SUBMISSIONS TO THE JUSTICE COMMITTEE CONCERNING "SLAPPS" AND "LAWFAIR"

A. Introduction

1. May I begin my thanking the Committee for this opportunity to submit evidence to it on the very important issue that it is considering, which engages the two vital rights of freedom of expression and the right to be protected from false and damaging allegations.

2. In 1912, the Russian author, Solzhensnitsyn wrote, "*such as it is, the press has become the greatest power within the western world, more powerful than the legislature, the executive and judiciary. One would like to ask, by whom has it been elected and to whom is it responsible*."

3. I offer evidence to the Committee with the benefit of 30 years of expertise both as an editorial and reputation management lawyer, and an author who has written a well-reviewed book for ***Bloomsbury*** ("***Reputation Matters***") about the very issues which are before the Committee, which was published only a few days ago.

4. I have legalled out live current affairs programmes, hard-hitting documentaries, films, magazines, newsprint, and controversial satire such as ***South Park***; literature such as non-fiction, fiction, celebrity autobiographies and a major NGO report. I have also legalled out two non-fiction books which I have written/co-written which (inter alia) make serious allegations against powerful corporations and individuals.

5. I have undertaken pre- and post-publication editorial work for clients such as ***ITV***, ***Sky***, ***Viacom***, ***Huffington Post***, ***MTV***, ***Capital Radio***, ***Newsweek***, ***Bloomsbury***, ***Silvertail Books***, ***Haymarket Media Group*** (https://www.haymarket.com/), ***The Voice*** (https://www.voice-online.co.uk/), and ***Amnesty International***.

6. ***Reputation Matters*** was published by Bloomsbury on 5 May. One of the main reasons why I wrote it was to try and correct the imbalance between those that write and lobby on behalf of (primarily) the print media - who effectively hunt as a pack - and those who for obvious reasons get less airtime and column inches, who write in defence of those who are victims of media abuse in some form or other.

7. I have written extensively on media law and regulation issues, about which I have also commentated in the media, and participated in major debates. I have also taught journalists how to navigate the impediments which (it is said) makes their work so difficult in recent times.

8. In 2003 I appeared before the Culture, Media & Sport Committee's investigation into press regulation, which was the precursor of the Leveson Investigation – providing written evidence to both. At the time,

I spoke primarily about the manifold failings of the Press Complaints Commission (now replaced by the Independent Standards Commission) at a time when it was not fashionable to do so. During my submissions, I expressed views which however were subsequently endorsed by Lord Leveson as part of his report.

9. I believe that I am therefore well-positioned position to address the Committee on issues to do with both press and editorial freedom, as against the two important counterbalancing interests - the right of the public not to be misled by powerful concerns such as newspapers and publishers and the right of individuals and companies to live their lives and conduct their business without false and damaging allegations being made against them.

B. <u>The key issues on which I believe I can assist the Committee</u>

1. Both in the material that I have read about the enquiry I have repeatedly heard the phrase, "*the tip of an iceberg*" being applied to what is said to be the chilling effect on journalists and authors of the UK law of libel. I can speak to this issue from 30 years' hands-on experience.

2. Concern is also expressed that there is no mechanism whereby a court can deal robustly and inexpensively with unmeritorious claims where public interest journalism is at stake. I believe that when journalists are doing their job to a high standard with the appropriate level of training and knowledge of the law, such a mechanism is readily available.

3. That is not to say that there could be improvements in the law and regulation governing journalism and non-fiction writing. I believe that there could indeed be such improvements and would like to propose some of them to the Committee.

C. <u>There are great dangers in the dissemination of false information</u>

4. In the seminal House of Lords case which created the defence that was the pre-cursor to the defence which is now set out at Section 4 of the Defamation Act 2013 ("the Act) Lord Hobhouse said this: "*No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations*."

5. It is not only right and proper, but also essential in the public interest that there is some impediment to the publication of material which is false and destructive. The expression is often used, that the laws of defamation and privacy have a "*chilling*" effect on free speech. To the

extent that their purpose is to prevent the dissemination of false and damaging information, then that is an entirely appropriate role and one which they must continue to be allowed to play.

6. Ever since I began to practise at the beginning of the 1990's, there has been a determined campaign, often based on false premises, to render the print press in particular free of any restraint which would cause it to undertake its proper function; namely to inform the country accurately, accountably and responsibly on matters of public interest.

7. The Act was a significant victory for this campaign, although some of the primary provisions of the Act had already been brought into effect via the common law, i.e. via judicial law making.

8. However, based on my experience of having legalled out films, television programmes, books, magazines, newsprint, etc, prior to the coming into effect of the Act, it was entirely possible to report current affairs with an appropriate degree of editorial freedom so long as tenets of good journalism were observed; i.e. the publication at issue accurately portrayed the ascertainable facts, and did not trespass beyond them.

9. Even before the common law precursor to the section 4 defence was in place, if you tailored your allegations to the evidence you had available, all that was required was that you proved them to a 51% probability – not an unbearable burden.

10. However in 1999 the seminal Reynolds case established a public interest defence which is now incarnated in section 4 of the Act. The effect of that defence is that if false and defamatory allegations are published, and the publisher elects to rely only on the section 4 defence and makes good that defence then two things follow. The victim of those false and defamatory allegations is robbed of their remedy, and false information on a matter of public interest goes uncorrected. Both these outcomes are much to detriment of society as a whole

11. To explode the myth that the current state of the law of libel is a serious impediment to the publishing of allegations against (inter alia) the rich and powerful, one only has to pick up newspapers on any day of the week to find them jam-packed with allegations of a defamatory nature (in the sense that they lower the subject in the estimate of right-thinking people) made against individuals and companies alike. The same goes for a vast array of books and news websites. The suggestion that the current state of the law and regulation in the UK prevents good investigative journalism and public interest stories seeing the light of day is nonsense.

12. Evidence has been given to this Committee that rare instances of defamation claims being issued is merely the tip of an iceberg; that there is a great number of stories which neither find their way into the

media or into non-fiction books because either of a perceived threat of litigation from those individuals or companies who are the subject of the allegations, or when, on being notified of the intended story, threats come in which persuade the authors/publishers to abandon such stories.

13. I have been an editorial lawyer legalling out (inter alia) non-fiction material for some 30 years, often on very contentions subjects and concerning powerful individuals and companies. During that time, I do not recall feeling obliged to advise against the publication of a single story for that reason.

14. By contrast, I have legalled out print and audio-visual material about very powerful and litigious organisations where I have used the mechanisms which have been provided by the law to ensure that allegations which are well founded and are in the public interest to publish, safely make it into the public domain.

15. It is appropriate sometimes necessary for a degree of courage and robustness to be shown by the prospective broadcaster or publisher. I was acting for a major terrestrial television company that wished to air a documentary which was very damning of the cult Scientology, which has vast financial reserves and is famously litigious. I viewed the programme and advised only one modest change, which was not that something should be cut, but that a "card" should be included which carried a denial from the Scientologist of a particular point to ensure that the Section 4 defence would be guaranteed. No editorial damage was done to the programme thereby; and it was right and proper that the denial was reported – vile though the Scientology cult is.

16. On my advice, as part of that work, the Scientology cult was given proper notification of the allegations which my client was proposing to transmit and they duly instructed one of the premier league reputational management firms, which sent me approximately 25 letters making an array of threats, both legal and regulatory. One included an enclosure which was so massive that it had to be put on a disc.

17. My advice to my broadcasting client was to ignore all of these because, firstly, (having done my work properly) I did not regard those threats as likely to be carried out and, if they were, we would prevail in any regulatory or legal dispute; and that we would secure a Section 4 defence. In fact, we did not hear a peep out of the Scientology church or its lawyers after publication – which was as I expected and I am sure because they knew that the Section 4 defence would defeat any libel claim.

18. The process whereby such material can be published is very straightforward:

(i) A summary is prepared of the relevant allegations, which must be fair and complete.

(ii) That summary is then sent over to the company and/or individual for comment.

(iii) The comment that is then received is either quoted directly or summarised in the book / newspaper article / programme.

19. If all these things are done, which in any event are no more than the actions of any responsible journalist/author, then according to the current case law, any publisher/broadcaster should secure the defence provided for by Section 4 of the Act. All that is required for that to be established is the following:

(i) The subject matter of the publication was in the public interest.

(ii) The author/broadcaster/publisher believed that the relevant publication was in the public interest.

(iii) That that belief was "reasonable" - i.e. it is subjected to an objective test.

20. Those stipulations set the bar so low for successful use that there is no proper excuse for those who are genuinely intent on publishing truthful material on public interest issues, in not securing that defence.

21. If litigation then follows, then the determination of a Section 4 defence is a relatively inexpensive process with a trial of approximately one day. Any reasonably substantial publisher or broadcaster should properly be asked to bear as part of its operating cost the occasional obligation for such a defence to be mounted. If it is done properly and with an appropriately careful eye on costs, not only should it not be expensive, but, if successful, the lion's share of the costs of that defence should then be borne by the Claimant.

D. <u>The key provisions of the journalistic codes</u>

1. All that is required to secure a bullet-proof Section 4 defence is to follow the universally accepted tenets of good journalism. Those are common to all the key codes.

2. The NUJ Code obliges journalists to "*Strive to ensure that information disseminated is honestly conveyed, accurate and fair*." It also requires journalists to do their "*utmost to correct harmful inaccuracies*."

3. The IPSO Code says this;

"i) *The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.*

ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published…"

4. The IMPRESS Code says this; "*1.1. Publishers must take all reasonable steps to ensure accuracy.*

   1.2. Publishers must correct any significant inaccuracy with due prominence, which should normally be equal prominence, at the earliest opportunity."

5. The US Society of Professional Journalists says this; "*Ethical journalism strives to ensure the free exchange of information that is accurate, fair and thorough. An ethical journalist acts with integrity*". It also asserts that; "*Ethical journalism should be accurate and fair*", and that journalists should "*Gather, update and correct information throughout the life of a news story.*"

6. If these moderate and reasonable stipulations are adhered to then a successful Section defence must then follow. My experience in doing reputation management work is that frequently they are not. The reasons appear to be either hubris, desire for financial gain, or career advancement – or a combination.

E. SLAPPS

1. A SLAPP is defined in recent SRA guidance as a "*misuse of the legal system … in order to discourage public criticism or action"*. I take this to include the threatened misuse of the legal system to stem legitimate criticism of companies or individuals.

2. This is disgraceful conduct on the part of any lawyer which brings the profession into disrepute and should be severely dealt with. It is however both extremely rare in my extensive experience and is also not hard to identify. Justin Rushbrooke QC has explained via his oral evidence that in *Wallis v Valentine* the court dealt robustly and summarily with such a claim and is well able to do again.

3. As I have explained above, the section 4 defence is also available to all forms of responsible journalism – whether by means of book, AV, web content or newsprint. This is a matter which should take no more than a day of court time to deal with, since the only issue is whether the matter was one of public interest – which in the case of public interest journalism will take the court no time to determine; and whether the journalist/author/publisher reasonably believed the publication also to be in the public interest. The latter should require only a witness statement setting out the reasons behind the publication – hardly a

difficult or protracted exercise. A trial of a section 4 defence should only require modest time to prepare and a day's hearing.

4. It follows then that the competent deployment of the section 4 defence provides a more than adequate safeguard to SLAPPS. Furthermore no judge from the Media and Communications List is going to have any difficulty identifying SLAPP litigation because it is impossible to disguise. Where the author/publisher has shown the diligence which should come as a matter of course for legitimate public interest journalism, the outcome of any trial of a section 4 defence should not be in doubt.

5. On this issue, I commend the recent Brett Wilson commentary, all of which I endorse based on my own knowledge and experience: https://inforrm.org/2022/05/25/slapps-a-real-problem-or-a-defendants-wildcard-iain-wilson/#more-52344.

F. The need for some effective means of correcting misinformation on matters of public interest

1. As the sage law lord that I quoted above emphasised, the dissemination of misinformation ill serves society as a whole. That means that there must be some means of it being corrected. One of the chief mischiefs of the Section 4 Defence is that once it is deployed, then by the unilateral election of the publisher, the public loses the right to learn that they have been misled.

2. At the moment, large corporations and/or powerful individuals can legitimately, however, say that for the most dangerous disseminators of false information, the denizens of Fleet Street, there is only the hopelessly flawed and purposefully impotent Independent Press Standards Organisation.

3. Three of the Fleet Street titles do not even submit themselves to the feeble degree of 'regulation' that this organisation provides; namely the ***Financial Times***, ***The Independent*** and ***The Guardian***. I have included many paragraphs critiquing IPSO in my book ***Reputation Matters***. Here is a selection.

[B]Fleet Street and the IPSO Code

IPSO was foisted on us in 2014 by Fleet Street which because of its hubris and lack of regard for the truth has refused flatly to be independently regulated according the moderate and reasonable recommendations of Lord Leveson made in his report at the conclusion of his Inquiry, which report was a devastating indictment of the British press and the regulator it had created (The PCC). Fleet Street, which constantly demands full accountability from others, refuses point-blank to be held accountable itself.

For most newspapers there is the Editor's Code as composed and administered by IPSO, by which those titles both set and mark their own homework. The IPSO regime also covers many local newspapers and magazines, which are owned by such major publishing conglomerates as Associated Newspapers and Reach. The full list of the publications regulated by IPSO can be accessed on its website: https://www.ipso.co.uk/complain/who-ipso-regulates/.

This is what IPSO mendaciously says of itself;

[display]
IPSO is the independent regulator for the newspaper and magazine industry in the UK. We hold newspapers and magazines to account for their actions, protect individual rights, uphold high standards of journalism and help to maintain freedom of expression for the press.
[display ends]

On the first of IPSO's Web pages, under a headline, WHAT WE DO, it makes this further entirely false claim: 'We make sure that member newspapers follow the *Editors' Code*.' It does nothing of the sort. The truth is that IPSO is neither independent, nor does it any real sense impose standards on the publications that it regulates. It will not step in to prevent lies being told, privacy being invaded (with very limited non-mandatory exceptions), or even to protect vulnerable children from press abuse. It merely publishes a code of practice and rather than truly holding the press 'to account', inadequately, selectively and sluggishly sanctions breaches of that code.

IPSO's true primary function is to ensure that the publications that it oversees remain free to mislead the public and trash human rights with the minimum possible interference, while at the same maintaining the pretence of being properly regulated.

[A]Key issue after Leveson was press regulation
After the Leveson Inquiry of 2011/12, the only issue of real importance was what would replace the disgraced PCC, which was finally laid to rest after 21 undistinguished years after its failings were finally exposed to such an extent by the Leveson Inquiry that even the

combined power of Fleet Street could not save it. Would it be a reincarnation of the failed PCC, or something genuinely independent and effective?

When setting out his recommendations for a body to replace the PCC, Lord Justice Leveson was not working in isolation. He was informed by a team of six assessors appointed from a variety of backgrounds, including journalism. Leveson's report records that:

All the relevant Assessors have clearly advised that the system I am recommending, organised by the industry to objective standards, delivers the independent regulation which is essential; it safeguards press freedoms, will not chill investigative journalism that is in the public interest, and can command public confidence. It is their unanimous advice that it is in the interests of both the industry and the Government to accept and implement the recommendations to that end.

The government, despite the personal promise of then Prime Minister David Cameron to phone-hacking victims, under intense pressure from Fleet Street, refused to do what was required to implement the Leveson recommendations. So it is that an entire county was let down by its political leaders and a once-in-a-lifetime opportunity to improve press standards substantially was spurned. Instead Fleet Street foisted IPSO on us. A re-badged PCC that had been rightly slated by Lord Leveson, IPSO even opened in the same offices and hired many of the PCC personnel. IPSO is the fourth incarnation of press self-regulation. All three predecessors failed, as was the intention of the press in creating them, as it was when creating IPSO.

IPSO is neither independent, nor does it in any real sense regulate the press. It has the power both to launch investigations and fine papers up to £1m, though it was set up in a way that effectively ruled out any such sanction being imposed. So far it has neither undertaken a single investigation nor issued a single fine even when overwhelming evidence of serial press abuse is presented to it. I suggest no one holds their breath.

[A]I get thrown out of the office of the chairman of IPSO

IPSO's first chairman Sir Alan Moses – a former appeal court judge – dragooned me out of his office during a meeting with him and Matt Tee, IPSO's chief executive, when I had the temerity to challenge IPSO's disgraceful policy on the prominence of corrections, which are

invariably a small fraction of the offending material. He explained to me that IPSO had the benefit of there being senior newspaper people on its committee when it was adjudicating complaints. I responded that their problem was how to explain why it is that according to their editorial judgement a story should enjoy a certain prominence at the point of publication, but for some reason when that story required correction a much lesser prominence was appropriate.

When Matt Tee interjected that the IPSO committee was not interested in my views, I responded with polite surprise since I thought I had been invited by IPSO to its offices for the very purpose of airing them. At this point I was told by Sir Alan Moses that I had been rude to Mr Tee and that I should leave his office immediately. Mr Tee then frog-marched me off the premises in front of all the IPSO staff. So much for free speech at IPSO! I wrote a full account of that entertaining and enlightening encounter for the excellent *INFORRM* magazine: https://inforrm.org/2015/04/29/ipso-the-inconvenient-truth-part-one-jonathan-coad/.

[A]The ironic element of the Code

There is a bitter irony in the public interest section proclaiming that 'There is a public interest in freedom of expression itself', which must be an allusion to Article 10, which also stresses the right of individuals to receive information.

This right is routinely denied the general public by IPSO by virtue of its policy on 'due prominence' for corrections, which ensures that most people who are misled by the newspapers that it regulates never find out about it. The absence in the Code to the public interest in Article 8 is conspicuous by its absence.

[A]The Editors' Code Book

IPSO publishes what it calls the *Editors' Code Book*, which is primarily a window-dressing exercise. It has two nauseating self-congratulatory introductory pieces. The first is by the Chairman of the Editors' Code Committee, which includes this: '… at a time when accountability is perhaps slipping out of fashion, by signing up to the Code and the self-regulatory regime for when the press sends a clear signal that it is prepared to be held fully accountable for its actions …' As the writer must know, the very existence of IPSO rather than a Leveson-compliant regulator is proof indeed that the press has no intention of being 'held fully accountable for its actions'.

[B]The Code Book's guidance is generally ignored by the papers that it regulates

The Code Book observes, 'More than 55 per cent of the complaints considered by IPSO involve clause 1.' It also sets out a number of 'key questions an editor should ask about a story' prior to publication, which can sometimes be effectively deployed in dealing with a paper prior to publication, either to eliminate or at least attenuate a looming media crisis:

• Can I demonstrate that the story is accurate?
• Can I demonstrate that we have taken care? For example, do we have notes to support the story?
• Have we put the key points of the story to the people mentioned in it? Do we need to? If we have, have we given proper consideration to how or whether the story should reflect what they have told us?
• Is the headline supported by the text of the story?
• Are the pictures misleading?

All of these provisions requiring a story to be properly substantiated prior to publication are then ignored by IPSO in its conduct of the complaints process, which allows newspapers ample time to try and scrape together a post-publication justification for a story. How much better would our press be if IPSO insisted on adherence to these stipulations.

This section of the Code Book includes this provision, 'IPSO may insist on seeing evidence that a publication has taken care, particularly when the subject of the story is also the source and it is told in his or her own words.' There is no way that during the course of an investigation IPSO is going to do that without robust insistence on the part of the complainant.

On the issue of headlines, the Code Book says this: 'Eye-catching headlines won't necessarily summarize everything in the story beneath, but Clause 1(i) requires any claim made in the headline to be supported by the text of the article.'

So far as corrections are concerned this is an important provision of the Code Book: 'Readers now access stories through a variety of channels, so it is best practice for corrections to be carried on all the media platforms that carried the story originally.' Again, this will only be done by a newspaper if you insist on it.

[A]IPSO and 'due prominence'

There is no more conclusive proof of IPSO's complete lack of independence than its policy on prominence, i.e. what constitutes 'due prominence'. Contrast the independent monitor for the press IMPRESS Code, which states: 'Publishers must correct any significant inaccuracy with due prominence, *which should normally be equal prominence*, at the earliest opportunity' (emphasis added).

IPSO neither permits an appeal against its adjudications, nor does it allow anyone (other than the parties to the complaint) to see the evidence on which those adjudications are based. The fact that more often than not IPSO finds 'no breach' rather than an even spread of decisions is not absolute proof of IPSO's corrupt nature. Its policy on prominence is.

[A]The interested parties

On the issue of the prominence accorded to corrections there are three interested parties:

- The newspaper;
- The complainant;
- The general public.

[A]IPSO invariably favours the newspaper

It only serves the interests of the newspaper that corrections enjoy a small fraction of the prominence of the offending article, or the proportion of it that breaches the IPSO Code. The interests both of the complainant and the general public require at least equal prominence.

Despite this IPSO invariably orders that the prominence of the correction should be a small fraction of the offending article, which means that only a small fraction of those deceived by the newspaper learn of the fact. Apart from the failure that this constitutes to bring to the attention of readers that they have been misled, it also means that IPSO's sole sanction is administered with pathetic leniency.

[A]IPSO is fully aware that this policy is untenable

Leaving aside the fact that such decisions on the prominence of corrections being a faction of that of the offending article (or its errant part) constitute a *volte face* from the original editorial decision on the importance of the initial story, there is another monstrous element dishonesty on the part of the print press.

In selling its advertising a newspaper applies the clearest measure of prominence by means of its rate cards. Can you imagine an employee of Associated Newspapers trying to explain to an advertiser that the same number of people will read an advertisement that is 10cm in area as one which is 100cm? Yet that is what IPSO is asking complainants and the public to accept, corrections almost invariably being substantially less than 10 per cent of the area of the original.

When you want to advertise with a newspaper you are accorded the prominence that you pay for based on a well-established measurement in the form of a rate card. So according to this measurement, where a story which takes up a page is comprehensively wrong, that page is accorded a monetary value by the paper. So, it should be that the monetary value of the correction in terms of prominence should be no less.

[A]The unique impact of the front page

Unlike any other page of a newspaper, the front page (and especially its headlines) is viewed by a substantial proportion of the population in the following non-exhaustive ways:

- In hardcopy form; via newspaper stands at railway stations, tube stations, petrol stations, newsagents, supermarkets, being read by fellow passengers on trains, buses, tubes, in cafes, canteens, restaurants, etc.; and in the waiting area of the IPSO offices;
- Held up to television cameras on late evening and early morning news and magazine programmes;
- Read out by radio presenters, both on evening and morning programmes;
- On news apps;
- Disseminated via social media.

It follows then that a banner headline such as the *Sun*'s iniquitous QUEEN BACKS BREXIT will have been read by tens of millions of individuals, the vast majority of whom would not dream of either buying the *Sun* or visiting its website. Not one of these individuals would see a small strip at the foot of a front page published weeks later referring to an adverse IPSO adjudication which will not be visible to anyone other than a sharp-eyed purchaser of the paper or visitor to its website; still less would they read that adjudication on any inside page.

The remedy ordered by IPSO on this vital constitutional issue was therefore virtually useless for because, the other that 99 per cent of those who saw the headline would not have seen the correction.

[A]The factors applied by IPSO on the issue of prominence

On the issue of prominence, the factors which IPSO have set out in its Code Book are as follows:

- The seriousness and consequences of the breach of the Code.
- The position, the prominence and the extent of the breach of the Code.
- The public interest in remedying the breach of the Code.
- Any action taken by the publisher to address the breach of the Code.

These are all reasonable provisions. But just as the Code is a good document which IPSO elects not to enforce, in reality these factors are deployed by IPSO solely to diminish the prominence of the correction or apology

4. As to the other three Fleet Street titles, their own bespoke forms of 'self-regulation' inspire even less confidence. If there were a proper Leveson-compliant regulator for the very powerful forces of public influence and information dissemination comprised by the Fleet Street titles, then powerful organisations/individuals - especially ones from overseas - could legitimately be told that there is no excuse for engaging in any form of litigation when a correction to false information can be obtained by a legitimate regulator.

5. While Fleet St. flatly refuses to be subject to any form of effective or independent regulation, one which was pretty well unanimously backed by Parliament, it ill behoves them to seek further indulgence from the legislature.

6. The acute dangers of the dissemination of false information on public interest matters

1. In my book I cite several examples where the dissemination by Fleet Street of self-interested false information can have seismic consequences. Here are some examples.

[A]The 'dark side' of the media

Most people associate the dark side of the British media – primary the press, though in its attempt to compete the broadcast media is catching up – with blatant criminality such as the phone-hacking.

A PR professional must however factor into their work that the abuse by the media of its privileges – the prime culprits being the denizens of Fleet Street – is endemic. It goes on daily and frequently concerns issues of immense importance. It therefore impacts us all and can have seismic consequences; one being our departure from the European Union (EU).

In March 2016 in the run-up to the Brexit referendum the *Sun* newspaper daubed 'QUEEN BACKS BREXIT' in huge capital letters all over its front page; a headline which was seen by tens of millions of people on news apps, newsstands, held up to TV cameras and heard when read out by radio stations.

The proprietor of the paper, Rupert Murdoch (a Europhobe republican), is reported to have complained that whereas he is influential in Downing Street, he is ignored in Europe. Since against nearly every expectation the wafer-thin majority was 52 per cent to leave against 48 per cent to stay, the *Sun*'s headline would only have to have swayed a small proportion of the 33 per cent of the then undecided voters for the paper's disgraceful abuse of its Article 10 (free speech) right to have had the desired effect. If you add to this the refusal by the bogus press regulator that is IPSO, which Fleet Street unilaterally foisted on us, to order a front-page correction – which meant that 99 per cent of those who saw the headline would not see the retraction, then this illegitimate flexing of editorial muscle may have had immense and long-term ramifications for the UK.

There is much that is commendable in the media, which I have been privileged to serve throughout my career as an editorial lawyer. At its best it plays a vital role in our democracy and informs us faithfully about issues of which we need to be aware. At its worst, it wields its immense power to inflict terrible damage both on society and on individuals within it.

The broadcast media is regulated by Ofcom with a degree of efficacy and generally serves us well. However, the grim revelations about the web of deceit spun by British BBC journalist Martin Bashir to secure his now infamous interview with Princess Diana, and the BBC's failure properly to investigated him, shows that even that august and precious institution has feet of clay. The hypocrisy of Fleet Street in tearing into the BBC because of its governance failures when it invests vast sums of money covering up its own wrongdoing is however, breath-taking.

The press's lack of effective regulation and consequent lack of accountability means not only is it free to administer poison into the psychological and spiritual bloodstream of society by its predilection for damning awfulization, it can have a devastating direct impact on individuals and enterprises alike; as I have seen repeatedly in my practice.

[A]And yes, even the Guardian *too when it has an editorial agenda to pursue*

Even more honourable Fleet Street titles such as the *Guardian* have on occasions elected to pursue its editorial agenda at the expense of both the truth and public interest – though in its defence the events that I now relate took place some 15 years ago and under a different legal and editorial regime.

In 2004 Colonel Campbell-James was wrongly accused by the *Guardian* of being involved in the appalling abuse of Iraqi war prisoners in the Abu Ghraib jail. Not only was he not at the jail at the time, he was not even in Iraq. This was not only a false allegation against a distinguished army office, it was also a serious allegation against his regiment, the British Army and the British State, the effect of which was to place other British soldiers serving in Iraq at risk of reprisals.

To its shame the *Guardian* initially cited the then common law Reynolds public interest defence (now Section 4 of the 2013 Defamation Act) as its justification for refusing to retract the allegation. Had it elected to run that defence Colonel Campbell-James would have been robbed of his right to vindication and a false story staining him, his regiment, the British Army and the nation as a whole would have stayed uncorrected. So much for it being a 'public interest' defence.

As Mr Justice Eady observed in his judgment, which merits reading in full [1]and was damning of the *Guardian*: 'It was not simply a matter of good journalistic practice [to publish a prompt retraction]; it was a matter of elementary human decency.' Only grudgingly and belatedly did the paper retract the allegation and only paid damages when ordered to do so by a court.

To its credit, the *Guardian* later acknowledged its failure to do right by the British officer in an acceptance of fault unlikely to come from any other Fleet Street title.[2]. Then editor Alan Rusbridger stated: 'In general we do try to correct errors swiftly. In this case, for a number of reasons, we didn't publish an apology as early as we should have done, which was very unfortunate. We very much regret the distress caused to Colonel Campbell-James and his family, and would like to apologise again to him, as we have already done in the newspaper and in open court.'

Since this was an aberration on the part of that title, when dealing with the *Guardian* I adopt a different approach from how I would dealing with either with the *Mirror* or *Mail* titles. The two *Guardian* lawyers are courteous, ethical and fair-minded and I only ever deal with them on Christian name terms, as I do some of the other Fleet Street lawyers with whom I can deal knowing that they will conduct themselves properly. The newspaper is reasonable to deal with if it gets things wrong and also has sensible and courteous readers' editors who will generally correct minor inaccuracies when asked to do so.

G. Defendant (Free Speech Lawyers) are at least as guilty of misusing the legal process

1. Another myth which needs to be exploded is that the legal process is abused on media issues only by lawyers acting for Claimants. In my experience, the egregious misuse of the legal process is rather more common on the part of lawyers acting for powerful corporate Defendants.

[A]Mirror Group Newspapers apes its larger and richer rivals

[1] https://www.5rb.com/wp-content/uploads/2013/10/Campbell-James-v-Guardian-QBD-12-May-2005.pdf

[2] https://www.theguardian.com/media/2005/may/13/pressandpublishing.iraq

Mirror Group Newspapers, as we now know, hacked phones in the same industrial quantities as did News UK. While they were doing this the senior lawyer presiding over the newspaper's lack of adherence to the law was Marcus Partington who it has been alleged in court knew about criminal activity and failed to prevent it.

Here is an extract from a letter sent to me by Marcus in response to a claim letter I sent to the *Mirror* on behalf of bestselling author Paul McKenna: 'If your firm were foolish enough to advise your client to issue proceedings, and if your client was foolish enough to accept that advice, then….he will learn to his immense personal and financial cost that he has picked the wrong fight over the wrong article with the wrong newspaper'. This was described by the trial judge as 'armchair machismo' in his judgment as he found in favour of my client.

[A]The role of a Fleet Street lawyer in working against the public interest

One of the reasons why I have never acted for a Fleet Street title, or sought to do so, is that for most of them you will be expected to advance arguments and make assertions which no honest part of you could believe are true, and defend and/or cover up wrongdoing which you know perfectly well should come into the public domain.

It was no surprise that some senior Fleet Street editorial lawyers were summoned to give evidence at the Leveson Inquiry and that Lord Justice Leveson had serious doubts as to the extent to which he was being told the truth by some of them. Some have subsequently had to leave their posts under a cloud. There are some honourable exceptions – fine folk who do defendant work both in the print and broadcast media without abandoning any concept of right or wrong. I will not embarrass them by naming names, but they know who they are.

However, Fleet Street could not get away with much of its wrongdoing if it were not abetted by a small coterie of well-paid lawyers prepared both to cover its tracks and to ensure that the fake news that it disseminates is not corrected. This does an immense disservice to society and press-abuse victims alike.

In the media industry there is an almost complete divide between claimant and defendant lawyers – especially when it comes to Fleet Street, where it is pretty well absolute. That is why I am so privileged to have occupied both camps, though I have never acted for a Fleet Street title. A celebrity client told me of a meeting which he had with

former CEO of News International Rebekah Brooks to resolve an issue in the newspaper at which she asked him who was his lawyer. When I was named she apparently put her head in her hands.

[A]The arrival of the 'Free Speech Lawyer'

Recently some of those that we in the trade used to call defendant lawyers have taken to calling themselves Free Speech Lawyers (FSL). Having seen a website for American attorneys claiming the moral high ground for such work I suspect it is one of those phenomena which has invaded us from the other side of the Atlantic.

However much which is presented as 'free speech' lawyering, much of it is in fact nothing of the sort. It is rather the mercenary exercise of saving the face of newspapers, editors and journalists when they publish false and disparaging copy, thereby ensuring that the most important victim of such press activity – the general public – never learns that it has been misled, and victims are robbed of vindication and compensation.

[A]Free speech and Animal Farm

The right of 'free speech' is alas by no means fairly distributed. Although there has been some mitigation of this with the advent of social media, when it comes to exercising the right of free speech there remains an immense inequality between the behemoths of Fleet Street and even the highest profile individuals and corporates.

As George Orwell sagely observed in his wonderful novella *Animal Farm*, so far as the ruling pigs are concerned, 'some are more equal than others'. For the free speech pigs read porcine behemoths like Associated Newspapers, Mirror Group Newspapers and News UK. Against the power wielded by such entities even the most powerful of my corporate clients are at a substantial disadvantage, which renders effective crisis PR essential.

The reason that we need both effective press regulation and the protection of reputation and privacy is precisely because without them the money and hubris-driven Fleet Street empires will both mislead us according to their editorial whim and further rob non-porcine individuals and entities even of such free speech audibility as they would otherwise have by telling lies about them.

[A]The damage that FSL can do pre-publication

What is it that the self-styled FSL of our country do to justify claiming the moral high ground – which not only do they ascribe to themselves but inevitably so do those whose interests they serve?

An ex-journalist at a leading Sunday tabloid told me how his in-house lawyer had facilitated the publication of more false stories than anyone else he knew – including journalists.

Did FSL at newspaper groups found guilty of serial criminality and human rights breaches regard it as part of their calling to turn a blind eye to, facilitate, deny and/or cover up this wrongdoing? I fear so. As a long-standing editorial lawyer, I cannot understand how anyone of my expertise can be embedded at a newspaper and not know that such serial criminality is rife.

[A]The damage that FSL can do post publication

It is however not the role of FSL prior to publication which most contravenes the public interest. It is their role post publication, along with the roles of individuals like newspaper apologists such as managing editors, 'ombudsmen' and entities such as IPSO that I want to expose to the harsh light of reality. They are the ones who 'chill' true free speech by trying to prevent those who have been misled from learning the truth – a right which Article 10 ranks no lower than the right to disseminate information.

FSL at IPSO regulated titles clearly regard their responsibilities as including the prevention of those who have been misled by their titles learning of that fact. They do this by trying first to persuade the acquiescent IPSO that an article which has plainly breached its Code is in fact compliant; and if this fails, to ensure that the corrections are a fraction of the size and prominence of the offending article so as to ensure the minimum people get to know about it. IPSO is itself one of the most potent enemies of true free speech because of its dismal failure as a "regulator" to ensure that those mislead by the titles it "regulates" learn of the fact.

So it is in an IPSO complaint where there is an argument over the prominence of the correction, it is the complainant's lawyers who are the real FSL because they seek to ensure that those who have been misled by a newspaper article are disabused of that false information, thereby trying to secure their Article 10 rights. Where a paper has stepped

outside its Article 10 right by publishing the false information it has no free speech right to defend.

Every time (for example) IPSO refuses to order the correction of a front-page howler via a subsequent front page it drives a coach and horses through Article 10 by denying the right of the millions of non-purchasers of the newspaper who have been misled by its front page to receive the corrective information in the only place where they will see it. It therefore proves the claim on its website to 'help maintain freedom of expression' to be false and consequently a breach of its own code's injunction against the publication of misleading or inaccurate material.

It must be difficult for those who are employed to be apologists for the same organizations and individuals who cynically blitzed the Article 8 rights of many thousands via phone hacking, blagging, bribing police officers, etc. to place their earnings/bonuses at risk by ever reminding those who employ them of the true nature of free speech. Those in private practice however have much less excuse. It is perfectly possible to make a reasonable living as a media lawyer without ever acting for a Fleet Street title, as I have throughout my 30-year career.

[A]Some of the other ways that FSL ill-serve society

Although I no longer should be, I am still astonished when a reply comes back to a claim letter which is grossly disingenuous and makes a litany of assertions which the writer cannot possibly believe are true; as I am when counsel instructed by the press draft defences denying the defamatory nature of an article which is blindingly obviously defamatory and solicitors (doubtless citing free speech principles) sign statements of truth to such documents.

I recall a hearing where Mr Justice Tugendhat, with his customary grace, declaring himself surprised at the assertion made by the defendant paper's lawyers that an article was not defamatory, saying that until he had read the defence it had not even occurred to him that the article was anything other than defamatory.

A leading FSL QC was on his feet at the time, who a few weeks later spent a pointless half hour trying to persuade a Court of Appeal judge that the same publication meant other than it plainly did – thereby making a second attempt to rob the readers of his client publisher of their right to learn that its paper had misled them.

It is routine for FSL, both at the Bar or in the solicitors' profession, to promulgate meanings for publications which they blindingly obviously do not bear. The defamatory meaning that they advance is crafted around the facts which the newspaper thinks it can prove, rather than the true sting of the words in the publication.

I have no idea how the barristers who produce such documents and solicitors who sign off on them are able to do so with a clear conscience, or with any sense that they are serving the cause of free speech or society as a whole. This is an exercise in medicating the hubris of editors by preventing those that have read the offending article and been poisoned by its sting from learning that they have been misled, thereby trashing their free speech rights. In those circumstances the real FSL act for the claimant.

[A]FSL lawyers and a religious minority

A recent encounter with an FSL acting for the *Telegraph* concerned an Islamophobic attack on a moderate and devout Muslim community leader for whom I acted. The FSL sought to deny the readers of that newspaper their free speech rights by insisting against the plain words of the article that it meant something other than what a judge subsequently emphatically found was the case and as we had always said that it meant.

When that was brought to an abrupt end at a preliminary trial on meaning, the retreat position was to try to deny the claimant the Statement in Open Court which fulfilled the element of the Article 10 right which is less popular in Fleet Street; namely the entitlement of the general public to receive information – such as that this individual had been falsely accused by the paper of severe wrongdoing and anti-social activity.

As any victim of falsities promulgated by one of the Goliaths of Fleet Street will tell you, one effective means of robbing an individual or organization of their right to free speech is widely to disseminate damning lies about them. The real free speech lawyer is the solicitor and/or barrister acting for that individual; particularly (as was the situation in this recent encounter with FSL) a faith community leader. In those circumstances not only has the leader's free speech right been undermined, but so too has that of the community that they serve as its mouthpiece.

[A]FSL and the Duchess of Sussex

Sometimes even a gaggle of distinguished lawyers, such as the heavyweight legal team that acted for the *Mail on Sunday* which include two top QCs, advance arguments on behalf of a Fleet Street behemoth which surely should have engaged their consciences.

This collective moral failure by the *Mail on Sunday*'s lawyers of is one of the untold stories from the proceedings; the other being just how vile is Thomas Markle for siding with his daughter's oppressors. They were defending the actions of a newspaper who had (as I assume) bribed the Duchess of Sussex's father to let them publish an intimate letter from his daughter, whom the newspaper then deployed in defence of the indefensible.

That legal team, which will have been around eight in size and cost around £5,000 an hour, rightly received a lashing from Warby J in the judgment in which he found that, despite their ingenuity and creativity, the newspaper had no viable defence to the Duchess of Sussex privacy and copyright case that she brought the paper.

Surely, they must all have known that.

These individuals are all facilitators of the wrongdoing which is endemic in Fleet Street by (as Warby J decries) deploying arguments that are 'tired and illegitimate' – arguments which IPSO will indulge, but which judges will generally not. Fleet Street will continue to conduct itself in the appalling way that it does now while it can find lawyers prepared to lend their support for such wrongdoing.

[A]The Warby J judgment

Here are some examples taken from his judgment of the contempt that Warby J (as he then was) had for many of the newspaper's arguments as advanced by their lawyers:

'I am satisfied that this line of defence has no sound basis in law.'

'In some respects, the defendant's case is legally untenable or flimsy at best ...'

'I would class the notion as fanciful.'

'This aspect of the Defence is in my judgment entirely hopeless.'

'I am unable to detect in these paragraphs any logical or arguably sufficient basis for disclosing any part of the Letter.'

'Thus, it was argued, an accurate court report would gain no protection insofar as it merely recited the incidents and events in court. This seems a remarkable argument for a news publisher to want to advance. Mr Speck cited no authority to support it.'

'The defendant's factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality.'

[A]The professional obligations of the Mail on Sunday*'s legal team*

These are the key obligations of a solicitor as per the SRA Principles[3]:

You act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice;
2. *in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons;*

   with independence;

   with honesty;

   with integrity;

   in a way that encourages equality, diversity and inclusion;

   in the best interest of each client. (emphasis added).

For barristers, they share the obligations at numbers 2 to 5. The Warby J judgment suggests that none of the lawyers acting for the *Mail on Sunday* were complying with their professional obligations.

[A]FSL and the Stokes family

[3] https://www.sra.org.uk/solicitors/standards-regulations/principles/

In August 2021 it was announced that nearly two years after an intrusive and deeply upsetting front page article about them, the privacy claim brought by Ben and Deborah Stokes against the Sun had been settled, with the newspaper agreeing to apologise and pay substantial damages. The nonsensical and desperate defence deployed by the paper's lawyers made the one in the Duchess of Sussex seem meritorious by comparison[4].

H. Conclusion

1. So far as journalists are concerned who may be the subject of SLAPP activity, either prior to or post-publication, there are broadly 3 categories:

    a. The wholly independent journalist without any corporate support;

    b. A writer for a substantial publishing company;

    c. A journalist either for a newspaper or broadcaster.

2. As to the first category, whatever is done to the law, there can be no prior restraint to the issue of proceedings (which would plainly be a breach of Article 6 of the ECHR), and therefore if an unprincipled prospective Claimant were to engage unprincipled media lawyers to prevent publication of true allegations against them, realistically there is not much that can be done. The law cannot solve every societal problem or cure its every ill.

3. As to the second and third categories, I respectfully suggest that the Committee is very wary of what appears to me to be an opportunist 'cry wolf' exercise concentrating on a tiny number of actual or threatened SLAPP claims. These journalists have more than sufficient protection under the present state of the law, and the granting of further license would be firmly against the public interest.

4. As I have explained, I wholly reject, from my 30 years of editorial experience, the 'tip of the iceberg' claim. When I was present hearing the oral evidence before the Committee on 10 May, it was striking that no instances, let alone evidence, were put forward for this claim.

5. As I have also explained, the myriad of articles, programmes, books, etc, which emerge every year making serious allegations against powerful corporations and individuals prove beyond any doubt that the UK law of defamation does not prevent good public interest journalism from bringing our attention to wrongdoing by those in power - corporate or individual.

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[4] https://inforrm.org/2021/09/13/the-stokes-familys-privacy-claim-why-the-sun-had-to-settle-paul-wragg/#more-50046

6. However it is very easy to give instances - and I can give many more than have been set out in this paper - of where, because of failures in regulation (the Press Complaints Commission and then subsequently IPSO) and anomalous lacunae in the law (Section 4 of the Act), not only is there great scope for false information to be published on matters of important public interest, but the means of correcting that information are currently wholly inadequate.

Jonathan Coad
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