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New pre-action protocol for media and communications claims

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TMT analysis: Nick Grant and Edward Smith, members of Payne Hicks Beach's privacy and media team, look at the implications of the new Pre-action Protocol for media and communications claims (the new PAP).

What changes will be introduced as a result of the new PAP and what is the practical impact of these changes?

The new PAP comes into force on 1 October 2019, the aim of which is to:

- understand and properly identify the issues in dispute and to share information and relevant documents
- make informed decisions as to whether and how to proceed
- try to settle the dispute without proceedings or reduce the issues in dispute
- avoid unnecessary expense and control the costs of resolving the dispute
- support the efficient management of proceedings where court proceedings cannot be avoided

The main benefits are that the pre-action requirements for claims in the media and communications list (broadly cases involving defamation, misuse of private information, data protection law, harassment by publication, breach of confidence and/or malicious falsehood) are now set out clearly in one place. The practical benefit for practitioners is that it will be clearer on both sides of any dispute how pre-action correspondence in relation to these causes of action should be focused to enable the parties to identify efficiently (and cost effectively) the issues in dispute and explore early resolution.

For defamation lawyers, how does the new PAP differ from the outgoing pre-action protocol for defamation cases?

The elements of the new PAP relating to defamation are familiar (from the protocol currently in force) but have been expanded in a couple of important respects.

Currently, it is merely 'desirable' for the claimant to identify their position as to the meaning of the words complained of in their letter of claim. The new PAP however states that the imputation of the words complained of (distinct from a fully pleaded meaning) 'should' be included in a letter of claim. No doubt this subtle development is a response to recent judicial guidance that where appropriate preliminary issue trials should be the norm in defamation claims. One of the most common forms of preliminary issue trial—which often take place prior to the service of the defence—is to decide the meaning of the words complained of. In order to identify whether a preliminary issue trial of this type would be beneficial in any claim, it is important that the parties set out their positions as early as possible in pre-action correspondence.

How will the recent Supreme Court judgment in *Lachaux v Independent Print Ltd and another* [2019] UKSC 27, [2019] All ER (D) 42 (Jun) impact on a party attempting to comply with section 3.2 of the new PAP?

The new PAP also adds another significant requirement in relation to defamation claims, in that the letter of claim should set out how or why the claimant's complaint has caused or is likely to cause serious harm pursuant to section 1 of the Defamation Act 2013.

Claimants will need to set out their case, as Lord Sumption stated at para [12], of *Lachaux v Independent Print Ltd and another* [2019] UKSC 27, [2019] All ER (D) 42 (Jun): 'By reference to the actual facts of the publications impact on their reputations not just to the meaning of words'. However, it is important to note that inference as to the context of the publication, the situation of the claimant and inherent probabilities could be sufficient to meet the test (see para [21]), so these elements should also be considered at the pre-action stage.

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Claimants who are trading for profit are required by the new PAP to set out such details as are available of the nature and value of the serious financial loss they assert has been caused or is likely to be caused by the publication. This puts the onus on a corporate claimant to act quickly and collate relevant financial data at this early stage.

For those litigating to restrain publication of information (ie breach of confidence and privacy claims), how can a party best ensure compliance with section 3.3 of the new PAP without inadvertently compromising confidentiality any further? What can be done if they are unsure about the exact information which may be published about them (such as in the recent case of *Bull v Desporte* [2019] EWHC 1650 (QB), [2019] All ER (D) 40 (Jul))?

In order to comply with the new PAP, it is possible for a claimant to refer to—and for the court to protect (as in *Bull v Desporte* [2019] EWHC 1650 (QB), [2019] All ER (D) 40 (Jul))—'categories of information' rather than specific pieces of information. However, claimants must particularise the information sufficiently such that it is clear and identifiable as confidential or private. Pre-action correspondence should be drafted in such a way that the legal duties that attach to the dissemination of the information are clear. However, because of the principle of open justice, it is also important for claimants to take advice at an early stage about the likelihood of information becoming public during the course of proceedings and any steps that may be available to prevent it.

If an individual believes that information that is thought to be private or confidential to them will be published, they should move quickly to take legal advice from a specialist practitioner should they wish to explore the options available to prevent publication, which depending on the circumstances may include seeking an injunction or other reporting restriction.

What impact will the new PAP have on tactics used by defendants to the types of claim covered?

Our experience is that defendants often try to exploit Pre-action Protocols by focusing their initial correspondence on possible breaches of the terms of the protocol—often applying a restrictively strict interpretation—rather than the substance of the claim. We hope that the terms of the new PAP are sufficient such that it will enable the parties to focus more efficiently on the issues of substance between the parties and the potential for early resolution.

Nick Grant and Edward Smith are members of Payne Hicks Beach's privacy and media team. The team specialise in managing and protecting clients' reputations through their extensive experience in these areas of law and an intimate understanding of how the media and other publishers work.

Interviewed by Evelyn Reid.

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