

New Defamation Act makes it harder for companies to sue

Companies will find it harder to sue for defamation under the Defamation Act 2013, which came into force on 1 January 2014. They must now show that a defamatory statement has caused, or is likely to cause, "serious financial loss".

The Defamation Act 2013 came into force in England and Wales on 1 January 2014. It introduces a requirement for all claimants to show that "serious harm" to its reputation has been caused by the statement complained about, or that serious harm is likely to be caused. For a body trading for profit, harm will not be "serious harm" unless it has caused, or is likely to cause, serious financial loss.

Reasons for change

English defamation law has long been seen as "claimant-friendly", in contrast to the laws in other countries.

- It presumes that a statement is false, meaning that the defendant must prove truth (or plead some other defence) rather than the claimant proving falsity.
- It says that a statement is published where it is read, rather than where it originates, meaning that the courts have jurisdiction over what is published on the internet if it was downloaded here, regardless of where it was uploaded or where the intended majority audience was located.
- The lack of a "single publication rule" meant that the limitation

period in respect of statements available online never expired.

- Additionally, damage was presumed once the elements of defamation were made out, meaning that claimants were automatically awarded "general" damages, although the quantum could vary.

Publishers alleged that these features led to international businesspeople and celebrities swamping English courts with claims that would never have succeeded in their home countries, and caused a chilling effect for both the established media and participants in the "new media" such as bloggers and those running websites. The new Act attempts to address some of those concerns.

The new test for defamation

A defamatory statement is one that lowers the claimant in the estimation of right-thinking people, or causes the claimant to be shunned and avoided. The new Act adds another requirement: a statement is not defamatory unless its publication has caused, or is likely to cause, serious harm to the reputation of the claimant. Harm to the reputation of a body that trades for profit is not serious harm unless it has caused, or is likely to cause, serious financial loss.

Key issues

Reasons for change

The new test for defamation

New defences

Publication of a defamatory statement

Other changes

Conclusion

An individual claimant faced with a requirement to show serious harm to its reputation may struggle; a company which has to prove serious financial loss is likely to find its task even harder. As the majority of the House of Lords accepted in *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, the good name of a company is, itself, a thing of value, and damage to reputation can have consequences far beyond financial loss, including lowering its standing in the eyes of the public and even its own staff. This might make people less willing to deal with it, or less willing or less proud to work for it.

Even if a company can show a decline in revenue following the defendant's defamatory statement, how will claimants be able to satisfy the court that the losses were caused by the statement rather than, for example, by changes in customer

taste, the existence of competitor promotions or new products or the general economic situation? There is also nothing in the Act which states how "serious" the loss must be in order to qualify as "serious financial loss". This will take some time for the courts to decide, but is likely to mean that publishers have more confidence in publishing, despite pre-publication complaints being made

There are a number of other changes made by the Act which will affect claimants' ability to sue.

New defences

The common law defences of justification, fair comment (latterly known as honest comment or honest opinion) and responsible publication (formerly known as "*Reynolds*" qualified privilege) have been abolished and replaced with statutory defences of "truth", "honest opinion" and "publication on matters of public interest". Honest opinion no longer requires the statement to be on a matter of public interest, and the responsible publication defence simply says that the court "must have regard to all the circumstances of the case" rather than adopting the House of Lords' ten criteria set out in *Reynolds v Times Newspapers* [2001] 2 AC 127. The precise differences between the old common law defences and their statutory replacements will take some time for the courts to work out.

The Act also creates some entirely new defences. One of them is qualified privilege relating to peer-reviewed material in scientific or academic journals, which is a response to complaints by academics and scientists that they were being threatened with proceedings by large companies for expressing their views on scientific and academic matters. The complainants said that, even if they successfully defended

proceedings, they faced large irrecoverable costs bills. The new defence will protect statements made in scientific or academic journals as long as the statement relates to a scientific or academic matter, and an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and another person with the relevant expertise in the matter concerned.

Another new defence protects "operators of websites" who do not "post" the defamatory statement. This new defence will fail if a claimant gives the operator a notice of complaint in relation to the statement and the operator fails to respond to the notice of complaint in accordance with relevant regulations. These are The Defamation (Operators of Websites) Regulations 2013, which also came into force on 1 January 2014. The Schedule to the Regulations sets out what an operator must do in order to be able to rely on the defence, and this may involve contacting the person who posted the statement within 48 hours or, if it is not possible to do that, removing the statement within 48 hours.

Publication of a defamatory statement

Section 8 of the Act says that if someone publishes substantially the same statement on more than one occasion, time starts running for limitation purposes from the date of the first publication. The limitation period for defamation claims is one year. This means that a claimant will not generally be able to bring proceedings in respect of a defamatory statement if a year has passed between the first publication of the statement and the date of the claim. Formerly, each republication by the same person started time running again. If a statement was available on a website, each click on it counted

as a publication, which meant that there was, in effect, no end to the limitation period as long as the statement was available to view.

Other changes

Section 9 of the Act states that, where a defendant is not domiciled in the UK, another Member State of the European Union or a state which is a contracting party to the Lugano Convention (i.e. the EU Member States, Switzerland, Norway and Iceland), a court will not have jurisdiction over a defamation action unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring the action. This is aimed at alleged cases of "forum shopping" where a claimant sues in England on the basis of a relatively small circulation of the defamatory statement compared with its circulation in other countries.

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The Act also introduces a presumption that defamation trials will no longer be heard by juries, and allows a court to order that a summary of its judgment be published if the claimant is successful in its claim. Previously the court had no such power, and could only award damages and an injunction against

repetition of the statements.

Conclusion

The number of defamation cases against media groups was decreasing even before the new Act came into force, so it will be interesting to see whether the decrease speeds up as a result of the changes, or whether, as

social media gives increasing numbers of people a convenient platform on which to offend and defame, the number of cases overall will remain steady. But the aim of the Act is unquestionably to make it harder to sue for defamation.

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