The Defamation Act: what's new?

The new Defamation Act, passed last year, was brought into force on 1 January 2014. It has been hailed as a significant advance for free speech. Nigel Tait, managing partner at leading media law firm Carter-Ruck, takes us through the key changes - how they will affect media law in practice, and how they might have made some previous outcomes rather different.

The Act codifies elements of the existing law on defamation and also introduces some substantive reforms. According to the Government, the new Act "rebalances the law on defamation to provide more effective protection for freedom of speech while at the same time ensuring that people who have been defamed are able to protect their reputation".

The leading textbook, *Gatley on Libel and Slander*, agrees, stating that "the Act undoubtedly effects a shift of the law in favour of free speech".

When I qualified as a solicitor in 1988, specialising in suing newspapers for libel, the balance between freedom of speech and reputation was to my mind entirely satisfactory. Of the last forty libel cases that had gone to trial against journalists, the media had lost every single one. Excepting one blip in 1988 where a newspaper actually won a case (a state of affairs so remarkable that an entire book was devoted to what was deemed a storm in a teacup), the pattern continued, with the next ten cases in a row going against the media. When one eminent libel QC (Desmond Browne) heard that I lectured to the profession on strategy and tactics in libel cases, he remarked that all I needed to say was: If you are acting for a plaintiff, issue a writ, and if for a defendant, tell your client to get out his chequebook.

Prior to the introduction of the new Act the polarity between reputation and free speech was already reversing. Twenty-six out of the last thirty-five cases had been decided in favour of defendants.

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So how would the Act have affected historic libel cases? And what does the Act say about the future of defamation law for both claimants and their lawyers?

One of the most notable changes brought about by the Act is the requirement in **Section 1** that, in order for a statement to be regarded as defamatory, it has to be shown that its publication has caused or is likely to cause serious harm to the reputation of the claimant. Clearly this is intended to alter the previous common law threshold. The court will now have to look at all the circumstances of the publication, not just the words themselves. Thus evidence from the claimant that demonstrates harm is likely to be admissible on meaning. This will undoubtedly lead to increased costs in the initial stages of a defamation action and uncertainty for defendants who argue that a publication is not defamatory before seeing the evidence.

In 1990 I acted for famous explorer Sir Ranulph Fiennes over the publication of false allegations in six copies of a Canadian magazine that had been published in England. The jury awarded £100,000 in damages. However, the new threshold in Section 1 (and the new provisions on jurisdiction), means it is unlikely the action would be brought now on the same facts or that Sir Ranulph would have been able to clear his name.

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Section 1(2) of the Defamation Act provides that the harm to the reputation of a body that trades for profit is 'serious harm' only where it has caused or is likely to cause that body serious financial loss.

This is a significant new development. In 2008 I acted for Tesco over a report in the *Guardian*, which falsely alleged that Tesco was avoiding £1bn of corporate tax on property deals through an elaborate network of offshore accounts. Tesco was unhappy with the apology published by the *Guardian* but settled the dispute following the publication of a further, front page apology some eight months after the offending article. If Section 1(2) now says that harm to a profit-making organisation's reputation is only 'serious harm' (something that now *has* to be established for a publication to be defamatory) if it caused or is likely to cause serious financial loss, could Tesco sue for libel today over the same allegation? How could it establish that it had, or

was likely to suffer, serious financial loss because of an article about corporation tax? It does, of course, depend on the facts, but the answer is probably with great difficulty, if at all.

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Section 3 contains the statutory defence of honest opinion. This provision broadly reflects the previous defence of honest comment (formerly "fair comment") however, the requirement that the 'comment' (or now the 'opinion') be on a matter of public interest has been removed.

In 1992 my client Vladimir Telnikoff was awarded £240,000 by a jury against the author of a letter published in the *Daily Telegraph* which accused him of "stressing his racialist recipe". Mr Telnikoff, who was not a racist, complained that the letter labelled him as one. A judge and the Court of Appeal decided that the words were comment, not an allegation of fact, and dismissed the case. The House of Lords allowed Mr Telnikoff's appeal on the ground that a reasonable jury, properly directed, could find that the allegation was one of fact. Mr Telnikoff would not have won the case had the Act been in force because, due to its provisions, he would not have brought it in the first place.

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There are some provisions in the Act that do not necessarily alter the status quo. **Section 2** of the Act codifies the defence of truth (formerly justification). **Section 4(1)** (the defence of publication on a matter of public interest) is expressly intended to reflect the common law defence of responsible journalism on a matter of public interest, as set out in *Flood v Times Newspapers* (2012 UKSC 11). However, **Section 4(3)** greatly expands the ambit of the defence formerly known as "reportage", and may be used by the media to air scurrilous and false allegations on the basis that they are only reporting on a dispute (which they will have stirred up in the first place).

Other provisions reflect the way that the media landscape has changed over the years: they address how the liability of the operators of *websites* is to be determined. **Section 5** provides that, where an action is brought against the operator of a website in respect of a statement posted on the website, it will be a defence for the operator to show that it did not post the statement. Section 5(5) provides that regulations (which have now been published) may prescribe how website operators must respond to a notice of complaint. This is so they have a defence under Section 5 of the Act in relation to allegedly defamatory statements posted on their sites by others.

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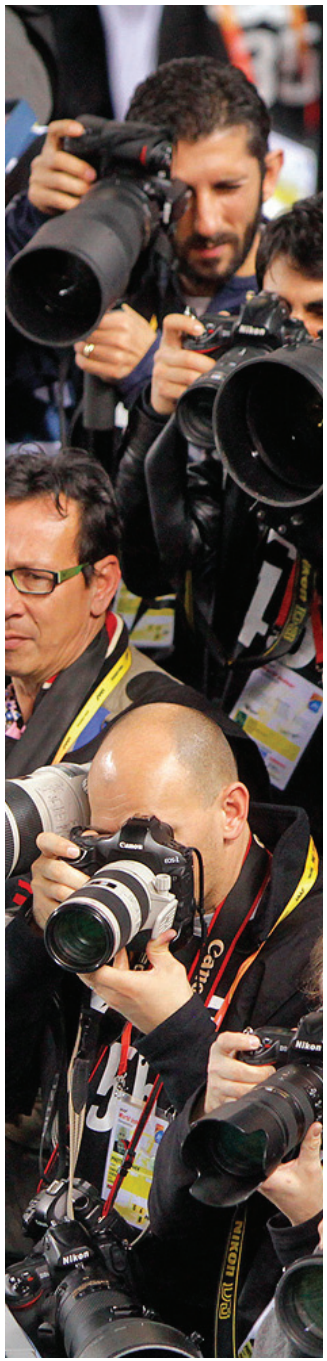

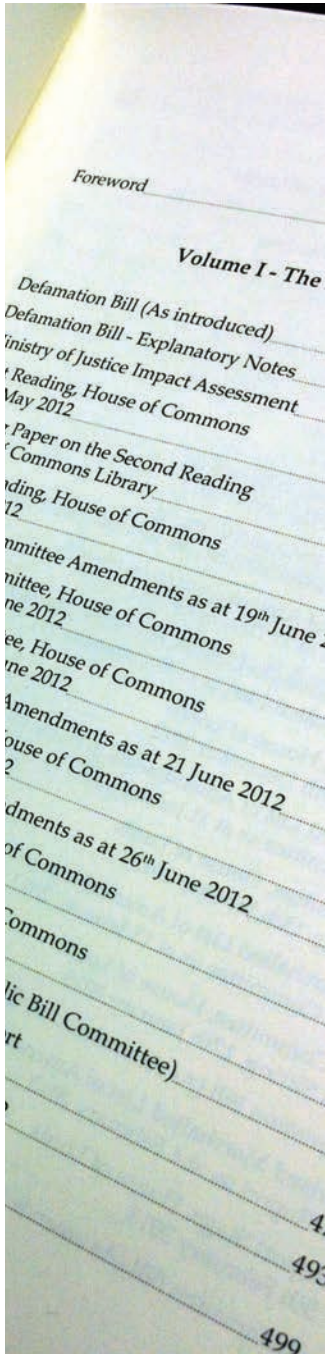

There are of course many other significant developments within the Act, but perhaps the development with most historical significance is **Section 11**, which abolishes the presumption that all defamation cases are to be tried by jury. Although an application may still be made for trial by jury, the presumption is now that a trial will be by judge alone - the section effectively abolishes trial by jury in libel actions.

In 2006, I acted for Sir Elton John over a nasty piece in the *Daily Mail* that was published despite the newspaper having been told prior to publication that the allegation was false. The trial was to be heard by a jury, a tribunal so often generous with other people's money. The *Mail*, having discovered that there was a break in Elton's tour schedule which coincided with the trial date, parted with £100,000 in damages, an apology and costs, in order to avoid the wrath of a star-struck jury. It is highly unlikely that, in the absence of jury trials, such a settlement would be achieved today.

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As Charles Dickens so lucidly observed in *Bleak House*, "the purpose of the law is to make business for itself", and in this regard I predict the Defamation Act 2013 will be a stunning success. Just when it looked as though clarity had been brought to the 1996 Defamation Act by a tsunami of court hearings (now largely won by defendants), this new Act will keep media lawyers and judges busy for at least ten years clarifying its wording and operation. So, we few lawyers should be happy. But what of our clients? Libel has until 1990, when conditional fee agreements were introduced, traditionally been the preserve of the rich. Just like the Ritz Hotel, the libel courts were open to all - provided you could afford it. Because of the high costs involved, the Master of the Rolls has issued a statement that he expects to see the earlier resolution of disputes, so perhaps the operation of the Act will not be tested so often. It is yet to be seen whether the Government's proposals in relation to costs, following the abolition of the existing no-win-no-fee regime, will prove workable. Only if it does, will the Act make any difference to the majority of libel victims. ■

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