Freedom of speech is being held to ransom

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Libel lawyers are misusing conditional fee agreements, writes David Hooper

LIBEL courts are no longer the preserve of the rich. Conditional fee agreements (CFAs) allow lawyers to offer a "no win, no fee" service. If the client wins, his lawyer trousers a success fee, paid as an extra percentage of his hourly rate. The cost is borne by the losing side.

Although CFAs were introduced to allow deserving claims to be brought, this has not happened with defamation. Instead, publishers and broadcasters threatened with mind-boggling costs are having to settle trivial and dubious claims. The danger to the media's freedom of speech is obvious.

The Department for Constitutional Affairs has published a consultation paper on CFAs and the consultation period ends on Friday. Let us hope that the findings will end the scandal of libel CFAs.

The intoxication of the CFA casino may cloud the judgment of claimants. For example, Sarah Pedder and Allan Dummer face about £300,000 in costs and risk bankruptcy after losing their cases in July against the *Daily Mail* and the *Evening Standard* over allegations that they had an affair while serving in the army in Oman.

Would they have sued if they had had to pay their own costs — bearing in mind that they had earlier admitted "a brief affair" and "a relationship" and that they had become lovers soon after leaving Oman? (They have since married.

Libel claimants' lawyers are increasingly persuading costs judges to allow a 100 per cent success fee because libel litigation is risky. But why is it so risky? Largely because of dubious claims encouraged by lawyers. If solicitors wish to fund such cases, they should do so at their normal rates.

With CFAs, a claimant can take out after-the-event (ATE) insurance to meet the defendant's costs if the claimant loses. But in libel such insurance is too expensive for most claimants. Ashworth v Peterborough United Football Club Limited illustrates how expensive it can be. Paul Ashworth, a coach with the club, won his claim in June 2001. Not only did the club have to pay his £66,000 agreed libel damages. It also had to pay his £58,000 legal costs and the £46,000 ATE premium, costing about a third of the £125,000 insurance cover.

If the claimant has no insurance, defendants had better settle because they will never recover costs if the claimant has no resources. This is known as the "ransom factor".

The ransom factor looms large in Adam Musa King v Telegraph Group, the first defamation case to consider the use of a CFA. In June the judge refused to strike out the case (involving allegations that King supported al-Qaeda), even though *The Daily Telegraph* argued that it was so weak as to amount to an abuse of process. This is being appealed. It was argued that the ransom factor could force defendants facing potential costs of £1 million to settle for paying £10,000 damages plus inflated costs in unmeritorious cases.

Meanwhile, judges should assess whether costs racked up in preparation for trial are proportionate to the issues. The courts should not allow a success fee if it produces disproportionate costs. The media should highlight abuses that rack up fees, such as time-wasting correspondence or setting up CFAs when it is known that a case will settle.

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