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Andrew Willan
Solicitor, Dispute Resolution

Defamation cases may be waning but GDPR provides fresh firepower in the claimant's reputational arsenal

May 25, 2018 by Andrew Willan

Recent research has found that the number of defamation cases in the courts of England and Wales fell to a record low of 49 last year, down from 86 three years ago.

The rise of GDPR gives those whose business it is to protect reputations fresh firepower, argues Andrew Willan

Whilst this is an attention-grabbing statistic, the first point to make is that the findings appear to be based solely on claims that reach court hearings (as opposed to those that are issued).

Our experience is that claims about false and libellous publications, at least at the pre-action stage, are as prevalent as ever.

The vast majority of claims will settle pre-action without the need to issue at all and, indeed, many issued claims will settle long before they actually end up before a judge.

These statistics should therefore be taken with a pinch of salt.

Seasoning aside, what is not in doubt is that the legal landscape has changed significantly in recent years as it seeks to keep pace with the rapidly developing ways we consume and divulge both news and details of our private lives.

Traditionally, defamation was seen as the first port of call for those seeking to protect their reputations.

But for many claimants today the traditional libel claim is no longer the weapon of choice, having been replaced by claims, most notably, in data protection and privacy.

In many cases, it will not be obvious whether a statement is defamatory despite the fact that it is clearly inaccurate.

Moreover, the requirement to show serious harm or a likelihood of serious harm (which was brought in by the Defamation Act 2013) has raised the bar for claimants.

Contrast this with claims under the Data Protection Act 1998.

Under this statute, a claimant may sue simply on the basis that the processing of data is inaccurate.

Indeed, the data protection regime goes further still, providing sufficient latitude for there to be an actionable claim even where the material processed is true.

Not only must data controllers ensure the accuracy of data, they can also be held to have mishandled data where the processing is excessive or irrelevant, or where it has been kept for longer than is necessary.

If a data controller falls foul of these requirements, they can be required to cease processing the data and pay damages.

The much publicised "right to be forgotten" (which will be codified by the General Data Protection Regulation coming into force today) also provides individuals with another useful tool.

Given the predominance of search engines such as Google in the habits of internet browsers, the erasure of search results that contain inaccurate or unlawful data can be an equally effective means for individuals to protect their reputation without the need to bring court proceedings.

While traditional libel actions still have their place, the armoury of potential claimants has undoubtedly been supplemented by the advent of privacy and data protection laws.

From a claimant’s perspective, you might argue that this additional firepower is very necessary given the extent to which inaccurate and unlawful information is now able to find its way into both traditional and social media.

It is perhaps no surprise that it is said that data protection, above everything else, is what keeps the major newspaper publishers awake at night.

Andrew Willan is a solicitor in the privacy & media team at Payne Hicks Beach