

# Smear tactics— a sign of the times?

Smears, complaints, abuse...it seems all's fair in love, war & litigation, but where will it all end, asks Khawar Qureshi QC



It is perhaps evidence of ageing that almost all of us will say at some point in our lives, 'it was better in the past'. However, anecdotal evidence suggests the litigation arena is becoming increasingly aggressive, and more focus is being applied to ask—why is this happening?

Lest we assume this does not apply to the five-star, relatively relaxed and confidential environs of international arbitration we would soon be disabused of our naivety.

As soon as lawyers convince themselves that they are the living embodiment of Von Clausewitz's 'total war' approach, there are no red lines, there is no trust and any means (however devious and foul) justify the end.

## Why is this happening?

What are the causes of this change, which can only be detrimental in terms of the well-being of the system and the legal profession long term?

First, the increasingly competitive environment with highly demanding clients, where briefs and instructions are perceived to be gained at the expense of others, is unlikely to engender restraint.

Second, the intense preoccupation with social media, electronic media and the internet has meant that deliberate, widespread and rapid dissemination of smear tactics is easier than ever before. The online abuse targeting some of the lawyers at the forefront of the 'Brexit challenges', such as Lord Pannick QC/Mishcon de Reya (*Jewish News*, 'Lawyers acting on Brexit

subjected to anti-Semitic abuse', 19 July 2016), and Jolyon Maugham QC (*Legal Cheek*, 'We spoke to the "sour grapes" lawyers challenging the referendum result', 22 July 2016), including abuse from individuals claiming to be lawyers, provide some stark examples of this phenomenon. The ease with which even apparently experienced users of mediums such as Twitter add fuel to the flames of misinformation without (it seems)

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any reflection or serious attempt at fact checking was shown when Lord McAlpine was falsely identified as a paedophile in 2012 (*The Independent*, 'Lawyers acting for Lord McAlpine draw up list of Twitter users for potential legal action', 15 November 2012). Messages referring to Lord McAlpine were 're-tweeted' more than 100,000 times, including by seasoned journalists.

We have witnessed our judges who dealt with the 'Brexit challenges' being described as 'Enemies of the People' in the most disgraceful manner by mainstream print media. We are witnessing increasingly 'bare' challenges to judges and arbitrators to recuse themselves on the basis of mere assertions. When the challenge fails, the judge/arbitrator is asked to recuse

themselves nevertheless, on the basis that they could not possibly continue to be 'impartial' having heard a challenge against them.

## Smears & complaints

As for lawyers themselves, RPC Legal Director Graham Reid identified that the evidence in respect of the sharp rise in solicitor-on-solicitor complaints suggested that 'litigation tactics were becoming more aggressive, with legal teams launching complaints against their opposition at the instruction of clients'.

The increasing concern is that unless the regulators step in soon, we will see clients (and more so their lawyers) using the professional Code of Conduct as just another part of their litigation armoury to smear an opponent or neutralise them in litigation. An indication of how such tactics are already taking hold was provided by the law firm RPC when they reported, in June 2016, that the number of solicitor-on-solicitor misconduct reports had jumped from 1,852 (in 2011) to 2,516 (in 2015)—while the number of overall misconduct claims remained roughly the same over that period (approximately 10,900) (*Legal Business*, 'Litigation tactics: Solicitor-on-solicitor misconduct complaints up a third in five years', 17 June 2016).

These are all very damaging developments. They are eroding the fabric of trust which must bind the 'actors' in the legal system, and without which we will be much worse off.

## What is the answer?

Judges and arbitrators must be robust in reporting and dealing with misconduct where they witness it. Regulators must be ever aware of the fact that their heavy burden,

understaffing and under resourcing may increasingly be viewed as providing a useful 'dark and dirty alleyway' within which to lure an unsuspecting lawyer.

Last but by no means least, if smear tactics are seen to be effective and go unchallenged as against judges or lawyers, the incentive for their deployment will be heightened. If we care about our legal system and our profession, we must all denounce such conduct and call upon the Lord Chancellor (first and foremost with regard to the protection of the judiciary), our courts and regulators to exercise greater vigilance. **NLJ**

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