

Article by **Dominic Crossley**, **Dispute Resolution partner and privacy law specialist**, at **Payne Hicks Beach** first published online in Solicitors Journal on 17 November 2015
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Reputation rights and the deceased

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The Oscar-tipped biopic of the life of Apple svengali Steve Jobs starring Michael Fassbender has met widespread praise by critics. Unlike the critics, the Jobs family has not welcomed the film, claiming that it does not contain a fair or accurate representation of the man and tarnishes the reputation and memories they wish to protect.

If the family attempted to prevent the release of the film, they have failed. The first amendment in the US provides enormous comfort for publishers, broadcasters, and film-makers alike. This jurisdiction, even after the Defamation Act 2013, remains a more favourable location for claimants. But what remedies could it provide for the families of the deceased in the event of reputational damage such as is said to result from the Jobs film?

This issue was considered by Lord Justice Leveson in his inquiry into the culture, media, and ethics of the press. Margaret Watson gave powerful evidence of the need to overturn the long-held doctrine that you cannot libel the dead. Her daughter was murdered and in the publicity that followed she was falsely portrayed as a bully. Tragically the Watsons' son was so incensed by the family's inability to hold the publishers to account that he took his own life, leaving his parents understandably determined to highlight the importance of this issue.

The law can certainly be brutal. The principle of libel rights ending on death was confirmed in *Harvey Smith v Bobby Dha* [2013] EWHC 838 QB where the claimant died having completed his case but before judgment had been given; it was decided the claim had to conclude at that limbo stage.

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Despite the Watsons' evidence, Leveson LJ was not convinced, describing a change in the law as 'an interesting idea' but concluding that the difficulties outweigh the benefits, citing Churchill as his example. With respect to Leveson LJ, it is easy to see the importance of differentiating between historical figures and those recently deceased. Helen Goodman MP argued that the law should allow a dead person's spouse or partner to sue a publisher for defamation for up to 12 months after death, saying 'vicious character assassination based upon lies is often more damaging to someone after death than to a living person, because they cannot answer back'.

The law providing for the right to privacy has also developed as an extension of the law of confidence and Toulson and Phipps, the authors of Confidentiality, have suggested that post-death disclosures may give rise to a cause of action. It is an untested but compelling proposition. Damages for distress and hurt feelings may logically be irrecoverable in any such privacy proceedings, but one might conceive of circumstances where an injunction could be awarded. Consider, for example, intimate photographs disclosed shortly after the death of a high-profile individual.

In *Pauline Bluck v The Information Commissioner UKIT 2006 EA*, the Information Tribunal considered the point in connection with an appeal against a refusal of a hospital trust to disclose medical information in response to a freedom of information request. It concluded that the duty of confidence was capable of surviving death. If confidentiality and privacy rights survive death, these provide potentially greater protection than libel for estates wishing to prevent unwelcome media attention.