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### The European Court of Human Rights Takes a Step Toward Balancing the Arms

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## McGoliath v. David: The European Court of Human Rights Recent “Equality of Arms” Decision

By Monique C. Lillard\*

### A. Introduction

The European Court of Human Rights has issued a judgment which adds to the developing law of Article 6, Section 1 (right to a fair hearing) of the European Convention on Human Rights (ECHR or “the Convention”) and which sheds light on Article 10 (freedom of expression) and its interaction with the law of defamation. Practically, the decision in *Steel and Morris v. the United Kingdom* (hereinafter referred to as *Steel*)<sup>1</sup> is likely to prompt a review of the availability of legal aid for defendants in civil cases in the United Kingdom (“UK”), and may be a small step towards balancing the arms in *ad terrorem* suits brought by large corporations against private citizens in order to silence public debate.

### B. Background

In the mid-1980’s, Helen Steel was intermittently employed for a low wage and David Morris was an unemployed single father.<sup>2</sup> They were associated with a small political group of environmental activists called London Greenpeace (unaffiliated with Greenpeace, International).<sup>3</sup> In 1986 Steel and Morris helped produce

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\* Professor of Law, University of Idaho. The author wishes to thank: Prof. Florian Hoffman for thoughtful editorial suggestions; Staffordshire University Law School (U.K.) for resources provided during her sabbatical year; and Keith Puttick, Principal Lecturer in Law at Staffordshire University Law School for his generous sharing of a U.K. perspective on this case.

<sup>1</sup> Case of *Steel and Morris v. United Kingdom*, App. No. 68416/01 (15 February 2005), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>. This case will be hereafter referred to as “*Steel*.”

<sup>2</sup> *Id.* at para. 9.

<sup>3</sup> *Id.* at para. 10.

and distribute a six-page leaflet entitled "What's wrong with McDonald's?"<sup>4</sup> The leaflet, a rigorous and resonating rant, purported to expose global economic injustice, the evils of beef production and rainforest defoliation, the health problems with McDonald's food, the cynicism of McDonald's marketing to children, and the undesirability of McDonald's employment practices. It contained the suggestion that parents prompt their children's imaginations by telling them the "grim story about how hamburgers are made," and turn the Ronald McDonald clown into a bogeyman.<sup>5</sup> One of the headings in the leaflet was "In what way are McDonald's responsible for torture and murder?"<sup>6</sup> Upon reading the text under this heading, one realizes that the reference is to holding animals in artificial and confined positions, then slaughtering them.<sup>7</sup>

A few thousand of the leaflets were distributed. McDonald's reacted with vigor, hiring seven private investigators from two different firms to infiltrate London Greenpeace.<sup>8</sup> After determining that London Greenpeace was not an incorporated body, so that no legal action could be taken directly against it, McDonald's<sup>9</sup> issued a writ against Steel, Morris and three others,<sup>10</sup> alleging libel. Thus began the longest trial, either civil or criminal, in English legal history.

It was deemed to be too prolonged and too complicated for a jury, so the matter was tried to a single judge, Mr. Justice Bell. McDonald's was represented by leading and junior counsel with experience in defamation law, and by several solicitors and assistants. Steel and Morris applied for but were denied legal aid because it was not available for defamation proceedings in the UK.<sup>11</sup> They therefore represented themselves throughout the trial and appeal, although they received help from barristers and solicitors acting *pro bono* and on an *ad hoc* basis.<sup>12</sup> It is estimated

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<sup>4</sup> *Id.* at paras. 10 and 11. The applicants protested the trial judge's finding that they assisted in production of the leaflet.

<sup>5</sup> *Id.* at para. 12.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at para. 13.

<sup>9</sup> Plaintiffs were McDonald's Corporation (a U.S. company) and McDonald's Restaurants Limited (a UK company), hereinafter referred to collectively as "McDonald's." *Id.* at para. 14.

<sup>10</sup> McDonald's withdrew proceeding against the three other defendants, in exchange for an apology. *Id.*

<sup>11</sup> *Id.* at para. 16.

<sup>12</sup> *Id.*

that McDonald's spent over GBP 10 million on trial expenses. Steel and Morris quickly used up the GBP 40,000 raised by donation for them. After 20,000 pages of transcripts, 40,000 pages of documentary evidence, 130 witnesses, Judge Bell deliberated for six months, then delivered his 762 page judgment in June, 1997, ten years after the leaflet was distributed by Steel and Morris and seven years after McDonald's had sought the writ.<sup>13</sup>

Judge Bell found numerous untruths in the leaflet. He was careful in his findings, as is demonstrated by the following excerpted finding:

The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' [i.e. McDonald's] advertisements, promotions and booklets have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.<sup>14</sup>

Steel and Morris counterclaimed for defamation arising from a leaflet produced by McDonald's entitled "Why McDonald's is going to Court," which alleged that Steel and Morris had published the original leaflet knowing it to be untrue.<sup>15</sup> Judge Bell found that McDonald's allegation that Steel and Morris had lied was "unjustified," but that those unjustified remarks were made with qualified privilege.<sup>16</sup> He found that the privilege was not lost because McDonald's had not acted with malice.<sup>17</sup>

Although McDonald's had proven no actual damages, Judge Bell awarded McDonald's GBP 60,000.<sup>18</sup>

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<sup>13</sup> *Id.* at para. 26.

<sup>14</sup> *Id.* at para. 27.

<sup>15</sup> *Id.* at para. 28.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> McDonald's did not invoke the English Rule, and did not ask for an order that the applicants pay their costs. *Id.* at para. 29.

An appeal followed, lasting 23 days, which resulted in a 301 page judgment.<sup>19</sup> The Court of Appeal found in applicants' favor on some points, disagreeing with Judge Bell about the truth of the sting of some of the leaflet's allegations, including the justification for writing that "if one eats enough McDonald's food, one's diet may well become high in fat, etc., with the very real risk of heart disease."<sup>20</sup> The Court of Appeal therefore reduced the damages to GBP 40,000.<sup>21</sup> The House of Lords refused further leave to appeal.<sup>22</sup>

Steel and Morris then applied to the European Court of Human Rights (ECtHR), which allowed them to bring two complaints. One, under Article 6, Section 1 of the Convention, contending that the denial of legal aid rendered the proceedings unfair; the other under Article 10, contending that the defamation proceeding and its outcome interfered disproportionately with applicants' right to freedom of expression.

### C. Unfair Trial – Lack of Counsel

Article 6 Section 1 of the Convention provides: "In the determination of his civil rights and obligations . . . , everyone is entitled to a fair . . . hearing . . . by [a] . . . tribunal. . ."<sup>23</sup> The Convention left Contracting States with a free choice of the means of ensuring effective civil access to court, and deliberately omitted an obligation to provide legal aid in civil cases.<sup>24</sup>

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<sup>19</sup> *Id.* at paras. 30-35. That appeal was heard in 1996, before the incorporation of the Convention into UK Law by the Human Rights Act 1998. If the appeal had been heard after that Act came in to operation (in October 2000) the UK's Court of Appeal would have been obliged to hear the arguments based on the Convention articles, and the matter need not have gone to the ECtHR in Strasbourg.

<sup>20</sup> *Id.* at pars. 34.

<sup>21</sup> *Id.* at para. 35.

<sup>22</sup> *Id.* at para. 36.

<sup>23</sup> European Convention on Human Rights, Nov. 4, 1950, art. 6(1), available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

<sup>24</sup> One alternative available to States is simplifying applicable civil procedure so that the system is more accessible. Another, used extensively by Judge Bell in the McDonald's case, is for the judge to intervene frequently during the courtroom proceedings. Case of Steel and Morris v. United Kingdom, App. No. 68416/01 (15 February 2005), paras. 57, 60 and 62, available at <http://cmiskp.echr.coe.int///tkp197/viewbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

In this case, the applicants were refused legal aid because the UK Legal Aid Act of 1988 explicitly provided that defamation proceedings were excepted from the legal aid scheme.<sup>25</sup> That Act was in force throughout the trial and appeal. In assessing whether this procedure, as applied to Steel and Morris, was in violation of Article 6(1), the European Court of Human Rights recalled that the right of access to a court is not absolute.<sup>26</sup> It does not demand "equality of arms" between both sides, "as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary."<sup>27</sup> Nor is there a right under the Convention to obtain free legal aid in civil matters.<sup>28</sup>

But the ECtHR held that the right of access secured by Article 6(1) does sometimes require the Convention states to provide legal aid in civil suits and found that the UK had violated this duty in the present case. The question that arises from this ruling is *when* legal aid in civil suits must be provided. *Steel* does not provide a satisfactory general answer, even though the ECtHR did determine that applicants Steel and Morris were deprived of their opportunity to present their case effectively by the denial of their request for legal aid.<sup>29</sup> Rather than set forth a clear standard, *Steel* continues the practice of answering on a case-by-case basis, depending "*inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively."<sup>30</sup> Clear guidelines are elusive in *Steel*. Cases like *Steel*, decided on the basis of the totality of the circumstances or case-by-case factual

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<sup>25</sup> Legal Aid Act 1988, Schedule 2, Part II, Paragraph 1. Since then legal aid law in England and Wales has been reformed by the Access to Justice Act 1999. The new act still maintains the presumption that civil legal aid should not be granted in defamation suits, but does allow for discretionary exceptional funding for cases involving wide public interest. Defamation suits could be treated favorably, within that discretion, but have not been.

<sup>26</sup> Case of Steel and Morris v. United Kingdom, App. No. 68416/01 (15 February 2005), para. 62, *available at* <http://cmiskp.echr.coe.int////tkp197/viewbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

<sup>27</sup> *Id.*

<sup>28</sup> *Airey v. Ireland*, 2 EHRR 305 (9/10/79)(Mr. O'Donoghue, Dissenting).

<sup>29</sup> Case of Steel and Morris v. United Kingdom, App. No. 68416/01 (15 February 2005), para. 72, *available at* <http://cmiskp.echr.coe.int////tkp197/viewbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

<sup>30</sup> *Id.* at para. 61.

analysis, are notoriously unhelpful for those who yearn to know the rules of law. While the ECtHR was acting in a supervisory, or review, mode, and as such is not attempting to take the place of competent national rule-making authorities,<sup>31</sup> people in Convention states charged with determining eligibility for civil legal aid will find themselves obliged to attempt to predict outcomes in future similar cases. They may only draw conclusions from a study of the ECtHR's method of analysis and the facts it found determinative in *Steel*.

First the ECtHR studied the character of the underlying civil case. The ECtHR pointed out that defamation actions are less serious and important than family rights cases, which affect relations between and among individuals, including children.<sup>32</sup> But the ECtHR noted that, in the instant case, *Steel* and *Morris* were defendants who had not chosen to commence the lawsuit,<sup>33</sup> but who were faced with significant damages.<sup>34</sup> Throughout the opinion the ECtHR also acknowledged the scope and complexity of the proceedings, noting that defamation law is inherently complicated and nuanced. In this respect, it seems pertinent to the ECtHR's analysis that the factual issues in contention were detailed and technical, touching on disparate areas of scientific knowledge.

Then the ECtHR assessed the applicants, inquiring into how able they were to present their own cases?<sup>35</sup> This analysis was made in hindsight, and therefore became more nearly an inquiry into how well the applicants actually performed, as opposed to how well they might have been expected to perform. The ECtHR concluded that *Steel* and *Morris* were "articulate and resourceful," forceful and persistent.<sup>36</sup> The ECtHR also noted that the applicants had been given some help from solicitors, and both Judge Bell and the Court of Appeals gave them some latitude for their inexperience. But the opinion is laden with evidence of how their lack of legal knowledge and experience hampered and possibly crippled their case. The ECtHR wrote: "neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in

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<sup>31</sup> *Id.* at para. 87.

<sup>32</sup> *Id.* at para. 63.

<sup>33</sup> *Id.* Of course, *Steel* and *Morris* could have chosen to apologize and be dismissed, like the three others who were sued along with them. But to do so would be to give up expressive rights. At this point the applicant's Article 10 rights link to their Article 6 rights.

<sup>34</sup> *Id.* McDonald's originally pled for damages up to GBP 100,000. The ECtHR compared the pled amount to the applicant's small or nonexistent incomes.

<sup>35</sup> *Id.* at para. 68.

<sup>36</sup> *Id.*.

person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel."<sup>37</sup>

The situation of Steel and Morris was contrasted with that of the applicant in the similar case of *McVicar v. the UK*.<sup>38</sup> Mr. McVicar, also a citizen of the UK and also a defendant in a defamation suit, had applied for and been denied legal aid.<sup>39</sup> McVicar also lost in the underlying lawsuit and had then applied to the ECtHR, asserting the same grounds: right to fair trial and freedom of expression. He was, however, unsuccessful.<sup>40</sup> The ECtHR in *Steel* distinguished McVicar's factual situation regarding his Article 6(1) allegation from the circumstances in the *Steel* case.<sup>41</sup> Mr. McVicar, the ECtHR noted, had been required to prove the truth of only a single, principal allegation.<sup>42</sup> Steel and Morris, on the other hand, were faced with proceedings of a different scale, given the length of the trial and complexity of the factual and legal issues.<sup>43</sup> The ECtHR also noted that Mr. McVicar was a well-educated and experienced journalist, and was represented for a significant portion of the proceedings by a solicitor specializing in defamation law.<sup>44</sup> Steel and Morris, on the other hand, were less well-educated and had less help from lawyers.

The ECtHR's attention to factual detail is interesting, and *McVicar* is logically distinguished, but the large questions remain unanswered: will Article 6(1) become a backdoor means to civil legal aid in Convention states? When, exactly, should Convention states consider that the Convention requires legal aid to be provided?

While Steel and Morris were defendants in a legal action, therefore not the instigators of the lawsuit, it is nonetheless possible to characterize them as the instigators of the events as they "toke on" McDonalds by leafleting and making active protest.

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<sup>37</sup> *Id.* at para. 69.

<sup>38</sup> *McVicar v. the United Kingdom*, App. No. 46311/99 (7 May 2002), available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=34164&sessionId=2275835&skin=hudoc-en&attachment=true>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Case of Steel and Morris v. United Kingdom*, App. No. 68416/01 (15 February 2005), paras. 64 and 67, available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

<sup>42</sup> *Id.* at para. 64.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at para. 67.



This was their right, of course, and is a right to be protected. But it is esoteric, a matter of principle. Other civil actions, whether people are technically plaintiffs or defendants, involve much more fundamental matters of existence. The ECtHR in *Steel* recognized this by implying that family law matters are more deserving of assurance of fair access and equality of arms than defamation suits.<sup>45</sup> On this reasoning, however, shouldn't employment matters also be protected by a grant of legal aid? After all, where people's livelihood is at stake, the consequences of losing income stream tangibly and quickly affect nearly every aspect of the lives of the dismissed worker and his or her family and dependents. Furthermore, employment proceedings can also be factually and legally complex, and often involve a large, rich, well-represented corporation on one side and an unsophisticated, unrepresented and underfunded individual on the other. On the other hand, it could be argued that employment, welfare and even family disputes are less deserving of public funding than defamation suits, given the latter category's potential for chilling important speech rights. By providing nothing more than a factual analysis of the proceedings below, the ECtHR leaves us pondering the extent and direction of its decision.

The U.K. Government had argued that the determination that legal aid was "'indispensable for effective access to court'" was reserved for "exceptional circumstances."<sup>46</sup> The ECtHR failed to pick up this language, and presented its analysis as completely factual, stating:

The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>47</sup>

This statement in *Steel* is neither a rule nor a standard, but is merely an open-ended invitation to test the limits of Article 6(1). *Steel's* Article 6(1) finding is not limited to defamation cases, so it is likely to provoke a review of the funding of a variety of civil suits in public and private law systems, along with a more general examination of access to the courts.

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<sup>45</sup> *Id.* at para. 63 (citing *McVicar v. the United Kingdom*, App. No. 46311/99 (7 May 2002), para. 61, available at [http://cmiskp.echr.coe.int//\\_/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=34164&sessionId=2275835&skin=hudoc-en&attachment=true](http://cmiskp.echr.coe.int//_/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=34164&sessionId=2275835&skin=hudoc-en&attachment=true)).

<sup>46</sup> *Id.* at para. 55.

<sup>47</sup> *Id.* at para. 61.

#### D. Unfair Trial – Other Complaints

The ECtHR declined to use its process as a backdoor appeal of specific substantive issues. Insofar as the applicants alleged that specific rulings made by the judges caused unfairness in breach of Article 6, Section 1, the ECtHR considered these “subsumed within the principal complaint about lack of legal aid.”<sup>48</sup>

#### E. Free Expression

Article 10, Section 1 of the Convention establishes the right to freedom of expression, including to hold opinions and to receive and impart information and ideas. Section 2 restricts these rights, as “necessary in a democratic society,” to protect, *inter alia* “the reputation or rights of others.”<sup>49</sup> Defamation law has long hovered within the crack between the concepts espoused by these two sections.<sup>50</sup> Legal protections offered by defamation law are an admitted interference with freedom of expression, but the interference is justified by the legitimate governmental aim of protecting the reputation and rights of others. The application of *Steel and Morris* led the ECtHR into this area of delicate balance.

The ECtHR began its inquiry by focusing on what is “necessary in a democratic society” and assessing the proportionality of the limitation imposed by defamation suits upon free expression. It noted the important political concerns expressed in the leaflet, and quickly rejected the UK government’s suggestion that as non-media defendants these applicants were entitled to less protection than the press.<sup>51</sup> At several points the ECtHR underlined the important public role of campaigns like

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<sup>48</sup> *Id.* at para. 75.

<sup>49</sup> *Id.* at para. 77 (quoting Article 10 of Convention). These restrictions are conceived within a legal and democratic framework.

<sup>50</sup> See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964). Indeed, the arguments made by applicants are similar to those made by defendants in *New York Times*. *New York Times* was asserted by the applicant in *McVicar* (*McVicar v. the United Kingdom*, App. No. 46311/99 (7 May 2002), para. 65, available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=34164&sessionId=2275835&skin=hudoc-en&attachment=true>) but was not addressed by the ECtHR.

<sup>51</sup> Case of *Steel and Morris v. United Kingdom*, App. No. 68416/01 (15 February 2005), paras. 89-90, available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

that launched by London Greenpeace.<sup>52</sup> The ECtHR found troubling, however, that the leaflet made serious allegations presented as statements of fact rather than value judgments.

It rejected applicants' arguments that McDonald's, as a large multinational company, should be unable to sue for defamation. The ECtHR reasoned that even large companies should be allowed "to challenge the truth, and limit the damage, of allegations which risk harming its reputation."<sup>53</sup> But the crux of the ECtHR's holding<sup>54</sup> was that, if a State does provide defamation remedies to corporate bodies, "it is essential, in order to safeguard the countervailing interests in free express and open debate, that a measure of procedural fairness and equality of arms is provided for."<sup>55</sup> The ECtHR recognized that an inequality of arms can be especially devastating to defendants in defamation cases, because they bear the burden of proving truth, a burden that the ECtHR was unwilling to declare incompatible with Article 10.<sup>56</sup>

The ECtHR focused particularly on the size of the damage award, which the Convention requires to bear a reasonable relationship of proportionality to the injury suffered.<sup>57</sup> The ECtHR's reasoning is not particularly clear here. The ECtHR was troubled that McDonald's received presumed damages, that is, that McDonald's did not have to prove that they had in fact suffered any financial loss.<sup>58</sup> The ECtHR also noted the disproportionality between the amount of damages and the incomes of Steel and Morris.<sup>59</sup> The ECtHR does not indicate which of these facts was determinative in concluding that applicants' Article 10 rights had been abrogated in the English lawsuit. The fact that McDonald's had done nothing, to date, to enforce the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at para. 94.

<sup>54</sup> *Id.* at para. 98. The ECtHR rejected, summarily, the applicants' objection to the placement of the burden of proof on truth should not be on the defendant. It refused to disturb factual findings by the UK courts regarding applicants' role in production of the leaflet and the relevance of similar leaflets earlier by other organizations.

<sup>55</sup> *Id.* at para. 95.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 96 (citing *Tolstoy Miloslavsky v. the UK*, 316-B Eur. Ct. H. R. (ser. A) at para. 49 (1995)).

<sup>58</sup> *Id.* at paras. 95-97.

<sup>59</sup> *Id.*

damages was not important, as the judgment against Steel and Morris remains pending and enforceable against them.<sup>60</sup>

This decision in *Steel* was in line with ECtHR precedent, notably *Thorgeir Thorgeirson v. Iceland*<sup>61</sup> and *Hertel v. Switzerland*.<sup>62</sup> *Thorgeirson* established the importance of freedom of expression for controversial issues not purely political, but involving matters about which there was strong interest in open public debate; the matter at issue was police mistreatment of citizens. *Hertel* was factually more like *Steel*, at it involved the expression of off-beat, non-mainstream views of science and health. Mr. Hertel wrote a research paper detailing a study he had done on the human effects of the consumption of food prepared in microwave ovens.<sup>63</sup> He sent that paper to the *Journal Franz Weber* which expanded on the findings, enlivened the writing, and added illustrations of the Grim Reaper peering out of and pointing to microwave ovens.<sup>64</sup> The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances was quick to sue under Swiss unfair competition law, winning an injunction against, among others, Mr. Hertel.<sup>65</sup> Mr. Hertel was prohibited from making certain specified statements about microwave ovens.<sup>66</sup> After determining that the injunction, an obvious infringement of speech, was "prescribed by law" and motivated by "legitimate aim," the ECtHR determined that the injunction was not "necessary in a democratic society" to achieve those aims.<sup>67</sup> That last inquiry required mainly an assessment of proportionality. In order to protect the manufacturers' commercial interests, the Swiss courts had curtailed applicant's right to utter statements "related to the very substance of his views" and had "partly censored his work."<sup>68</sup> This went beyond what was "necessary."<sup>69</sup>

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<sup>60</sup> *Id.* at para. 95 (citing *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88 (25 June 1992), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson&sessionid=2282851&skin=hudoc-en>).

<sup>61</sup> *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88 (25 June 1992), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson&sessionid=2282851&skin=hudoc-en>).

<sup>62</sup> *Hertel v. Switzerland*, App. No. 25181/94 (25 August 1998), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hertel&sessionid=2282932&skin=hudoc-en>

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at para. 20. The injunction was limited and specific about what could not be said.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at para. 50.

## F. Remedies

Under Article 41 of the Convention, the ECtHR awarded no pecuniary damage to Steel and Morris, because they had not incurred actual costs for their own lawyers, nor was there proof that they had lost earnings as a result of the preparation of their own defense.<sup>70</sup> However, Steel and Morris were awarded non-pecuniary damages of EUR 20,000 and 15,000, respectively, for stress, anxiety, stress-related physical illness and Mr. Morris' lost time with his young son.<sup>71</sup> The ECtHR was careful to separate the natural stress suffered by litigants to any lawsuit from the extra anxiety felt by Steel and Morris because they had to defend themselves.<sup>72</sup> Steel and Morris did have counsel and solicitors for the ECtHR hearing; some of those expenses (EUR 50,000) were awarded.<sup>73</sup>

## G. *Ad terrorem* Suits

The ECtHR did not comment on or make any reference to McDonald's motivation for bringing the suit. The absence of pecuniary loss, McDonald's willingness to drop the matter for an apology, and McDonald's admitted lack of desire to enforce the judgment show that McDonald's was not in the suit for the money. Nor is it likely that McDonald's was hurt, in any sense, by the distribution of a few thousand leaflets. Ironically, by bringing this suit, McDonald's has broadcast the assertions in the leaflet far beyond the streets of London. Even if it is assumed that a corporation can have such emotions as pride, humiliation, or satisfaction from an abstract victory, it is an astounding business decision to invest GBP 10 million on lawyers, plus the cost of three years of private detectives, just as a balm to an infinitesimally damaged reputation.

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<sup>69</sup> *Id.* at para. 51.

<sup>70</sup> Case of Steel and Morris v. United Kingdom, App. No. 68416/01 (15 February 2005), paras. 100-112, available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

But it would be a savvy business decision to try to nip such leafleting and criticism in the bud. The leaflet contained a fair amount of accurate information along with its stinging value judgments. Certainly McDonald’s won in both the trial court and the Court of Appeal, so its case was not without merit. Nonetheless, the main purpose of the suit may well have been to chill and stifle potential future critics. This case demonstrates that even indigents, and therefore certainly people with any economic assets, are intimidated and even terrorized by the prospect of a large civil judgment – hence the appellation *ad terrorem* suits.<sup>74</sup> McGoliath may well have been attempting to gag not only David Morris and Helen Steel, but also potential future Davids who were crafting their slingshots.

It is hard to define an *ad terrorem* suit, and even harder to formulate legal rules to stop such legal actions; motivation is usually irrelevant if one stands on firm legal ground. Perhaps it is just as well that the ECtHR proceeding stayed away from the accusatory label.<sup>75</sup> By avoiding the focus on McDonald’s motivation, the ECtHR allowed its decision to have even broader effect. As it stands, the ECtHR decision, despite its vague parameters, is a victory for the less powerful parties to important civil suits throughout the states parties of the Convention.

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<sup>74</sup> McDonald’s case was not meritless, but otherwise would meet the standard definition of a Strategic Lawsuit Against Public Participation or “SLAPP.” Defamation is one of the favorite tools of SLAPPers. See D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, 9 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 491 (2001). California and other American states have successfully attempted to prevent SLAPP suits. See, e.g., Cal. Code Div. Pro. Section 425.16. See, generally, Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss* 22 COA2d 317 (Oct. 2004).

<sup>75</sup> In fact, the ECtHR correctly defended McDonald’s ability to sue. “[T]he fact that the plaintiff . . . was a large multinational company should [not] in principle deprive it of a right to defend itself against defamatory allegations. . . . [T]here is an interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, [and] for the wider economic good.” *Case of Steel and Morris v. United Kingdom*, App. No. 68416/01 (15 February 2005), para. 94, available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=42244&sessionId=2271639&skin=hudoc-en&attachment=true>.