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The media, defamation and lawyers

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Libel claimants may have higher hurdles to clear, but the proliferation of social media and privacy instructions is keeping lawyers busy. Marialuisa Taddia reports.

The Defamation Act 2013 may have raised the bar for actions against publishers for false statements that are damaging to reputation, but practitioners remain very busy.

Indeed, social media is injecting new lifeblood into media law, while claimants are testing the law and turning to alternative causes of action, such as misuse of private information, breach of data protection or harassment.

The statistics on defamation appear bad news for lawyers. The number of cases fell by almost a third in the year to the end of June 2015, with the number brought by businesses registering the sharpest decline (45%). Social media cases, by contrast, are up 38%. And that statistic does not include unreported cases.

Carter-Ruck managing partner Nigel Tait says the figures are ‘misleading’. They miss ‘the vast underbelly’ of what is going on. ‘Most defamation cases settle without a contested hearing in front of a judge that is worth reporting,’ he says. Citing section 1 of the act, which requires claimants to establish that the statement complained of has caused or is likely to cause serious harm to reputation, Tait observes: ‘The act has created a new threshold and people are testing it.’

Jonathan Barnes, barrister at media and entertainment set 5RB, says that, while there may have been 'fewer final trials', over the past year these 'have largely been replaced with preliminary issue trials to decide whether there has been serious harm done by the publication under section 1'.

This is understandable, according to Payne Hicks Beach partner Dominic Crossley: 'You have to be brave to issue libel proceedings [now]. In all but the most serious and straightforward cases, the act has not only provided higher hurdles, but also created uncertainty as to how the court will approach a number of the defences. That uncertainty is likely to continue for years.'

Yet Crossley is as busy as ever: 'A lawyer's role is less that of issuing court proceedings for libel, and more advisory; trying to find a practical solution to reputational issues.' This can include securing a correction or prominent apology from newspapers.

On the defendant side, 'we get just as many pre-action letters of complaint [as before the act],' says RPC senior associate Harry Kinmonth. But he also sees a decline in defamation claims resulting in proceedings: 'Having tried their luck, claimants decide that [section 1] is quite a high hurdle, and it's not worth the costs risk. Or they'll try and pursue different causes of action based on the same harm.'

Claimants may have higher hurdles to jump, but social media postings are becoming a practitioner staple. Brett Wilson partner Iain Wilson says: 'There are definitely fewer [libel claims] against the traditional press, but more against individuals who publish on social media or internet intermediaries.'

Testing

As practitioners adjust, there remains uncertainty over the extent to which the act has codified the law or changed it. Take the new test of 'serious harm'. At common law, a claimant previously had to prove that the words used had a defamatory tendency, Pinsent Masons' Alex Keenlyside explains.

Jameel v Dow Jones established a 'threshold of seriousness' to strike out trivial claims without 'a real and substantial tort'. But the act has further raised the bar, he says, pointing to the High Court's July decision in *Lachaux v Independent & Ors*. AOL's Huffington Post, the *London Evening Standard*, the *Independent* and sister publication '*i*' published allegations about Bruno Lachaux's conduct involving his ex-wife and children, allegations he claimed were defamatory. Libel, the court held, is no longer actionable without proof of damage. 'The main point to take from *Lachaux* is that claimants have to prove as a fact on the balance of probabilities that serious reputational harm has been caused by or is likely to be caused by the publication,' Keenlyside says.

Serious harm can be inferred but only in obvious cases involving 'a grave imputation, such as conspiracy to murder or serious sexual crime' that is widely published, for example in the national media, Mr Justice Warby said.

The application of the serious harm test as interpreted by Warby J will be considered by the Court of Appeal in November, Crossley notes: 'The test remains something of an unknown quantity. It will be very interesting to see how it is applied.'

Lewis Silkin partner Jonathan Coad, who represents AOL (UK) Ltd, one of the three defendants that have been granted permission to appeal, says: 'There are several judgments on serious harm which are waiting for this determination.'

Lachaux is also significant because it is part of a trend towards dealing with 'serious harm' as a preliminary issue trial. 'It is now going to be standard procedure,' Coad says. 'That still means that legal costs have to be expended, but it is going to make it easier to see off claims. A preliminary issue hearing is far less expensive than a full trial.'

Other parts of the statute need testing. Barnes points to the defence of publication on a matter of public interest, now codified in section 4 and abolishing the common law Reynolds defence. 'Section 4 is supposed to have replaced the defence of qualified privilege but I don't think it has done it precisely word for word,' he says. 'Once we go through litigation about section 1, which is all to do with whether a claimant can bring the claim or not, the two areas of defence of honest opinion and public interest reporting will both end up with there needing to be test cases.' The new statutory defence of honest opinion has replaced the common law defence of fair comment.

If bringing a claim is tough for individuals, corporations face an even narrower and stricter test – they must show actual or likely serious financial loss in order to establish serious harm. Crossley argues that the test is 'counter-intuitive' because of the 'strategic challenge' of seeking evidence from, say, customers and suppliers that what they have read is causing the business to decline.

Coad notes: 'Companies are going to have to show serious harm in their finances, which is incredibly difficult, because the limitation period is a year for a defamation claim [from the date of publication] and, of course, the accounting period [is] a year.'

Roughly half of claims coming across Coad's desk that would have been viable before the act are not so now, he maintains.

Yet lawyers who focus on corporate reputation management are no less busy. Pinsent Masons' Keenlyside says: 'It is more important than ever for corporates to protect their reputation, largely because the range of threats is increasing as a result of social media.' In the past, companies focused on monitoring potential reputation attacks from broadsheets and broadcasters. Now they must also monitor 'disgruntled customers, disaffected employees, campaign groups and unscrupulous competitors, all of whom can take to social media to traduce your reputation', Keenlyside says.

Social media

Despite the strictures of the new law, the arrival of Twitter, Facebook and other new media platforms has provided a boon for practitioners.

'I am far more likely to be instructed in relation to an online-only publication than I am in a newspaper libel,' Crossley says. 'The internet has given a previously unseen opportunity for everybody to be a publisher, and the freedom of expression opportunities provided by social media platforms are literally without limit.'

But unlike traditional publishers, most social media users do not have access to legal or editorial advice and 'therefore there are countless numbers of false and defamatory allegations and invasions of privacy that are published every second', Crossley says. This is generating 'a vast amount of work for lawyers' to ensure clients' reputations are not 'unfairly impugned'.

One purpose of the Defamation Act 2013 was to stamp out 'libel tourism' – wealthy foreign business people and celebrities using English courts to sue (mainly US) publishers. One high-profile example was the Saudi billionaire who in 2005 successfully sued an American researcher in the UK, where her book had sold just 23 copies over the internet. This led the US to introduce in 2010 the SPEECH Act, which makes foreign defamation rulings unenforceable in the US unless the judgment is consistent with US law.

Taking that cue, section 9 of the UK act says that where the defendant is domiciled outside the EU or EFTA, the court will not have jurisdiction to hear a defamation claim unless England and Wales is 'clearly the most appropriate place' in which to bring it.

Before the act there were more cases against American defendants than now, says Jonathan Barnes, a barrister at media and entertainment set 5RB, but he adds: 'What the act doesn't do is limit claimants [by location]. They can still sue in England regardless of nationality, or domicile or residence.' Take Bruno Lachaux, a French national who lives and works in Dubai and has no connection with the UK other than his British ex-wife. He never lived or worked in the UK and visited London only occasionally and briefly. As Lewis puts it: 'Lachaux might be helpful guidance on to what extent libel tourism still remains.'

Carter-Ruck managing partner Nigel Tait points to another recent case, *Alvaro Sobrinho v Impresa Publishing SA* where the claimant, a dual Angolan-Portuguese national brought libel proceedings in England against a Portuguese newspaper with only negligible readership in the UK. 'At first blush, you might think that's a libel tourist who is suing in England, but the court couldn't stop it on libel tourism grounds because we signed up to European law,' he says.

But restoring a client's reputation does not necessarily imply court action. 'Most social media defamation will not meet the serious harm threshold because there isn't sufficient publication,' Coad says. He adds that in the 'wild west' of social media with 'a lot of crazy people who don't give a flying poo about the law', issuing a claim could backfire.

Coad contends that social media has a limited impact on corporate clients: 'The real problem comes if and when a newspaper picks up a story on social media and then runs with it, and that's the point at which I normally get called in.'

So what are the alternatives to issuing legal proceedings?

Lawyers can request online intermediaries to remove the offensive content and threaten a lawsuit if they do not – in Google v Tamiz, the Court of Appeal said that Google could be liable for defamatory posts on its Blogger.com platform, if, after being put on notice by the claimant, they did not remove the content within a reasonable time, Wilson points out.

Lawyers also work with private investigators, computer experts and PR specialists to track down the originators of the postings, and demote negative comments on search engines. 'There is a huge industry involved in taking down postings on social media. It is very refined and sophisticated,' says Carter-Ruck's Tait.

If the vast majority of 'self-publishers' are immune from legal action, a handful have got so big they are beginning to be treated as traditional publishers. Seddons partner Mark Lewis cites the example of Katie Hopkins, who has over 600,000 Twitter followers. 'It is proper publishing if you have 600,000 followers and you are going on the attack against individuals. It's inevitable that somebody might sue you for libel,' he says. Lewis is acting for activist and writer Jack Monroe, who is suing Hopkins over a tweet Hopkins sent that allegedly accused Monroe of supporting war memorial vandalism, an allegation which Monroe, daughter of a Falklands veteran with a brother in the RAF, said was untrue.

She has not commented further since issuing proceedings.

Furthermore, Lewis adds, if a Twitter user with only a few followers makes a false or defamatory statement that is retweeted by a follower who has 4m followers (for example) 'then potentially the publication can be to any of those 4m'. But lawyers also need to know when the game is worth the candle: some prolific tweeters are 'potless, so they wouldn't be worth suing', Lewis concludes.

Privacy

To circumvent the serious harm threshold, claimants are also supplementing libel claims or in some

cases substituting them with other causes of action.

‘Lawyers [in media litigation] are likely to be increasingly busy in connection with privacy instructions,’ Crossley says. By ‘privacy’ he means claims under the Data Protection Act 1998 (DPA) and the tort of misuse of private information, which is an area of media law expanding partly as a result of the recent phone-hacking litigation.

Such actions can be brought for published information that is personal, whether or not it is true, and unlike defamation they do not have a threshold of seriousness.

Lewis says: ‘If a client says “there is a story about me on the front page of a newspaper which is untrue and defamatory”, then one would sue probably in libel or maybe in libel and privacy if it’s private information.’

The cause of action for misuse of private information was first established by the Lords in *Campbell v MGN Limited*, through the balancing of articles 8 (right to respect for private and family life) and 10 (right to freedom of expression) of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998.

The rule on prior restraint of defamatory statements also means that it is ‘much easier’ to get an injunction to restrain a threatened misuse of private information, Tait says. He notes that after the Leveson report ‘the media went fairly quiet’ but ‘they are becoming braver now. We are certainly noticing that the Sun and the Sun on Sunday are much more aggressive about stories, and we often use either the law of libel or privacy to try and deal with them’.

Privacy litigation is also taking off, Wilson argues, following the Court of Appeal’s decision in *Representative Claimants v Mirror Group Newspapers Ltd*, which relates to the Mirror Group phone-hacking litigation. In December, the higher court upheld Mann J’s awards of substantial sums of up to £260,250, setting out the approach to, and the level of damages in privacy cases. Before MGN v Gulati & Ors, damages awards for misuse of private information had been relatively modest – the largest being the £60,000 awarded to Max Mosley in 2008.

In other recent judgments claimants have successfully ‘mixed and matched’ DPA, misuse of private information and defamation claims. In *Weller & Ors v Associated Newspapers Limited*, where the claimant brought proceedings for breach of data protection and misuse of private information, the Court of Appeal upheld damages of £10,000 awarded to musician Paul Weller after Mail Online published un-pixellated photographs of his children.

In *Google Inc. v Vidal-Hall*, the Court of Appeal confirmed that misuse of private information is a tort, and extended the scope of the DPA by establishing that proof of pecuniary loss is not necessary in order to claim compensation for distress under section 13 of the act.

‘*Vidal-Hall* [suggests] it is open season for bringing claims under the DPA,’ Wilson says. ‘If you are upset about the way data about you has been processed, and you have a viable claim, you can recover damages for being upset. So claims that were traditionally brought in defamation might be brought under the DPA now.’

In a following ruling (*His Highness Prince Moulay Hicham Ben Abdullah Al Alaoui of Morocco v Elaph Publishing Limited*) the High Court confirmed that a data protection claim can be run in conjunction with defamation. The claimant obtained permission to amend his libel claim, which was largely struck out, by adding a claim under the DPA on the grounds that there had been unfair and unlawful processing of his personal data.

As with *Lachaux*, the Prince Moulay Hicham case is listed to be heard by the Court of Appeal in November and practitioners are eagerly awaiting the outcome.

RPC's Kinmonth says there has been a noticeable increase in data protection-related claims, either to supplement a libel action or as a standalone alternative, and not just because of *Vidal-Hall*. In the 2014 *Costeja v Google* ruling, concerning data protection and the internet, the Court of Justice of the European Union confirmed the 'right to be forgotten' principle. An internet search engine must consider requests from individuals to remove content that is 'inadequate, irrelevant or no longer relevant'.

Claimants will increasingly turn to data protection, rather than defamation, in seeking to have content removed not just from Blogger and Google+, but also from Google search results, one lawyer told the *Gazette*.

Another advantage of the DPA, notes Barnes, is that in disputes between two private parties, and not involving the media, the public interest defence for journalism (under section 32) does not apply.

Media lawyers are also increasingly using the law of harassment to protect their clients' reputations. Wilson points to the 2011 High Court decision in *Law Society (and others) v Rick Kordowski*, which established the principle that the law of harassment (under the Protection from Harassment Act 1997) and the DPA can be used as a cause of action for online publications instead of, or as well as, defamation. Brett Wilson represented the Law Society in the class action on behalf of the profession against Kordowski, the owner of Solicitors from Hell. The case led to the permanent closure of the website.

Barnes, who is working on a case where defamation and harassment are alleged concurrently, says: 'Harassment by speech is certainly viable as a complaint and you can bring it in relation to speech that isn't just defamatory, but it could also be bullying or abusive, which is just the sort of stuff that turns up on social media.' People who are being 'trolled' on social media are being both defamed and harassed at the same time, he says.

To assist individual claimants, media lawyers are also using breach of copyright actions and the law of malicious falsehood (in combination with, or instead of, defamation) to help businesses. Coad's corporate reputation management work entails dealing mainly with Fleet Street titles, and so 'the most common recourse' he has is to the Independent Press Standards Organisation, which is charged with enforcing the Editors' Code of Practice that governs most UK publishers.

The coming year will clarify the extent to which defamation remains the number one remedy for restoring a reputation tarnished by publishers. Whatever the outcome, though, most lawyers in the sector look set to prosper.