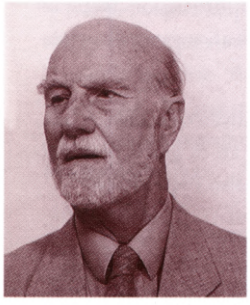
An informer's tale

by John Booth



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John Booth here examines the management by the Inland Revenue of a false informer. The subsequent failure of the Inland Revenue to either apologise to the informer's victim or provide compensation for worry, inconvenience and expense is also considered.

Under the thirty-year (copyright) rule, contemporary information from government departments is restricted, but through the Reports (with evidence) of the Parliamentary Commissioner for Administration's Select Committee ('the Committee') into taxpayers' complaints, departmental procedures and explanations are published. The report into Case No C.126/J (1974–75 HC 49 XXIX, 585) is one such case. It showed the Inland Revenue's error of judgment over the management of the information received and its refusal to apologise and provide redress. The outcome was a change of administrative policy over compensation; also revealed was an ambiguous policy over the protection of the identity of the false informer, frustrating an action in tort for damages against the Inland Revenue ('the Revenue').

The case is of interest not only because of the ambiguous position of the informer, but because the Revenue – having refused any compensation to the complainant – submitted an appendix to the Committee 'to consider compensation on … the facts of each case'. It is considered here in the light of the report and the Committee's minutes of evidence (1974–75 HC 454 XXX, 1, Appendix; HC 454 XXI), which should be read together. The Parliamentary Commissioner (the 'Commissioner') is clear that the Revenue enquiries were based on inaccurate information causing worry, inconvenience and expense, for which compensation was refused.

FACTS AND BACKGROUND

The informer's involvement with the Revenue is complex and indicative of the criticisms reflecting the 'eccentric busy-body' to whom Lord Edmund-Davies later referred in *D v NSPCC* [1977] 1 All ER 589 at p. 615f. In the summer of 1974, the informer 'had seen a man painting a house' and, asking for an estimate to paint his own house, was given one price for cash and a higher one with a bill and cheque. The informer then made his own enquiries and reported it to the Revenue.

The Commissioner accepted the inspector's duty to follow up information, required where an inspector, if dissatisfied with a return, 'may make an assessment to the best of his judgment'. In 1968, a Select Committee was shown to have thought that help for an individual was needed regarding a rigorous inspector where 'discretion is of the highest importance' (1968–69 HC 101-ii, XII, 541, q. 164). In 1986 the *Financial Times* advised it prudent to satisfy an inspector's reasonable curiosity, if he 'is not acting from an excess of zeal'.

The chairman of the Board of the Inland Revenue ('the Board') agreed with the Commissioner, before the Committee, about the 'peremptory' tone of the inspector's letter and criticism was made of the refused 'request to be seen in another district'. But the Commissioner also found that not 'enough consideration was shown to the complainant' and that 'a more courteous approach seems to have been indicated', suggesting an 'excess of zeal'. The information received from the informer proved inaccurate, but the Revenue reported to the Commissioner 'the standing' of the informer, on which was claimed an entitlement to 'assume that the evidence was reliable'.

In the 1991 Taxpayer's Charter it is shown that the Revenue maintain a 'presumption of taxpayer honesty'. In this case the taxpayer (the complainant) was shown to have been employed by the Post Office, where character references as to integrity are required; his completed income tax return showed his only income to be from the Post Office. Despite these contradictions the Revenue continued to believe the informer, until the inspector visited the house which had been painted and, 'following enquiries, he was able to establish that it was not the complainant who had done the painting'. A letter was sent by the inspector stating that he could not apologise for doing the job which he had to do, but regretting that the complainant had been troubled unnecessarily.

The Revenue were unabashed, claiming to the Select Committee that it was not the Revenue which had made a mistake but the informer, re-asserting that he was a 'person of some standing' and that the action taken was 'not unreasonable'.

ANONYMITY OR NOT?

Such was the disbelief of the inspector as to the protestations of innocence, that it was reported to the Commissioner that 'it might be necessary to ask the complainant to call, when the informer was present, or to supply a photograph'. Thus faced by his accuser, with identity revealed and the (alleged) privilege of anonymity overcome, it would then have been possible for the

complainant to have considered a case in tort, for defamation, with damages.

It was a point taken up by the Committee. Mrs Kellett-Bowman MP asked:

Q. *'He would have a civil remedy, would he not? ... against the informant. I should have thought it was libellous?'*

A. *'He would not know who the informant was'.*

Q. *'You protect your informants?'*

A. *'Oh, yes. We certainly would not tell him who the informant was'.*

However, without an immunity certificate from a court, this was an assumed authority. The invitation for accuser (informer) and accused (taxpayer/complainant) to meet also appears to be an admission of willingness to exchange knowledge of identities, revealing the ambiguity of this 'protection' by the Revenue. The Revenue were asked about the protection of anonymity given to an informer and commented that 'public interest immunity has its source in the common law rather than statute'. Although *D v NSPCC* was quoted as an authority, that case did not reach the House of Lords until 1977 and the Commissioner reported Case No. C.126/J in December 1974; this does not suggest close attention to detail by the Revenue. *D v NSPCC* was later important, however, as it was shown to have drawn some of the origins of anonymity from the protection of police informants which in *Marks v Beyfus* [1890] 25 QB 494, 'had already hardened into a rule of law'.

MEDIEVAL GLOOM

The secrecy or the anonymity of informers was created by the courts with origins shown to be shrouded in medieval gloom – giving unacceptable powers to the malicious informer without sanctions – and undermining legislative authority.

None of the immunity explanations were provided for the Committee, but the Commissioner did report the department's excuse of countering tax evasion, saying that without such immunity these 'enquiries into tax evasion, with [their] valuable policing effect, would tend to dry up'. This rationale had departmental origins in administrative convenience, rather than an analytic assessment of advantages. Neither was the inspector's suggestion, made at one stage, to arrange a meeting with informer and complainant commented on again. Such a meeting would have made a nonsense of preserving immunity.

The Committee did, forcibly, show their concern over the 'problem of expenses ... to the taxpayer', specifically stating that 'the case ... which has worried us is Case No. C.126/J'. The Commissioner had reported that the claimant had been told that 'there is no question of compensation from the Inland Revenue', concluding that he could only report that the claimant had 'been put by the inspector's enquiries to needless expense for which he can obtain no redress'. This had also been confirmed by a Treasury minister who 'refused any reimbursement of the solicitor's fees that the taxpayer had unnecessarily incurred'.

Before the Committee, the Board stated their opposition to reimbursement of expenses:

'where we inevitably go wrong should we then pay the expenses incurred by the other side? I think that this is very, very difficult'.

THE COMMITTEE AND COMPENSATION

Whilst admitting that '... this was a small affair', the Board's obduracy was excused on grounds that in complex cases some expense amounts involved 'can run into very large sums', making it difficult to pay 'in this case', but if the 'fees were in four figures, we do not pay'. This was an incomplete discussion because the Revenue 'excuse' of not paying in four figures was not a confirmation that the cases under discussion were in response to false informers, merely such as arise generally when 'we go wrong'.

It was an argument again of administrative convenience; the Committee was not convinced, suggesting an ex gratia payment to meet modest expenses. The Board was also required to:

'look again, because these cases leave us very uncomfortable indeed. We see that a man who can ill afford legal fees has had to incur them and that is not to our liking at all'.

On 5 February the matter was looked at once more and on 16 June a letter from a Mr Price, representing the Board, was sent to the Clerk of the Committees and published as an *Appendix* to the *First Report from the Select Committee* on 2 July 1975.

The letter considered compensation: 'typically, the loss will be in respect of compliance costs ... covering such things as agent's fees'. It was accepted that 'when the taxpayer's costs arise directly out of a serious error on the part of the Board itself', as a general principle 'it would be right for the Board to consider compensation ... on the facts of each case ... and this will be the Board's future practice'. It might have then been the Board's 'future practice', but the change in policy was not made widely known and was not practised in tax districts. The letter of 16 June 1975 was only discovered by a practitioner in 1992 from the advice of an inspector.

However, the Board's 'policy' of not paying compensation for department errors and mistakes was in contradiction to Treasury instructions dating from 1897. It is shown, in consequence of an examination by the Committee of Public Accounts of the 1894–95 Appropriation Accounts, that the Board had been severely criticised over dispensing payments which 'they had no power to remit', (1897 HC 196 VIII, 5). A Treasury Minute was issued, which is the authority for all subsequent dispensations. It stated that:

'(2) A remission may be made in favour of individuals from motives of equity or compassion' ((1898) HC 261 VIII, 147).

It is suggested that all subsequent obstacles to payments in 'equity or compassion' could have been made on such dispensationary authority and that Case No. C.126/J was such a case. The letter of 16 June 1975 disguised the fact that authority already existed. The subsequent *Code of Practice* accepted, publicly, compensation payments for which authority had existed – and been resisted – since 1897.

ERRORS OF JUDGMENT

The minutes of the Select Committee show the Board seeking to distance the department from its errors of commission. One error was that of the tenacious inspector, whose authority (under the *Taxes Management Act* 1970) is that 'he may make an assessment to tax to the best of his judgment'. Another was that of the district inspector who took over the case. It was not

correct for the Board to claim that the mistake was 'solely' made by the informer. The mistake, under statute, was the failure by the inspector to exercise the 'best of his judgment'; it was not good enough. To have escaped criticism the Revenue could have brought the informer within the *Perjury Act 1911* by a declaration, and then brought him before the courts, but that procedure was not followed.

Neither was it helpful of the Board's representative to add, in response to a question from Mrs Kellett-Browne (member of the Committee), that 'this is the sort of case where one would expect that the loss just lies where it falls'. It was nothing of the sort. The responsibilities accrued under s. 29 of the Taxes Management Act.

The Board's chairman interposed a hypothetical case of following up a bank certificate of interest received in the name of 'X' as, in his view, 'the circumstances here are not very different'. Those circumstances are totally different, as it is the Taxes Management Act which requires that:

'every person carrying on the trade or business of banking, shall, if required to do so by notice from an inspector, make and deliver ... a return of all interest paid or credited ... giving the names and addresses of the persons to whom the interest was paid or credited'.

Such statutory declarations bear no relation whatsoever to unsolicited comments from 'eccentric busybodies' and such comparison is not valid.

REDRESS IN TORT

It remains to consider redress for the complainant, which was denied. It was stated by the Commissioner that the complainant 'can obtain no redress'.

The question of libel was raised by a Committee member; the chairman did interject, 'No, I do not think he could get a civil remedy'. The possibility of a libel action was not denied, only that 'he [the complainant] would not know who the informant was'. The case report stated that the inspector had said that 'it might be necessary to ask the complainant to call when the informer was present. The complainant said he would welcome the opportunity'. It is assumed that the Revenue would also have had the agreement of the informer.

The suggested meeting between informer and complainant is odd, implying a willingness to exchange identities. Had this taken place the complainant would have had the option of an action in tort for libel, slander or defamation. When asked, the Revenue did confirm that they 'will not disclose an informant's identity unless required to do so by a court order'.

Although the Revenue (erroneously) quoted the authority for anonymity in *D v NSPCC*, support for protecting an informant's identity did exist in 1973. Lord Diplock, in *D v NSPCC* in 1977, referring to *Marks v Beyfus*, took the view that the refusal to disclose the identity of an informer had 'already hardened into a rule of law'. But it is also shown that the precedent from *Marks v Beyfus* may not have been as sound as claimed.

It is well established that the policy of protecting the informer's identity is meant to protect from retribution. In *D v NSPCC*, Lord Denning quoted *Home v Bentinck* (1820) Br & B 130, at p. 162:

'no person would become an informer if his name might be disclosed in a court of justice, and if he might be subjected to the resentment of the party against whom he had informed'.

However, such a 'resentment' arose from protecting the informers of fabricated evidence under the Common Informers Acts for rewards on penal convictions – which brought the death penalty – a resentment justly deserved. Wigmore's *Evidence*, revised by McNaughton in 1961 and 1972, affirmed the principle of protection, 'to avoid the risk of defamation or malicious prosecution', adding:

'That the government has this privilege is well established, and its soundness cannot be questioned'.

However, as identified by Cross and Tapper in *Rogers v Secretary of State for Home Department* [1973] AC 388, at p. 407, it was stated that evidence would be 'excluded on the grounds of public policy unless [its] production is required to establish innocence in a criminal trial'.

IMMUNITY OF AN INFORMER

The 'soundness' of the 'privilege of protection' has now been questioned. In 1982 Ian Eagles in 'Evidentiary Protection for Informers' [1982] *Crim LJ* (NZ), noted that:

'It should not be assumed that every scrap of information supplied to regulatory agencies or the police entitles the giver to have his identity concealed'.

Also in 'The Privilege of Non-Disclosure and Informers' [1980] *The Irish Jurist*, PA O'Connor had traced the aspect of executive privilege, or the refusal by the State to reveal the identity of informers or communications between them and 'law enforcement authorities'. *A-G v Simpson* [1959] IR 105, at p.133, was quoted where, in a criminal case, Davitt P confirmed that:

'the Court will not ordinarily allow the name of the informer to be disclosed ... but may, if the needs of justice so require, direct the name to be disclosed'.

O'Connor also noted that in *Marks v Beyfus* in 1890, Lord Esher's opinion on the non-disclosure of an informer's identity was that public policy 'which says that an innocent man is not to be condemned when his innocence can be proved', is the policy 'that must prevail'. This conclusion suggests that the view of Lord Diplock in 1977, that the non-disclosure of an informer's identity had (in 1890) 'hardened into a rule of law' was, in 1973, less 'hard' than was supposed.

The question also arises as to whether or not, with the identity of the informer known, a case in tort could be brought.

MALICIOUS INTENT & INJURIOUS FALSEHOOD

It has been established that, despite Lord Denning's assurance in *D v NSPCC* that 'there is no proof' that the informer acted

'falsely and maliciously', others disagree that, in respect of malice, 'a desire to injure the plaintiff will usually be present'. It was shown that it was the inspector, by visiting the painted house, who finally established that the complainant was innocent, implying that the informer persisted in his allegations. But Salmond and Heuston show in *Law of Torts,* 20th edn, Sweet & Maxwell (1992), that:

'if the statement is made maliciously, and is in fact false, the defendant is liable for it although he had good grounds for believing it to be true; malice destroys the privilege, and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence'.

Such a position would not have allowed the Revenue to protect the informer.

Margaret Brazier identified an issue common to all torts in *The Law of Torts*, 9th edn, Butterworths (1993) that 'to compensate those who have suffered harm through the invasion of their interests occasioned by the conduct of others', to which she added, on malice: 'though it is malicious, it will not be a tort unless the interest which it violates is protected by some tort'.

In the case under consideration the complainant was reported, falsely, to the Revenue, as carrying on a business as a painter. Salmond and Heuston discuss deceits and injurious falsehoods. The former was shown to be a false statement made to the plaintiff whereby he acts to his own loss. An injurious falsehood, however, is a 'false statement made to other persons concerning the plaintiff whereby he suffers loss through the action of those others'.

Brazier notes the 'similarities between injurious falsehood and the related tort of defamation', where there is a choice of remedy. By electing to sue in injurious falsehood the plaintiff obtained legal aid, unavailable in defamation, and the defendant did not have the right to trial by jury.

The *Defamation Act* 1952 provides for slander affecting official, professional or business reputation and slander of title 'or other malicious falsehood'. Brazier summarised some of the differences as follows:

(1) in defamation, truth is a defence if proved. In injurious falsehood the plaintiff must prove the untruth;

(2) in defamation the plaintiff has to prove malice only if rebutted by qualified privilege. In injurious falsehood the plaintiff always has to prove malice;

(3) defamation fails unless the plaintiff's reputation is besmirched. Injurious falsehood will lie even if his reputation is untarnished.

The most cogent factor affecting choice for a person of modest means would be the costs.

It is noted in Salmond and Heuston that the torts of injurious falsehood and malicious falsehood are equally acceptable. Section 2 of the Defamation Act was drafted in terms of 'Malicious Falsehood' and was so used in the *Report of the Committee on Defamation* (1974–75 Cmnd 5909).

In Case No. C.126/J the complainant did lose – in respect of the expenses incurred – in proving this falsehood to the Revenue and improving his position as a postal worker vis-à-vis his employer, the Post Office. His contract of employment might have been compromised, bringing disciplinary action from his employer.

It is interesting that Salmond and Heuston note that:

'no action for malicious prosecution will lie until or unless the prosecution or other proceeding has terminated in favour of the person complaining of it'.

It was shown that the Revenue eventually admitted that an error had been made, although they did not apologise, and the Commissioner confirmed the complainant's 'unnecessary worry, inconvenience and expense ... for which he can obtain no redress'. This would appear to have met the conditions of terminating proceedings in favour of the complainant.

A further twist to this 'informer's tale' is also indicated by Salmond and Heuston. The *Crown Proceedings Act* 1947, s. 2(1) provides:

'Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject'

when proceedings were instituted against the appropriate government department. It is therefore conjectured that, had the Revenue persisted in and raised an assessment, apart from appeals to the General Commissioners, the complainant's success might also have attracted an action in tort against the Inland Revenue.

CONCLUSION

A conclusion is that there is no statutory authority for, or apparent regulatory control of the informer for the Revenue, and particularly the false informer. The responsibility appears to fall upon an inspector's 'judgment', and that at whim. It is not an acceptable statutory position and does not provide accountability to Parliament.

There is a statutory provision 'at discretion' to make rewards for information received, and to provide accounts, although such payments are within the costs of collection and management and not separately identifiable. This is probably because of the trivial nature of payments set against total costs and revenues, as was shown from amounts of rewards paid, but there is no evidence as to the cost effectiveness of such payments and only a supposition that it is of any worth.

The secrecy or the anonymity of informers was created by the courts with origins shown to be shrouded in medieval gloom – giving unacceptable powers to the malicious informer without sanctions – and undermining legislative authority.

Without evidence of advantages and with little evidence of hindrance, it is suggested that the statutory provision for rewards should be repealed. In the absence of current relatively trivial rewards as motivation the informer might fade away. Future unsolicited information should then be brought within the provisions of the Perjury Act, or other declaration acts, as committees have recommended. The Revenue Department would then be able to escape from a twilight world of non-statutory administrative sanction.

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