seem to be a reason the Court of Justice is likely to accept for ignoring the decision of the Finnish court.

Although the Court of Appeal held that there was jurisdiction to grant an anti-suit injunction, it reversed the judge's decision and held that, on the facts, such an injunction should not have been granted.

LOUISE MERRETT

SUPERSIZED SPEECH—MCLIBEL COMES TO STRASBOURG

THE "McLibel trial", the longest trial in English legal history, has finally come to Strasbourg. In its decision *Steel and Morris* v. *UK*, App. No. 6841/01 (judgment of 15 February 2005), the European Court of Human Rights has assessed English law concerning libel. Interestingly, it found that illegitimate restrictions on free speech may stem not from State prohibition, but from lack of State aid.

The applicants, a part-time bar-worker and an unemployed postman, were sued for libel by McDonald's, the fast-food giant. Using private investigators, McDonald's found out that a Greenpeace leaflet accusing it of "McCancer, McDisease and McGreed" was distributed by the applicants. After a lengthy trial, heard unusually by a judge alone, the judge found that M had participated in the production of the leaflet, and that both S and M had participated in its distribution. He found that some of the allegations contained in the leaflet were untrue (that McDonald's caused starvation, destroyed rainforests, forced tribes off their lands, lied about use of recycled paper, knowingly sold unhealthy food, and prevented unionisation of workers) and some were true (that McDonald's exploited children through its marketing, that it paid low wages, and that it promoted its food as having nutritional value that it did not possess). The judge awarded McDonald's through its US and UK corporate entities together, £60,000.

M and S were refused legal aid, which, under the Legal Aid Act 1988, was unavailable for defamation proceedings, so they largely represented themselves. Today, under the Access to Justice Act 1999, defamation proceedings would still be excluded from legal aid funding (Schedule 2, paragraph 1(a)(f)), subject to the possibility of special authorisation by the Lord Chancellor (section 6(8)).

The applicants claimed in the European Court that the unavailability of legal aid violated their rights under Article 6(1) of

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the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to fair trial) and under Article 10 (freedom of expression).

The Court found that the denial of legal aid violated Article 6(1), as it contributed to an unacceptable inequality between the applicants and McDonald's as litigants. The Court reiterated the principle it laid down in previous decisions, that there is no absolute right to receive legal aid, and its necessity for a fair trial must be assessed in each case. In reaching its present decision, the Court considered the complexity of the trial, the disparity between the parties, and the stake for the applicants—in this case the applicants' defence of their right to free speech. Although very different from matters in which previously the Court found legal assistance to be necessary for a fair trial—the determination of important family rights—the protection of free speech, which the Court called a Convention right of considerable importance, weighed in favour of recognising a right to legal aid, other circumstances considered.

The Court also accepted the Article 10 claim. It viewed the breadth of the free speech right of public campaigners as similar to that of journalists: both are important contributors to the public debate, and both, although allowed a degree of hyperbole, must provide accurate factual information. The Court left to the margin of appreciation of the States the decision whether to allow companies to sue for defamation. It viewed open debate about business practices as important, but also saw a legitimate interest in protecting commercial success of companies from harm to reputation. But the interest in free speech requires that a State which allows companies to sue for defamation must provide procedural means to ensure "equality of arms". The Court viewed the choice with which the applicants were faced—either withdrawing the leaflet and apologizing to McDonald's, or having to prove the truth of the allegations without legal aid—as breaching Article 10.

The Court found that the amount of damages itself, although modest compared to some recent awards in English cases, contributed to the breach of Article 10, as it was disproportional to the low incomes of the applicants.

It is suggested that, in view of the decision, the Lord Chancellor should publish a direction to the Legal Services Commission, under Article 6(8)(a), to fund legal aid in relation to defamation in cases where a meaningful exercise of freedom of speech is involved.

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A change in legal aid provision would start to redress the imbalance highlighted by the Court, but is it enough? Possibly, the ability of corporations to sue for libel, recognised in English law (*South Hetton Coal* v. *North-Eastern Association Ltd.* [1894] 1 Q.B. 133), should be re-examined. While the European Court allowed this within the margin of appreciation of the State, the underlying reasoning of the decision should serve as a call for a reassessment of English law in light of the Human Rights Act.

Protection of human dignity is sufficiently important to silence speech; protection of commercial reputation is not. In *Derbyshire CC* v. *Times* [1993] A.C. 534, the House of Lords explained why local authorities should not be able to sue for libel, stating that it is of public importance that a governmental body should be open to "uninhibited public criticism". This would seem to hold equally true for large commercial corporations. They, no less than the government, control the marketplace of ideas. They are powerful public actors, impacting upon people's lives, and should be open to the same kind of criticism as governmental bodies.

If corporations could not sue for libel, the tort of injurious falsehood would still be available when knowledge of the falsehood or an improper motive could be established. This would answer the legitimate need to protect companies from rivals who try to cause harm to their business by spreading false information about them. At least, the adoption of the more limited 1975 Faulks Committee suggestions, that companies should not be able to sue for libel without showing financial loss or likely financial damage, should be considered.

The Court's determination that conformity of damages with Article 10 must be assessed, not only in relation to extent of the injury, but also in relation to the defendant's income and resources, presents a challenge to English law. Currently, the resources of the parties are taken into account in awarding exemplary damages, but not in the award of compensatory damages (*John* v. *MGN Ltd.* [1997] Q.B. 586). The English courts already consider the involvement of the right of free speech as a reason for reducing the size of libel damages: a court's power, under section 8 of the Courts and Legal Services Act 1990, to substitute another award where a jury has awarded "excessive" damages, must be construed in a manner consistent with Article 10 (*Rantzen* v. *Mirror Group Newspapers* [1994] Q.B. 670). The defendant's income could be seen as one factor in the consideration of the conformity of the damages with Article 10.

The European Court has decided that the outcome of current English law is a breach of fundamental rights. This situation should

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be rectified, both by change in the provision of legal aid, and by examination of other possibilities of redressing disparity in such cases.

A. SCOLNICOV

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