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Defamation claims post-Lachaux (2020)

28 August 2020

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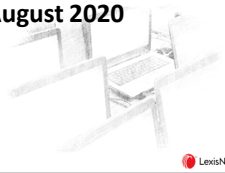
Defamation claims post-Lachaux (2020)

The law as stated during this webinar is up to date as of **26 August 2020**



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Introduction

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Romana Canneti

Barrister
4 King's Bench Walk

Mathilde Groppo

Associate
Carter Ruck

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Agenda

- General trends
  - Objectives underpinning the Defamation Act 2013 – have they been met?
  - The new face of claims for reputational harm
  - New practices in libel litigation
- Specific developments in the substantive law of defamation
- Specific developments related to applicable procedure and rules on costs

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General trends

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Defamation Act 2013

- Lord Lester's Bill was intended to 'reform law of defamation' and 'ensure fair balance' between freedom of expression and reputation:
  - New attempt to raise the bar and deter trivial claims (section 1)
- The 'heart of the Bill': new statutory public interest defence (section 4)
  - Lord McNally House of Lords, Grand Committee, 19 December 2012
- Claims on the rise:
  - Judicial statistics for 2019: 'highest number of claims since 1998, up 22% on 2018 – will a possible effect of Supreme Court judgment in Lachaux in 2019 be to bring the figures down?
- Notable number of politically-orientated claims
  - **Anna Turley v Unite the Union and Stephen Walker [2019] EWHC 3547 (QB)**
  - **Rachel Riley v Laura Murray [2020] EWHC 977 (QB)**
  - **Richard Millett v Jeremy Corbyn [2020] EWHC 1848 (QB)**
  - **Richard Burgon MP v. News Group Newspapers Limited and Thomas Newton Dunn [2019] EWHC 195 (QB)**

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The face of claims for reputational harm

- Interplay between defamation and other causes of action
  - Malicious falsehood
  - Data Protection
- Relationship between Defamation Act, GDPR, Data Protection Act 2018 and Codes of Conduct
- Common focus on the need for prior consideration and keeping an audit trail.
- 'Pot-pourri' claims/letters before action – alternative and cumulative rather than free-standing causes of action
- **Sube v (1) News Group Newspapers Limited & (2) Express Newspapers, [2020] EWHC 1125 (QB)**

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New practices in libel litigation: preliminary issue trials

- Serious harm preliminary issue trials disappearing
  - Historically encouraged: **Ames & Anor v The Spamhaus Project Ltd & Anor [2015] EWHC 127 (QB)**
  - Now deemed inappropriate where they would raise substantial issues of fact and law requiring disclosure and witness statements: **Brown v Bower & Anor [2017] EWHC 1388 (QB)**
- Meaning preliminary issue trials becoming the norm where the meaning is in dispute
  - Useful case management practice, in line with the overriding objective (Brown v Bower)
  - Timings: before service of the Defence. **Morgan v Associated Newspapers Ltd [2018] EWHC 1850 (QB); Bokova v Associated Newspapers Ltd [2018] EWHC 2032 (QB); Poroshenko v BBC [2019] EWHC 213 (QB)**
  - In practice: paper determinations (***Hewson v TNL & ANL*** **[2019] EWHC 650 (QB)**) and costs capping to dispense with costs budgeting (***Price v MGN Ltd*** **[2018] EWHC 3395 (QB)**)

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Specific developments: substantive law

A review of the case law applying the Defamation Act 2013

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Serious Harm threshold in s1 Defamation Act 2013

- A "higher hurdle"?
  - Common law threshold: *Thornton v Telegraph Media Group* [2010] EWHC 1414
  - Parliament's intention in introducing new statutory threshold
  - The statutory test's first case: what does 'likelihood ' mean? ***Cooke v MGN Ltd* [2015] 1WLR 895 par33**
- Section 1(1) : the leading case: **Lachaux v Independent Print Limited [2019] UKSC 27** – Clarification of the proper interpretation of the statutory test
  - Court of Appeal's findings on the ambit of s1(1): **Lachaux v Independent Print Limited [2017] EWCA Civ 1334** : a return to actionability per se?
  - Lord Sumption's judgment redresses the balance
  - Facts required, meaning alone falls short of serious harm threshold
  - Subsequent cases: **Alison Morgan v Times Newspapers Ltd [2019] EWHC 1525 (QB); ZC v Royal Free London NHS Foundation Trust [2019] EWHC 2040 (QB); Yavuz v Tesco Stores Ltd and Another: QBD 22 Jul 2019** (slander, inference); **Turley v Unite the Union [2019] EWHC 3547 (QB)**

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Serious Harm threshold in s1 Defamation Act 2013

- Section 1(2): requirement of serious financial loss when claimant is a body trading for profit – meaning of 'caused or is likely to cause'
  - **Brett Wilson LLP v Person(s) Unknown [2015] EWHC 2628 (QB)**
  - **Pirtek (UK) Ltd v Jackson [2017] EWHC 2834 (QB)**
  - **Burki v Seventy Thirty Limited [2018] EWHC 2151 (QB)**

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Section 3: Honest opinion

- Three conditions in order to avail oneself of the defence
- Distinguishing between a statement of fact and a statement of opinion: **Koutsogiannis v The Random House Group [2019] EWHC 48 (QB), [11-17]**
- Implied or inferred opinion based on factual statements: whose opinion is it?
  - **Tinkler v Ferguson [2018] EWHC 3563 (QB), [37]**
  - **Sheikh v Associated Newspapers [2019] EWHC 2947 (QB)**
- Inferences of fact: still an opinion? (**Butt v Secretary of State for the Home Department [2019] EWCA Civ 933**)

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Section 4: statutory public interest defence

- Common law roots
  - **Reynolds v Times Newspapers Limited [2001] 2 AC 127 HL; Jameel v Wall Street Journal Europe Sprl [2007] 1 AC 359 HL; Flood v Times Newspapers Ltd [2012] 2 AC 273 SC**
- **Alexander Economou v David de Freitas: [2016] EWHC 1853 (QB)** first instance per Warby J; also **[2018] EWCA Civ 2591** two-stage test [83-84]. General analysis of ambit and effect of s4 defence.
- The leading case on s4 - **Serafin v Malkiewicz** and others:
  - **[2020] UKSC 23**: responsible journalism test has gone, though factors may be relevant;
  - **[2019] EWCA Civ 852**: a return to *Reynolds* checklist and 'core requirement' and common law 'responsible journalism' tests: divergence from Warby J and Court of Appeal in *Economou*;
  - **[2017] EWHC 2992 (QB)**: matters reported in the public interest despite Ds' failure to seek comment.

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Section 4: statutory public interest defence

- Effect of Serafin – s4 clarified: two-stage test: objective assessment of D's subjective belief that publication in the public interest. Pre-requisite that subject-matter itself be of public interest.
- Other notable cases on D's belief: **Hourani v Thomson [2017]); Doyle v Smith [2019] EMLR 15** (D had not shown such belief [75-76]; further, D knew that what he published was untrue, as he had invented and published a false confession by C [79], [84]); **Turley v Unite the Union [2019] EWHC 3547 (QB),** D1 had not formed the relevant belief [148-149] (D2 failed to show that his belief was reasonable [153-156])

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Jurisdiction: suing a foreign defendant

- Suing a defendant not domiciled in the UK/EU/a state party to the Lugano Convention: overcoming the jurisdictional bar in section 9 (**Wright v Ver [2020] EWCA Civ 672**)
- Suing a foreign defendant domiciled in the EU/a state party to the Lugano Convention: limited scope of available remedies (**Saïd v Groupe L'Express & Anor [2018] EWHC 3593 (QB)**)
- Brexit: extending the reach of section 9

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Section 12: publication of a summary of the Court's judgment

- Important new vindicatory mechanism: when should it be sought?
- Two examples:
  - **Shakil-Ur-Rahman v ARY Network Ltd & Anor [2016] EWHC 3110 (QB)**
  - **Ghannouchi v Middle East Online Ltd & Anor [2020] EWHC 1992 (QB)**
- Efficiency dependent on directions made regarding the circumstances of publication

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Specific developments: procedure and costs

A review of the changes in the practice of libel litigation

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Procedural changes operational since 1 October 2019

- The Media and Communications List: a specialist list of the Queen's Bench Division
  - Practical consequences regarding the issuing of media claims
- New practice directions: PD 53A and PD53B
  - Transfers into and out of the MCL
  - Guidance regarding the contents of statements of case in media and communications cases – see specifically the rules on harassment
- A new pre-action protocol for media and communications claims with limited impact

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Costs: abolition of recoverability of success fees since 6 April 2019

- The need to protect a claimant in libel proceedings against liability for adverse costs
- Controlling costs by limiting the recoverability of additional liabilities: e.g. success fees since 6 April 2019

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Conclusion

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