 2 liner saying "we're going to defend it" that's absolutely fine, that doesn't worry me, what would worry me far more is if they suddenly say "on the contrary, not only does this not have any merit because of this, this and this, but actually we have purposely done this, this, this and this" or whatever and I think there's a big room for …. to change, not the mind set of claimants because people get how you can go to the media and tell your story, but I think there's still a massive		I would say that when we get the feedback, we're told it's the principal reason [for settlement]; Cases do settle after trial but awaiting judgment so there is [still a purpose there] - exactly. The biggest pressure point is the 2 weeks leading up to trial…

			want to put messages to them that this is really unhelpful then you would go through publications and media that the staff would read more than management would read, or potential customers that is what we're aiming for sometimes to stir it beyond the little department or fiefdom of people who are dealing with it and shake some trees where other people are saying "get rid of that" "get it out of the papers" "why are we fighting this case" "why haven't we settled it ….." and that often is relevant, where the decision makers are in a different jurisdiction for some people there's a sense of validation in just having it heard; the client can get a level of comfort. It's not a question of whether they win or lose ultimately	educational programme to be done to get defendants to talk about and change their [approach]. I do think that my biggest point is that I think that defendants could do far more		

25	[Intended] - on the day of the launch we will be engaging with media across the board some that will be aimed more at putting particular pressure on the corporate so papers that they might care about, so the Financial Times or the New York Times – we will also be targeting tabloid media as our class is so large that we get a cross section of the population; so we're targeting the normal wide range of TV so broadcast media and also paper on the day. …and also taking a strong digital approach as well, so it's very social media and web-site for want of a better word and the grand term for that is an integrated approach to comms;	Yes – by claimants; Respondent engaged by claimant law firm;	to encourage further participation; for the awareness for participation; we need to make sure we're signing up as many people as possible and we're taking quite an explicit campaign focus to that to try and drive that participation. …useful kind of tool both in convincing the courts of the legitimacy of the action and also in putting some pressure on the defendant to take the matter seriously or however the litigation process rolls on obviously the more damaging it is to their reputation and the more damaging it is to their reputation, the more open they will be to having	Not as yet.	[Not applicable at this stage]	[Not applicable at this stage]

			discussions beforehand.			
26	Some but not a lot… some reporting by the Broadsheets but not a great deal. …given the nature of the subject matter and some of the evidence … one might have expected rather more but no, there was very limited coverage.	…coverage was as a result of [press interest rather than activation].	N/A	N/A	N/A	Cases went to full trial.
27	…was a big thing a few years ago but seems less important now. …legal cases are not covered so much in the media now because few of the papers have got specialist legal people… …papers are losing money hand over fist, they're having to get rid of specialist jobs and general reporters are covering most things…	There were a number of claimant lawyers, plaintiff lawyers as they were in those days, who were very proactive in contacting the media… There are certain firms that are very active [in terms of activation of media]…	…Certainly they [claimant lawyers] find it quite useful for bringing more clients…	[Have had no experience of defendant lawyers contacting me] no, not that I recall. They like to keep it as low as possible if they're being sued. You have to contact them of course if you're writing a story but I don't remember ever having any real interaction with them; they would then send a statement but I don't remember having any great interaction or discussion with them…		…I do think that [public opinion or press comment has an impact on defendants in these cases… I think the media attention can put a bit of pressure on the defendant but often these are big American drug companies who are not that bothered about getting bad media in Britain. They know the legal system is weak for the claimants, as compared to America…

28	There has been media attention to this case, yes. …there has been coverage in the left-leaning media… - it's classic media – it's the Guardian, it's the Observer, but actually some of the financial reporting media were interested in the last hearing as well, so the FT and Bloomberg also reported on it…	The media has been activated by the claimant law firm, FFF. [I know …] because the narrative is precisely the narrative that's being put forward by the claimants in the case. So it's easy to trace the genesis of the story, the direction of the story; sometimes actually there's even a quote from the lead partner… it's not hidden; and FFF firm have been very transparent in many respects about their open courting of the media; it's part of their litigation strategy. There's obviously a suite of tactics that are involved, media is a hugely important part of it. Here I have not seen coverage that I did not [conclude] was activated – none at all. The reason the activation is here is sort of all linked. It's here because this is the jurisdiction in which the claim is and this is the only	I think it's just pressure to settle; if you think about the business model of the claimant law firm, they want to get a win, they don't want to risk too much of their own equity, they know a lot of these cases are speculative so what they really want to do is create a huge splash and then get an early settlement and a nice uplift. [Can see this] quite easily because the claims are totally unparticularised. If you've got 40,000 people FFF firm have admittedly served what they describe as a generic particulars of claim for each claimant; there's no way they can have independently audited each of those individuals and made a judgement about the extent to which their livelihoods have been impacted … and they're not even pretending to. The sums alleged in damages are so far beyond the likely average yearly income of somebody in that	…they have reacted to media, been invited to respond and have activated media themselves, though … not with the impact they ought to have had although that is changing. Institutionally they have been somewhat reluctant to engage with the media, as a matter of corporate culture but I think they are now realising that it's such a huge part of this litigation strategy that they have to… …bounced by the media "we're running a story tomorrow, it's about how you did this that and the other" they [DDD] then scramble around trying to deal with it on a very fact specific basis put something out there … and then … 2 days later FFF firm have found some other evidence and can disprove it. So … the lessons from that were they should have known what the story was already; as soon as this happened they should have internally	…of course I would say that the reporting is unfair and its erroneous … …big picture stories, big emotive stories, allegations at a very high level of generality that are difficult to disprove unless you've got 20 specific facts/reports independent experts ready to go and they weren't. …already, an assumed narrative and it's very difficult to displace that.	I think [media was part of the reason for the settlement in the CCC case] and the reason is that DDD had already admitted liability so letting the story just run on and on and on wasn't in anyone's interest; some money had to be paid so it was either pay it sooner or pay it later and the later it gets paid the more of a story it's allowed to become and the more expensive it is.

		jurisdiction in which FFF firm can legally operate; so its business model is dependent on its ability to bring cases here and win them or settle them …. Obviously here is somewhere the London media, the financial media are those that are going to have the most impact from a corporate perspective on whether a corporate defendant will settle or not… Amnesty or Friends of the Earth are used publicly to try and credentialise the litigation, used by FFF firm… the claimants' lawyers.	region so it's all hugely inflated again for headline grabbing purposes and in order to create a sort of anchor for settlement, to get a number that's fixed in people's minds as to how much the claim is worth.	audited everything, perhaps brought in an independent rapporteur to be the spokesperson with the media to say … there's no scientific way in which the following things can be true but that has to be done at a very sophisticated level and you have to be able to engage on specific facts and you've got to get it right.		
	Media attention in GLO's	Activation of media: if so, by whom	To what purpose(s)	Has the defendant engaged in the media battle	How accurate has reporting been	Has activated media attention impacted on a decision to settle

Key:

1.	QC	C (10%); D (90%)	15 – 20 GLOs and 30 to 40 advised on; PI, environmental, product liability
2.	PR	(legally qualified)	C and D - multiple
3.	In-House	D	1 GLO; environmental/land ownership and compensation
4.	QC[2]	D	1 England 1 overseas; environmental
5.	In-House	D	6 to 8 between them; 2 England; environmental, PI
5a	In-House	D	(part of team at 5)
6.	In-House	D	2; environmental, PI PG
7.	Solicitor	C	23, not all formal GLOs; all child abuse
8.	QC	C and D	5 GLOs; environmental, accident, product liability, PI
9.	Solicitor	D	15+ 1 formal GLO; environmen;product liability; employment; principal/agent
10.	Solicitor	C and D	2 English; 1 overseas; environmental, data protection/privacy/defamation
11.	Solicitor	C	10+ – 6 to 7 formally as GLOs – PI, product liability, major accidents
12.	Solicitor	C	10+ GLOs – all child abuse
13.	Solicitor	D	5+ not all formally as GLOs – PI, product liability, environmental
14.	Solicitor	C	8+ in England; some overseas; PI, product liability, environmental
15.	Solicitor	C	well over 300 group cases <10 under formal GLOs – all PI
16.	Solicitor	D	10+ cases – all PI
17.	Solicitor	C	5 to 8 or so – all PI
18.	Solicitor	C	upwards of 20; mostly claimaints; Mainly disasters, product liability/PI
19.	Solicitor	C	1 – 200 claimants; unlawful means conspiracy; breach of Data Protection Act
20.	Solicitor	C	upwards of 20; child abuse
21.	Solicitor	D	10+ cases – principally clinical negligence; some PI and some child abuse
22.	Journalist		published material on various cases
23.	In House	D	1 - some 640 claimants
24.	Litigation PR		4 – 3 on claimant side, one on defendant side – PI, employment, contractual;
25.	Litigation PR		1 claimant side, financial/breach of statutory duty;
26.	Judge		1 as judge (PI); 1 counsel; C – product liability (medical); both c 2,000 claimants;

[2] Interviewed in former capacity as In-House counsel

27.	Journalist		many, latterly mainly product liability (medical) and clinical negligence;
28.	Solicitor	D	1 environmental claim – c40,000 claimants

“CCC” – cases

“DDD” - defendant

“FFF” – firms

“SS” – solicitors

“JJ” – journalists

“PR” - PR professionals