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The Offer of Amends Procedure under the Defamation Act 1996

Justin Rushbrooke QC

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- How big a discount?
- Are there maximum and minimum discounts?
- To what extent can D keep an OOA in abeyance?
- Other points

Basic principles:

- Mechanism set out under ss.2-4 Defamation Act 1996
- If OOA accepted the proceedings come to an end save only for enforcement of the offer (s.3(2) DA 1996)
- Assessment of compensation is determined on same principles as damages in defamation proceedings (s.3(5) DA 1996)
- OOA may be relied on as a defence, but if so, D may not rely on any other defence
- If OOA relied on as a defence C must (effectively) show malice in order to succeed (s.4(3) DA 1996)

How big a discount?

The starting point:

- In most cases an OOA will have a ‘major deflationary effect’ on compensation
- The Court applies a 2-stage test: (1) identify the award that would be made without reference to the OOA; (2) discount that figure to take account of the OOA.
- The ceiling for general damages (where no OOA) is currently c.£300k

Per Eady J in *Nail v News Group Newspapers Ltd* [2004] EMLR 362, [34–36] (approved in the CA):

> “The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively ‘won’. He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character.

Per Eady J in *Nail v News Group Newspapers Ltd* (continued):

> “The very adoption of the procedure has therefore a **major deflationary effect** upon the appropriate level of compensation.
>
> This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.”

How much of a discount?

- 50% is probably the highest available
- The discount will usually be somewhere between 35% and 50%
- Even a badly behaved D is likely to receive a 10% discount

50% - the likely upper limit

In *KC v MGN Ltd* [2013] 1 W.L.R. 1015 the CA approved 50%

- D made its Offer of Amends ‘with reasonable promptitude’ (effectively a few weeks after publication)
- D also published a prompt apology, after a short period of negotiation, in the same terms as C had sought
- Extremely serious allegation but C not named in the article
- Thus Bean J’s £150,000 starting point was too high; his award of £75,000 was reduced to £50,000

50% - the likely upper limit

KC v MGN Ltd [2013] 1 W.L.R. 1015, per Lord Judge CJ at [50]:

> "There has been no argument before us that the 50% discount to allow for the offer of amends procedure, as adopted by the newspaper, was inappropriate.
>
> The offer of amends was made with reasonable promptitude in this case and the first apology published even earlier. KC therefore knew very soon after the date of publication that he was vindicated, and that this was bound to have "a major deflationary effect" on any award…

50% - the likely upper limit

KC v MGN Ltd [2013] 1 W.L.R. 1015, per Lord Judge CJ at [50]:

> "We understand that this discount is as high as any discount so far selected by any judge exercising this jurisdiction. In our judgment it was appropriate."

50% - the likely upper limit

NB also Bean J at [46]:

> “It is important that an unqualified offer of amends should give the tortfeasor what May LJ described as a healthy discount, but not a discount so great as to lead to defendants libelling claimants with equanimity, knowing that they will be able to buy their way out of trouble with an apology. That, in my view, is why the stage 2 discount has so far never exceeded 50%; and why I find it difficult to think of circumstances in which it would or should…”

The range in between:

35-50% is “the usual discount for a **prompt and unqualified** OOA” (per Warby J in *Barron v Vines* [2017] EWHC 162, [26])

Factors leading to a reduced discount include:

- Delay in making the OOA
- Reluctance to publish meaningful retraction and apology
- Delay in removing allegations from website
- Off-hand treatment of C

- See eg *Undre v LB Harrow* [2017] EMLR 8, Sir David Eady: 25% discount awarded

How long can D keep an OOA in abeyance?

- OOA has to be made no later than service of defence
- D may be able to extend time for defence by raising ‘serious harm’ or meaning issues
- In some recent cases D has bought itself considerable time before making an OOA: eg *Lachaux v AOL (UK) Ltd*
- But can D float both truth and an OOA as potential defences?
- Is this in accordance with the CPR and the spirit of the OOA regime?

Brown v Bower [2017] EWHC 1388, Warby J:

"54. To say that a defendant need not plead a substantive defence before a preliminary issue is resolved is not the same as saying that defendants have a right to stay silent on the question of whether any such defence will or may be advanced, or to keep to themselves even the general nature of any such defence. Defendants to claims in defamation are expected to reveal their hand not just during litigation, but before it starts…

Brown v Bower [2017] EWHC 1388, Warby J:

"54. … The expectations of defendants which are set out in the defamation PAP are not qualified by the offer of amends regime, which was in place when the PAP was formulated. Nor, in my judgment, does the fact that a defendant seeks an order for a preliminary trial on serious harm justify an exemption from those expectations, or from the requirements of CPR 1.3."

NB in *Brown v Bower* Ds were not required to serve defences before the trial on meaning, nor commit to making an OOA.

As to the effect on compensation where D wishes to keep alive the possibility of an OOA or a defence of truth:

- The entire discount will not be lost, though it will be lower if the OOA is “withheld” until after an unsuccessful serious harm challenge
- An indication meanwhile that truth will be pleaded might lead to a larger reduction in the discount, because of its effect on C’s feelings

- Per Warby J at [56(3)]

Brown v Bower [2017] EWHC 1388, Warby J:

"56(3). … the primary purpose of the offer of amends regime is to bring about swift settlement, ideally before litigation begins. It was clearly not intended to operate as a fallback for defendants, after they had tried their luck with a preliminary trial on some substantive issue.."

What if D makes an OOA but refuses to offer an undertaking?

- C can reject the OOA but must face the consequences if it is relied upon as a Defence, ie s.4(3) DA 1996 applies
- C **cannot** accept the OOA and then fight on solely to obtain a final injunction: s.3(5) DA 1996. *Quaere* if there is also a malicious falsehood claim?
- In an extreme case C may be able to issue a new claim seeking a final injunction against future repetitions

THANK YOU

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