

# NEW YEAR; NEW DEFAMATION ACT

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## LITIGATION AND DISPUTE RESOLUTION

**1 January 2014 marked the coming into force of the Defamation Act 2013 (the Act). The Act received Royal Assent in April of last year and seeks to consolidate and reform the law of defamation. The Act grapples with a number of contemporary legal issues including the role of defamation in the digital age, restricting vexatious litigants and addressing forum shopping.**

### **RAISING THE BAR: "SERIOUS HARM"**

Perhaps the most widely reported element of the Act is the introduction of the "serious harm" requirement in section 1 of the Act. This section provides that a statement is not defamatory unless its publication has caused, or is likely to cause, serious harm to the reputation of the claimant. While this appears to mark a significant change in the law, as it sets the bar high for a claimant looking to bring a claim for defamation, it arguably cements an attitude that has been developed by the Courts through its considerations that there needs to be a "threshold of seriousness"<sup>1</sup> in what is defamatory and that there should be a "real and substantial tort"<sup>2</sup>. In relation to harm to the reputation of a company (or a "body that trades for profit"), the Act makes it clear that there will only be "serious harm" if the harm to the reputation of that entity has caused, or is likely to cause, serious financial loss. The introduction of section 1 will see the Courts implementing Parliament's desire to shut out trivial claims and claimants will need to provide evidence of the "serious harm" that has been caused (or is likely to be caused) to their reputation by a defamatory statement.

### **A DEFENCE FOR WEBSITE OPERATORS**

In a move to address the use of websites by seemingly anonymous third parties as a platform for publishing defamatory statements, the Act introduces (in section 5) a defence for the operators of such websites. Section 5 provides a defence to an action for defamation brought against a website operator, in respect of a statement posted on their website, if the operator can show that they did not themselves post the statement on the website. However, section 5(3) provides a mechanism for this defence to be defeated if the claimant can show that it was not possible to identify the person who actually posted the statement; that they gave the operator a notice of complaint in relation to the statement; and that the operator failed to respond to that notice.

The Defamation (Operators of Websites) Regulations 2013 (the Regulations) were published after the Act and flesh out the provisions in section 5 of the Act. Regulation 2 sets out the information that a complainant must include in a notice of complaint, such as:

- ◆ their email address;
- ◆ the meaning they attribute to the statement referred to in the notice; and
- ◆ the aspects of the statement they believe are factually inaccurate or are opinions not supported by fact.

The notice must also contain a confirmation that the complainant does not have sufficient information about the poster to bring proceedings against them and an indication as to whether they consent to the operator giving the poster their name and email address.

The Schedule to the Regulations sets out the actions that must then be taken by an operator in response to a notice of complaint in order to maintain the operator defence.

- ◆ The operator must, within 48 hours of receiving a notice of complaint, send the poster a copy of the notice (with the complainant's details hidden if they have not consented to them being shared).
- ◆ This must be accompanied by a notification that the statement will be removed from the locations set out in the notice unless the poster responds within five days informing the operator whether or not they wish the statement to be removed, providing their full name and postal address and confirming whether they consent to these contact details being shared with the complainant.
- ◆ The operator must then pass on this information to the complainant and remove the statement if the poster confirms that it should be removed, or if the poster does not respond within five days.
- ◆ If the poster does not wish the statement to be removed and consents to their contact details being shared with the complainant then the complainant will then be in a position to issue proceedings against the poster (not the operator).
- ◆ If the operator has no means of contacting the poster then they must, within 48 hours of receiving a notice of complaint, remove the statement from the locations on the website specified in the notice of complaint.

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<sup>1</sup> Thornton v Telegraph Media Group Ltd [2010] EWHC 1414

<sup>2</sup> Jameel v Dow Jones & Co [2005] EWCA Civ 75

While these provisions protect the honest website operator, who will have the benefit of the defence if they follow the statutory procedure, the first shortcoming in the new Act from the perspective of the complainant is that if the poster does not consent to their details being shared then the complainant still will not be in a position to pursue the anonymous poster. In that situation the complainant would then need to apply to the Court for a Norwich Pharmacal order that the operator disclose the poster's contact details and the complainant would be forced to incur the costs of this application as well as the costs of the operator in disclosing the information. Secondly, even if a poster does consent to the statement being removed, it will still have been left on the website for a number of days while the complainant jumps through the statutory procedural hoops.

#### **TACKLING LIBEL TOURISM**

Section 9 of the Act aims to tackle the issue of the English Courts readily accepting jurisdiction simply because a claimant frames their claim to focus on damage in England in order to take advantage of English libel and defamation laws (which are more pro-claimant than other jurisdictions) – an issue that has been dubbed "libel tourism". Section 9(2) of the Act applies in respect of actions against a person not domiciled in the UK or EU Member State (or resident in a country that is party to the Lugano Convention). It provides that the Courts of England and Wales do not have jurisdiction unless the Court is satisfied that of all of the places in which the statement complained of has been published, England and Wales is clearly the most appropriate jurisdiction in which to bring an action in respect of the statement.

Prior to this statutory provision, the Courts had discretion to determine whether England and Wales was the appropriate forum. The explanatory notes to the Act (which are aids to construction, not part of the Act) provide that the Court will now be required to consider the overall global picture to consider where it would be most appropriate for the claim to be heard. The notes give an example that if a statement has been published more times in another jurisdiction than that is a good basis on which to conclude that the other jurisdiction is the most appropriate forum. The notes state that other factors that will be considered are: the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere; the extent to which the publication was targeted at a readership in England and Wales compared to elsewhere; and whether these are a reason to think the claimant wouldn't

receive a fair hearing elsewhere. While the Act replaces the Court's discretion, the considerations and the end point that will be achieved are not far from common law principles that have been developed by the judges in recent case law to avoid claims being brought by claimants without a substantial connection or reputation in England and Wales.

The Act also sees the common law defences of Reynolds privilege, justification and fair comment replaced by the statutory (but broadly similar) defences of publication on a matter of public interest, truth and honest opinion. The new statutory provisions abolish the old common law and the explanatory notes to the Act confirm that this means that where a defendant wishes to rely on the new statutory defence the Court would be required to apply the words used in the statute, not the current case law. However, the notes also state that in cases where uncertainty arises, the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied. It remains to be seen whether the codification of these defences will actually alter the approach of the Courts in practice.

Overall the Act seeks to consolidate a complex area of law and also reflects the legislature's concern that the Courts should shut out trivial cases and cases with no real tie to England and Wales. It is somewhat surprising, in light of the Jackson reforms last year, that the Act does not deal specifically with the issue of costs, which have long been an issue in relation to defamation. It is likely, however, that the Court will push the need for proportionate costs when implementing the provisions of the Act in practice.

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