Defamation Act 2013

Taylor Wessing analysis

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Introduction

The Defamation Act 2013[1] was enacted on 25 April 2013. This note discusses the likely practical implications of the Act[2].

In summary, the Act shifts the balance, between free speech and the right to reputation, in favour of free speech. In some areas this shift is likely to be significant (e.g. the hurdle for companies wishing to sue for libel), in other areas there may be little change in practice (e.g. the truth defence).

Serious harm (section 1)

Under the 2013 Act, "**a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.**"

General comments (see below for companies):
The first question is whether section 1 gives a new definition to 'defamatory' or whether it is setting an additional requirement for a claimant to prove, on top of the existing examples of defamatory meaning. In our view, the serious harm requirement is additional to the existing definitions of defamatory meaning. If so, a claimant will therefore need to show that the words complained of, for example:

a) caused or are likely to cause serious harm to the claimant's reputation; **and**

b) tend, for example, to:

i) lower the claimant in the estimation of right-thinking or reasonable members of society; or

ii) substantially affect in an adverse manner the attitude of others towards the claimant, etc.

Most claims brought by individuals are unlikely to be affected by the serious harm threshold. This is because most defamatory statements which are disputed or litigated are clearly likely to cause serious damage to a person's reputation, the main issue being whether the defendant can prove truth or another defence. However, we predict that the threshold will increase the number of cases where either the claimant decides not to take action or the defendant resists offering any remedy. Possible, examples might include where:

- The claimant has a bad reputation anyway and it is in doubt whether the claimant's reputation would be seriously harmed over and above his or her existing (suspect) reputation;
- The claimant needs to prove an innuendo identification and the people (with the special knowledge) who would identify the claimant would not believe the words would seriously harm the claimant's reputation (under the previous law, this would generally not prevent the meaning being defamatory);
- There is limited publication in the jurisdiction and/or the claimant is not known in the jurisdiction;
- The meaning is borderline vulgar abuse, 'pub talk' or a mere criticism of goods or services; or
- Any damage was transient or short-lived due to a quick retraction, clarification or apology.

It should be apparent that any of these factors may also lead to a *Jameel* abuse argument being deployed by the defendant. Therefore, the serious harm requirement is likely to lead to more early strike out applications by defendants on both grounds.

1 http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted

2 At the time of writing (1 May 2013), most of the provisions are not in force and are awaiting implementation by Statutory Instrument. This note relates to the position in England and Wales.

Bodies trading for profit

One of the most important provisions in the 2013 Act states: "**For the purposes of this section [1], harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss**".

In our opinion, this means that a for-profit company is likely to need to specify in its letter of claim and Particulars of Claim that the statement:

a) Has caused or is likely to cause the body financial loss;

b) What that loss is; and

c) That the loss is serious.

If it does not specify these things, the defendant may well insist on such details before responding substantively.

We foresee that the serious financial loss requirement is going to make it difficult for companies to sue for defamation. In practice, companies are going to be less likely to take action or even threaten to take action as a result of the new law. Defendants are more likely to be braver about criticising companies, appreciating the "serious financial loss" hurdle which companies face. This in turn is likely to lead to more actions by individuals associated with the company, e.g. the CEO or someone named in the article. They may argue that the article identified and was defamatory of them. Some companies are more associated with individuals than others. For example, the late Steve Jobs was closely associated with Apple. Some officers of small companies may argue that an allegation against the company is an allegation against them (to avoid having to prove the "serious financial loss"). But they will still need to prove serious harm – as to which see above – and the other elements a claimant has to prove. Publishers and broadcasters should therefore make it clear when they are only criticising companies, and not also suggesting impropriety against any individuals themselves (if that is appropriate in the circumstances). It may be that companies will choose to take action with whatever regulator is decided on, following the Leveson report, in respect of inaccuracies rather than claiming defamation.

Truth (section 2)

Justification has been abolished in favour of a statutory truth defence. The defendant has to prove that "**the imputation conveyed by the statement complained of is substantially true**". Section 5 of the 1952 Act is more or less transposed into section 2(2) of the 2013 Act with more modern language, with a reference to "seriously harm", rather than "materially injure", the claimant's reputation. It seems likely that the legal principles underlying justification will probably continue to be applied by the courts

Honest opinion (section 3)

Fair comment is abolished. The honest opinion defence requires that:

a) the statement complained of was a statement of opinion;

b) the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and

c) an honest person could have held the opinion on the basis of —

i) any fact which existed at the time the statement complained of was published;

ii) anything asserted to be a fact in a privileged statement published before the statement complained of.

Importantly, under the wording of the new defence, it appears that the commentator need not know the fact upon which an honest person could have held the opinion, at the time the statement was published. This releases the defence from one of the previous shackles which sometimes made it difficult to rely on. The previous requirement that the comment be in the public interest does not appear either.

One question is whether the basis of the opinion, which must be indicated in the statement, must be the same as the fact (or privileged assertion) on the basis of which an honest person could have held the opinion. The wording is not entirely clear. According to the Explanatory Notes, the third condition (c) is an objective test. There seems to be a potential conflict between stating that the basis of the opinion must be indicated in the article but not apparently insisting that the basis of the opinion be in the commentator's mind at the time of the article. It appears, therefore, that the defence can succeed where:

a) the opinion indicates Fact A as its basis, where Fact A is in the mind of the commentator but false, and

b) an honest person could have held the opinion based on Fact B which is true but unknown to the commentator at the time of publication.

If this is how the courts interpret section 3, the defence can protect an honestly held opinion even if the commentator has grounded it on something which is false, provided there was other true factual support for the honest opinion. Of course, if the false statement of fact, which is indicated in the article, is defamatory of the claimant, then the defendant will need to rely on another defence in relation to that untrue fact.

The defence has retained some of its ancestor's technical nature unfortunately, but it should ultimately protect honest opinions more readily than the fair comment defence allowed. Where claimants could previously be fairly confident if an opinion piece made significant factual errors, they may now need to ask themselves whether there is another fact or privileged statement on which an honest person could have held the defamatory opinion about them.

Malice has been simplified to "**The defence is defeated if the claimant shows that the defendant did not hold the opinion**". This is likely to be difficult for a claimant to prove in most cases.

Where a publisher publishes the opinion of another person ("the author"), then "**the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion**".

Publication on a matter of public interest (section 4)

Reynolds privilege is abolished under the 2013 Act. Instead, it will be "**a defence to an action for defamation for the defendant to show that —**

a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

b) the defendant reasonably believed that publishing the statement complained of was in the public interest."

In the new defence, there is no express requirement for the publisher to prove that it:

a) has met a standard of responsible journalism;

b) satisfied any or all of the *Reynolds* factors; or

c) acted both fairly and responsibly in gathering and publishing information.

Instead, assuming that the statement was on a matter of public interest, the issue will boil down to the defendant's reasonable belief. In deciding this, "**the court must make such allowance for editorial judgement as it considers appropriate**", as well as "**all the circumstances of the case**". The defence seems on its face to be more flexible and more in favour of free speech than *Reynolds*. However, our view is that the court is likely to end up considering similar factors to those in *Reynolds* on the question of reasonable belief and we may be back to *Reynolds*, *Jameel* and *Flood* more or less, under a different name.

It seems likely that, where appropriate, the courts will consider that, if the defendant has not done sufficient checks and has written the article in an unbalanced and immoderate way, then it would not be reasonable to believe publication is in the public interest. It is likely that consideration of the steps taken by the defendant to verify the truth will often play a part. This is because the steps taken to verify must be disregarded from the assessment of reasonable belief in a neutral reportage situation (see below), and hence should not generally be disregarded in other cases.

It appears that the 'reasonable belief' will have a subjective and an objective dimension. The focus of both limbs of the defence is on the public interest, which is not defined. A crucial question is whether the English courts will adopt a moral or intellectual high ground on what is in the public interest (as the ECtHR did in its first *Von Hannover* decision for example)[3] or whether they will be flexible in the context of more salacious stories. If they do the former, then the new public interest defence may be beyond the reaches of many red-top or celebrity stories. Our prediction is that the courts will apply the public interest test with flexibility but a defendant must show the court something convincing substantially beyond the tittle-tattle of footballers' wives and girlfriends. It seems likely that scientific and academic debate will generally be considered by the courts to be in the public interest.

There is no provision stating that the defence is defeated by malice. However, this should be encompassed within the second limb of the new defence.

Neutral reportage

The 2013 Act codifies the neutral reportage part of *Reynolds* as follows:

"**If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.**"

On its face, this appears to codify the common law but as the ultimate test (reasonable belief that publishing the statement was in the public interest) is new, there may be scope for argument. One question is how flexible the courts will be with the concept of "dispute".

Operators of websites and persons who are not the author, editor or publisher of a statement complained of (sections 5, 10 and 13)

The 2013 Act does not abolish the defence under Section 1 of the Defamation Act 1996 or the hosting exemption under Regulation 19 of the E-Commerce Regulations. It adds the following defence for operators of websites under section 5:

- **This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.**
- **It is a defence for the operator to show that it was not the operator who posted the statement on the website.**
- **The defence is defeated if the claimant shows that —**

  a) it was not possible for the claimant to identify the person who posted the statement,

  b) the claimant gave the operator a notice of complaint in relation to the statement, and

  c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

- **For the purposes of [(a) above], it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.**

3 It is worth noting that *Reynolds*, *Jameel* and *Flood* all involved stories which were clearly in the public interest.

- **The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.**
- **The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.**

The Act states that regulations must be made which determine when and how a website operator must respond to a notice of complaint (including as to taking the post down and revealing the identity or contact details of the poster). A notice of complaint includes a notice which:

a) specifies the complainant's name,

b) sets out the statement concerned and explains why it is defamatory of the complainant,

c) specifies where on the website the statement was posted, and

d) contains such other information as may be specified in regulations.

In a nutshell, subject to the regulations, it appears that a website operator will have a defence in relation to a defamatory statement posted by a third party on its site if:

a) The claimant can identify the poster; or

b) The operator has not received a notice of complaint; or

c) The owner, on receipt of a notice of complaint complies with the regulations e.g. it takes down the post and/or provides the claimant with the identity or contact details of the poster.

There is likely to be litigation on what is meant by "operator of a website" and "posted on the website". These appear to be relatively old-fashioned terms as a lot of user generated content is nowadays published via mobile platforms and apps. In addition, there are many different levels of involvement in operating a website. It seems likely that a pure ISP is not the operator of a website on which the statement complained of has been posted. Pure ISPs are more likely to try to rely on section 10 of the 2013 Act (see below), as well as section 1 of the 1996 Act and Regulation 19.

Action against a person who is not the author, editor, etc (section 10)

In addition to the website operator defence, "**a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher**."

This is an additional potential safe-harbour for intermediaries, such as ISPs and social media platforms. It means, for example, that if it is reasonably practicable for a claimant to sue the person who posted a comment on social media, then action cannot be taken against the social media platform (regardless of compliance under the website operator defence) or the ISP. In most cases it is likely to be practical to sue the author (if identifiable), particularly given that the courts are sometimes prepared to give permission for claimants to serve proceedings via social media platforms. It appears that the regulations for the website operator defence will make provision about identifying the poster or giving information to enable the claimant to make a *Norwich Pharmacal* application against another intermediary to ascertain the poster's identity. If this leads to nothing and/or the claimant cannot realistically take action against the poster, then it can potentially take action against an intermediary. However, some intermediaries may not be publishers at common law at all and so would not need to rely on any of the defences[4]. In any event, the intermediary itself in many cases is likely to have a defence under section 5 of the 2013 Act (if it is a website owner) and under section 1 of the 1996 Act and/or Regulation 19, provided it has promptly removed the content once it has received sufficient notice.

4 For more information. see e.g. *Bunt v Tilley*; *Metropolitan v Google* and *Tamiz v Google*.

Section 10 is not only likely to apply to those hosting social media. It also likely applies to the groups specified in section 1(3) of the 1996 Act as not being an author, editor or publisher. These include a printer, a distributor or seller of printed material (e.g. a bookshop) or the broadcaster of a live programme containing the statement where the broadcaster has no effective control over the maker of the statement. Therefore, for example, action cannot be taken against a printer or bookshop if the claimant can take action against the author, editor or publisher.

It is not clear when the court will be satisfied that "it is not reasonably practicable for an action to be brought against the author, editor or publisher". For example, before the court will rule that an action is not practicable:

a) Does a claimant need to have made one or more *Norwich Pharmacal* applications before the threshold has been met?

b) Does the fact that the author, editor or publisher is in another country make a difference and, if so, in which countries is action not reasonably practicable?

Potential boost for the UK safe-harbour for intermediaries

The combination of sections 5 and 10 of the 2013 Act, plus the section 1 defence and Regulation 19 exemption mean that potential defamation defendants who are intermediaries have been given a significant boost under English law. Whilst it will take time for the full impact of the 2013 Act to be known and the defence depends on what the regulations will say, England now seems to be a more attractive and safer place to print, distribute and host third party content. The legislative combination does not go as far as s.230 CDA under US law, but English libel claimants and overseas libel tourists hoping to target intermediaries may need to take out their atlas and shop elsewhere.

Order to remove statement or cease distribution etc (section 13)

Whether or not an intermediary is liable, the 2013 Act gives the court power to order the intermediary to remove or to stop distributing the defamatory statement. In particular, the court may order -

a) the operator of a website on which the defamatory statement is posted to remove the statement, or

b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

For example, if the claimant wins against a primary publisher (e.g. the author of the post), but the intermediary is not liable, the court can still potentially order the intermediary to remove or stop distributing the offending material.

Peer-reviewed statements in scientific or academic journals (section 6)

The 2013 Act provides a qualified privilege defence for statements in scientific or academic journals if:

a) the statement relates to a scientific or academic matter; and

b) before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—

i) the editor of the journal, and

ii) one or more persons with expertise in the scientific or academic matter concerned.

There is also a privilege for the publication:

a) in the same journal of the assessment of the statement's scientific or academic merit by one of the peer reviewers; and

b) of a fair and accurate copy of, extract from or summary of the statement or assessment.

During the consultation process for the Defamation Bill, it was apparent that the scientific and academic community and their publishers were hoping for a stand-alone defence which would protect them from the chilling effect of actual, or a potential threat of, libel proceedings when discussing scientific or academic topics generally (as opposed to within the narrow confines of peer review). This defence does not achieve that and scientists, academics and their publishers will need to rely on another defence. In this regard, the combination of the "*serious harm*" / "*serious financial loss*" requirements and the more flexible 'Honest Opinion' and 'Publication on a Matter of Public Interest' defences should reduce the chill on honest scientific and academic debate[5].

Expansion of statutory privilege (section 7)

The 2013 Act expands the absolute and qualified privileges set out in the 1996 Act. In summary, the main changes are:

a) An extension of the privilege from reports of certain UK or EU proceedings or official documents to reports of equivalent proceedings or documents anywhere in the world.

b) A new qualified privilege for fair and accurate reports of proceedings:

   i) at press conferences;

   ii) of scientific or academic conferences.

We set out the main changes in more detail below[6]:

Defamation Act 1996	Defamation Act 2013
Absolute privilege under s.14	
Only applied to:	Now applies to:
a) any court in the United Kingdom;	**a) any court in the United Kingdom;**
b) the European Court of Justice or any court attached to that court;	**b) any court established under the law of a country or territory outside the United Kingdom;**
c) the European Court of Human Rights; and	**c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement.**
d) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party.	

5 NB the Defamation Act 2013 does not directly reduce the costs of defending a defamation claim, which is a contributing factor to any chilling effect on scientific and academic debate.

6 The table only highlights some key changes. It is not a comprehensive list or description of the privileges available under the 1996 or 2013 Acts.

Defamation Act 1996	Defamation Act 2013
Qualified privilege under s.15 and Schedule 1 for fair and accurate reports	
Para 9 - Only applied to a copy of or extract from a notice or other matter issued for the information of the public by or on behalf of— a) a legislature in any member State or the European Parliament; b) the government of any member State, or any authority performing governmental functions in any member State or part of a member State, or the European Commission; c) an international organisation or international conference.	Now applies to **a copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of —** **a) a legislature or government *anywhere in the world*;** **b) an authority *anywhere in the world* performing governmental functions;** **c) an international organisation or international conference.**
Para 10 – a copy of or extract from a document made available by a court in any member State or the European Court of Justice (or any court attached to that court), or by a judge or officer of any such court.	Now applies to **a copy of, extract from or summary of a document made available by *a court anywhere in the world*, or by a judge or officer of such a court.**
	New para 11A for **proceedings at a press conference held *anywhere in the world* for the discussion of a matter of public interest.**
Para 12 - proceedings at any public meeting held in a member State.	Now applies to **proceedings at any public meeting held *anywhere in the world*.**
Para 13 - proceedings at a general meeting of a UK public company.	Now applies to **proceedings at a general meeting of *a listed company*.**
Para 14 – finding or decision of certain kinds of associations, formed in the UK or another member State.	Now applies to such associations ***formed anywhere in the world*.**
	New para 14A for a: **a) report of proceedings of a scientific or academic conference held anywhere in the world; or** **b) copy of, extract from or summary of matter published by such a conference.**

The expansion of the privilege to reports of public meetings and press conferences on matters of public interest anywhere in the world will be helpful for the media. It is not clear if a report of a company press release without a press conference would be included. This seems unlikely unless the press release forms part of a press conference or public meeting.

It should be remembered that the reporting must still satisfy the other conditions for the privilege to apply e.g. it must be fair and accurate, of public interest and for the public benefit and, where relevant, include a statement by way of explanation or contradiction if requested (see s.15 DA96).

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Single publication rule (section 8)

The limitation period for defamation claims is one year from the date on which the cause of action accrued. The 2013 Act establishes a single publication rule which should prevent, amongst other things, indefinite liability for online publications, including internet archives. Thus, the limitation period should be one year from the date of first publication of the article. In particular, the section applies if a person:

a) publishes a statement to the public ("the first publication"), and

b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

The rule is that "**any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication**".

But this "**does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication**".

The key issue will be whether the manner of the subsequent publication is materially different. Factors the court may take into account include "**the level of prominence**" and "**the extent of the subsequent publication**". Examples of cases where the section will need to be considered include:

- a new link to a news article, in the publisher's internet archive;
- a repeat of a broadcast;
- an old obscure article becoming very widely read after a newsworthy event takes place and/or the article gets tweeted around the world;
- a new edition of a book.

On the wording of the Act, the single publication rule only appears to help a person who published both first and the subsequent publication. It does not seem to apply to a second person who publishes the same statement for the first time. In other words, if a different website owner or broadcaster re-publishes / re-broadcasts old material, then they cannot seemingly rely on the rule since they are not the person who published the first publication.

Action against a person not domiciled in the EU (section 9)

To help prevent certain libel tourists litigating in England, the 2013 Act gives the court power to refuse jurisdiction unless it is satisfied that England is the most appropriate jurisdiction.

The provision applies to actions for defamation against a person who is domiciled outside the EU, Iceland, Norway and Switzerland[7]. The Act states that "**a court does not have jurisdiction to hear and determine an action … unless the court 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 an action in respect of the statement**".

This appears to mean, for example, that a person could not bring a libel action against a US media defendant over publication in a US newspaper (which is also read in England), unless England is clearly the most appropriate place to sue. In such a case, the court would likely consider that the claimant could sue in the US, particularly if the number of English readers is far less than US readers. But an important factor may be the place where the claimant has a reputation. If the claimant is an American (perhaps hoping to take advantage of England's more claimant-friendly laws than in the US), then the English court is likely to strike out the claim. But if the claimant is English and living in England (without a particular reputation in the US), then it may be that the court might seize jurisdiction on the basis that the claimant's reputation has been damaged in England and not in the US. It appears from the wording of section 9 that if the court is in doubt, then it should refuse jurisdiction on the basis that England is not "*clearly* the most appropriate place".

7 The section applies to defendants not domiciled in the UK, another Member State of the EU or a contracting party to the Lugano Convention.

Interestingly, the Act also provides that "**references … to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of**". This appears to mean that if substantially the same imputation had been made in e.g. the US by a defendant domiciled in the US, the court may take into account that the claimant might have more appropriately been able to take action against the defendant in the US, rather than England even if the later publication is only in England.

Trial to be without a jury unless the court orders otherwise (clause 11)

The 2013 Act will remove the presumption that defamation cases shall be tried with a jury in the Queen's Bench Division. The position under the new law will likely be that a defamation action "*shall be tried without a jury unless the court in its discretion orders it to be tried with a jury*": s.69(3) Senior Courts Act 1981.

The result overall is likely to be that most defamation actions can be determined quicker, more efficiently and at less cost. This is because the court does not need to leave issues for a jury to determine (e.g. a meaning which is capable of being defamatory) and can instead make an early determination of the actual meaning. The early determination of meaning and other issues can help parties more quickly assess their chances of winning, without waiting for a jury to decide.

Power of court to order a summary of its judgment to be published (section 12)

The Act gives the court power, if the claimant wins, to order the defendant to publish a summary of the judgment. The legislation also states that:

- **The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.**
- **If the parties cannot agree on the wording, the wording is to be settled by the court.**
- **If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.**

Defendants are likely to be reluctant about giving prominence to the summary and there are likely to be disputes about the positioning and wording of the summary. On the "time, manner, form and place of publication", the court can only give "directions". It is not clear if the court can actually order these four things (as it can for the wording of the summary) if the parties cannot agree.

For defendants who are not publishers or broadcasters, it is not clear where they would publish a summary if ordered to do so. It may be that a claimant seeks publication of the summary in a relevant trade magazine or a local or national newspaper, whereas the defendant would argue that publication of the summary should not be ordered at all.

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