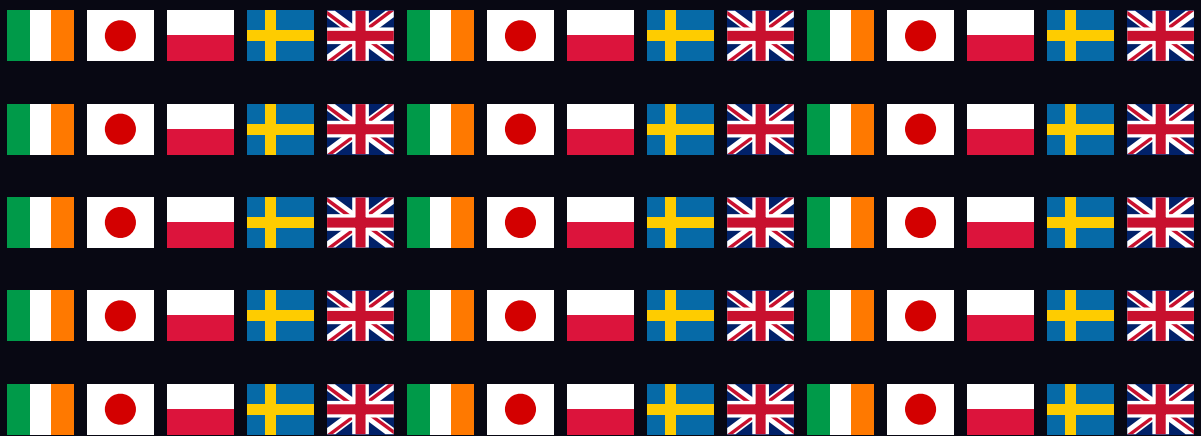


# DEFAMATION & REPUTATION MANAGEMENT

United Kingdom - England &  
Wales



# Defamation & Reputation Management

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Quick reference guide enabling side-by-side comparison of local insights, including into claims; remedies; key laws and legal tests; the role of data protection law; harassment; online defamation and other adverse online content; anonymity and privacy in litigation; freedom of expression and the rights of the press; multi-agency reputation management; and trends and developments.

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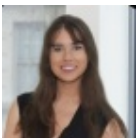
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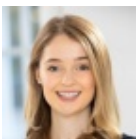
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## DEFAMATION CLAIMS

### Key laws

What key legislation and case law serve as the basis for defamation claims in your jurisdiction?

While the law of defamation is based on common law, it has been largely codified (and modified) by statute. The principle relevant statute is the Defamation Act 2013 .

This codified a threshold test for a statement to qualify as defamatory, as well as key defences, which were renamed and modified, with the effect of raising the bar for bringing a claim and strengthening defences for publishers. While the new definitions draw heavily from the previous defences, the old versions are abolished. The courts are now busy interpreting key concepts and definitions introduced by the Act.

The Defamation Act 1996 (largely replaced by the 2013 statute) remains partly in force, with the most important provision relating to the offer of amends defence. The Defamation Act 1952 also remains partly in force and contains certain exceptions to the rule that an action in slander requires proof of special damage.

Those practising in the field inevitably turn to pre-2013 case law for guidance when interpreting the 2013 Act, which is very broadly drafted and open to wide interpretation. Judicial decisions that post-date the 2013 Act are closely scrutinised for the light they shed on key concepts such as 'serious harm' and 'publication on a matter of public interest'.

*Law stated - 16 May 2023*

### Legal tests

What is the test to determine whether words published are defamatory? Must the claimant show actual harm or loss?

Showing that a statement is 'defamatory' is the necessary first element in the cause of action, which is comprised of the following components:

- a defamatory statement;
- published to a third party (with 'publication' covering all types of communication, from newspapers, books and TV or radio to email, text, social media posts, a letter, a conversation or even a song or graffiti); and
- which refers to the claimant (ie, which 'identifies' the claimant to the recipient of the statement).

To show that a statement is defamatory, a claimant must first establish that that the meaning of the statement complained of is defamatory of them at common law. One of the classic tests for this is whether, taken as a whole, the statement tends to lower the claimant in the estimation of right-thinking people generally. Other tests are whether the statement causes the claimant to be shunned or avoided or exposes them to ridicule and contempt.

There are three levels of seriousness to the 'meaning' of any defamatory allegation: the most serious being an allegation that the claimant is guilty of wrongdoing, the second being that there are reasonable grounds to suspect the claimant of wrongdoing and the least serious being that there are reasonable grounds to investigate whether the claimant is guilty of wrongdoing. The higher the level of 'meaning', the more evidence will be required to demonstrate a defence of truth.

If it can be established that a statement is defamatory, then the next question is whether, under section 1 of the Defamation Act 2013, the defamatory statement has caused 'serious harm'.

Under section 1(1), personal claimants must now show that the defamatory statement has caused or is likely to cause 'serious harm' to their reputation.

In the decision of *Lachaux (Respondent) v Independent Print Ltd and another (Appellants)* [2019] UKSC 27 the Supreme Court held this to mean that the 'meaning' of the statement is not the sole factor and the question of whether the section 1 test is met requires 'a combination of the inherent tendency of the words and their actual impact to those to whom they were communicated'. This requirement for 'actual impact' places the bar higher than the test prior to the 2013 Act.

For a corporate claimant, the bar has been set higher by section 1(2): '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.' It is therefore harder for companies to sue for libel than individuals.

Libel is only actionable where serious harm has either been proven or where serious harm can be inferred. Conversely, an action for slander will generally only succeed where the claimant can prove they have suffered special damage arising from the slander. The exceptions to this rule are either where the allegation is of a criminal nature or where the words complained of disparage a complainant in their office, trade, business or profession.

*Law stated - 16 May 2023*

## Libel and slander

Does your jurisdiction distinguish between libel and slander?

Yes, it does. Libel typically takes the form of written communications such as print publications (eg, newspapers, magazines, books) and online material such as website content. Other forms of communication also count as libel because they are permanent or lasting, for example TV and radio broadcasts, films and theatre performances.

Slander typically covers spoken statements (such as a conversation) or concerns transient, or temporary, forms of publication such as chat room forums.

*Law stated - 16 May 2023*

## Standing

Who can sue in defamation and must the claimant be named in the publication in order to bring a claim? Are there any key differences between litigation involving individual and corporate claimants?

Defamation is a personal action. Only a person or corporate body who is 'referred to' in the defamatory statement is able to bring a claim. It is not necessary to be named. The test is whether the claimant is 'identified', or put another way, whether readers of the statement would 'think of' the claimant. It is therefore possible for a statement to defame various people without naming them.

A defamation claim generally cannot be brought on someone else's behalf (save for where that person is a minor). The action dies with the claimant.

Certain entities cannot bring a defamation claim, including government bodies and unincorporated associations.

A key difference in individual and corporate defamation claims is the different requirements for showing serious harm to reputation.

*Law stated - 16 May 2023*

## Defences

### What key defences are available to a claim in defamation?

The key defences include the following provisions of the 2013 Act:

- Section 2: truth. It is a defence to show that the statement is substantially true. The burden of proof lies with the maker of the statement.
- Section 3: honest opinion. This is designed to protect statements that count as opinion or comment, provided the statement indicates the basis of that opinion and provided it could be held by an honest person.
- Section 4: publication on a matter of public interest. This is a very broad defence designed to fortify freedom of expression. It protects statements about public interest subject matter where the publisher reasonably believed publishing the statement was in the public interest.

Another key defence is 'privilege', which is a type of right to report or communicate on certain occasions. It is derived from both common law and statute. It can take many forms and can provide complete or partial protection. For example, 'absolute privilege' protects reports of court proceedings while in other situations the privilege is only 'qualified' and can be defeated in certain circumstances.

*Law stated - 16 May 2023*

## Jurisdiction

### How do the courts approach questions of jurisdiction, for example in relation to online content that may be accessed by readers and viewers in multiple jurisdictions?

The general rule is that an action for defamation may be brought in the courts of England and Wales when the defendant is domiciled or based there or where the claimant has a sufficiently established reputation in England and publication has taken place there.

The courts will balance a variety of factors when determining whether England is the correct forum for a defamation claim. These include:

- the extent of publication in England;
- the level of damage caused to the claimant's reputation in England as compared to other jurisdictions;
- the extent to which the publication targeted readers in this jurisdiction; and
- whether the claimant is capable of receiving a fair hearing elsewhere.

*Law stated - 16 May 2023*

## Burden of proof

### Who bears the burden of proof in defamation claims in your jurisdiction?

Upon the claimant's establishing that the statement complained of is defamatory and has caused or is likely to cause serious harm to their reputation, the burden of proof then lies with the defendant. The defendant must then prove that it has an available defence to its publication of the defamatory allegation.

*Law stated - 16 May 2023*



## Limitation period

### What limitation period applies to claims in defamation?

A claim in defamation must be brought within one year from the date of publication. The single publication rule introduced by the Defamation Act 2013 means that any cause of action in respect of any subsequent publication of the same statement by the defendant is treated as having arisen from the date of first publication.

The court does have discretion to disapply the limitation period in certain circumstances.

*Law stated - 16 May 2023*

## Evidence

### What rules and procedures govern the collection, submission and admissibility of evidence in defamation trials? Is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The rules and procedures for defamation trials are set out in the Civil Procedure Rules (CPR). Rule 32 and Practice Direction 32 of the CPR deal with rules of evidence. Rules concerning pre-action conduct are set out in the Pre-action Protocol for Media and Communications Claims .

In general, evidence must be relevant to the issues in the case, reliable and proportionate. Expert witness testimony is allowed, provided that the expert is qualified in the relevant area in which they are providing testimony and that they are impartial.

Aside from the need to evidence some actual reputational harm, other common evidential issues would include proving that people within this jurisdiction actually read (or heard or saw) the publication. Unlike with print publication, online publication is not inferred and evidence of people downloading or reading it will be important. There needs to be a 'real and substantial tort'. If only a few people read the material, the claim risks being struck out.

*Law stated - 16 May 2023*

## Trial format and time frames

### Are defamation cases decided by a judge or jury? How long does a case typically take to reach trial and a verdict or judgment?

Since the Defamation Act 2013, English defamation cases are decided by a judge alone. The exception to this rule is where the court orders otherwise (although this has not happened since the introduction of the 2013 Act).

The length of time it takes for a defamation case to reach trial and judgment varies depending on the complexity of the case and the availability of the court. In general, it can take between 12 and 18 months for a case to reach trial, although it can be longer if interim issues and hearings arise. Once the trial finishes, it may be two to three weeks (or longer) for the judge to deliver a judgment.

*Law stated - 16 May 2023*

## Case management and anti-SLAPP laws

What types of application or case management procedure are available to enable an early determination or dismissal of a claim? Does your jurisdiction have anti-SLAPP (strategic lawsuits against public participation) legislation?

Where there is disagreement between the parties on the 'meaning' of the defamatory statement, the courts will order an interim hearing at an early stage in which the judge will determine the correct meaning for the purposes of the ongoing litigation. The fact of an adverse finding on the meaning at this early stage can lead to early settlement of the dispute.

There are other case management procedures available to parties to enable an early determination or dismissal of a claim. These include an application to strike out on the grounds that the claim is frivolous or meritless or that it amounts to an abuse of process. Either party can also make an application for summary judgment, which allows the court to make an early determination of a particular issue in a case, or of the full claim, without the need for a trial. The applicant must show that there is no real prospect of the other party succeeding at trial on the full claim or on a specific issue.

The Pre-action Protocol for Media and Communications Claims in the Civil Procedure Rules aims to encourage the parties to share information at an early stage with a view to resolving their dispute without the need for litigation. Parties who fail to comply with the protocol may be penalised by the court.

England does not, as the time of writing, have specific anti-SLAPP legislation. However, it is a highly relevant topic that is the subject of intense debate among practitioners, politicians and regulators.

*Law stated - 16 May 2023*

### **Other causes of action**

Does your jurisdiction recognise other causes of action that are separate from but related to defamation, such as malicious falsehood? If so, what are the main differences between these and defamation claims?

Malicious falsehood is a tort that protects a claimant's economic interests from being damaged by false statements. To succeed, a claimant must prove that the defendant maliciously published a false statement that referred to the claimant and that statement has caused economic loss or is likely to cause economic loss and is in writing or other permanent form or relates to the claimant's office, profession, trade or business.

In contrast to a claim in defamation, a claimant need not prove that there has been any damage (or likely damage) to its reputation. However, it is generally more difficult to succeed in a claim for malicious falsehood, primarily because of the need to prove that the statement was made in malice. Damages awarded for claims in malicious falsehood tend to be lower than those awarded in defamation claims.

*Law stated - 16 May 2023*

### **Criminal defamation**

Does your jurisdiction recognise any criminal offences for defamation? If so, what are the elements of these offences and how are they punished?

No, there is no criminal offence for defamation in England.

## DEFAMATION REMEDIES

### Damages

How are damages and compensation calculated in defamation cases? What key principles underpin damages awards?

Damages are awarded to compensate a successful claimant for the harm caused to their reputation because of the defamatory statement. The aim is to remedy the claimant's distress as well as vindicate its reputation. The level of damages is calculated by the court, considering several factors including the seriousness of the allegation, the extent and nature of the publication, and the level of damage caused to the claimant's reputation. Special damages are available for actual pecuniary loss, and additional damages can be awarded for aggravating conduct.

In exceptional circumstances the court has discretion to award exemplary punitive damages to punish the defendant for misconduct or particularly egregious behaviour. Exemplary damages are not concerned with compensating the claimant, but rather penalising the defendant. For example, a court is likely to award exemplary damages where a publisher has deliberately made a defamatory statement it knows to be false for its own profit.

The key principles that underpin awards for damages are that they should be proportionate to the harm suffered and should be awarded fairly and justly.

*Law stated - 16 May 2023*

### Injunctions

Are pre-publication, interim or final injunctions available? What procedures apply?

Technically, yes. However, a defamation claimant is extremely unlikely to succeed in an application for an interim injunction to be granted pending trial. The rule against prior restraint means that a defendant would merely have to put forward an arguable defence to publication (such as arguing that the statement is true) to prevent an interim injunction. The principle is underpinned by the fact that a claimant can seek damages in the event of publication of a defamatory statement, which is deemed to serve as appropriate vindication.

Where a claimant is successful at trial, final injunctions can be granted against a publisher to restrain any future publication of the same or similar material.

*Law stated - 16 May 2023*

### Other remedies

What other remedies are available at trial?

In addition to an award of damages, a court can order a defendant (eg, a newspaper) to publish a summary of the judgment.

It can also order a website operator to remove a defamatory statement and other entities to stop distributing, selling or displaying the statement.

*Law stated - 16 May 2023*

## Settlement

What might typically be agreed if the parties decide to settle a case? Are settlements subject to any procedural requirements?

Where a case settles, it is common for a publisher to agree to take down defamatory material from online sources and publish an apology or a correction. Sometimes, compensation can also be negotiated, and the claimant can insist on a formal statement of apology (a statement in open court) being read out in court in front of a judge.

There are no procedural requirements in English law for settlement negotiations. If proceedings have been commenced, the parties would file a consent order with the court settling the claim. If settlement negotiations are ongoing, the parties might enter into a standstill agreement to pause the proceedings to enable negotiations to continue.

*Law stated - 16 May 2023*

## PROTECTING PRIVACY AND CONFIDENTIALITY

### Key laws and legal tests

Other than applicable data protection legislation, is there a separate law of privacy in your jurisdiction that regulates the publication of private or confidential information? If yes, what is the test to determine whether an individual's privacy has been infringed?

It is now established that there is a distinct tort of 'misuse of private information'. This developed out of the leading case of *Campbell v MGN* [2004] UKHL 22 and was formally recognised in the case of *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB). The House of Lords in *Campbell* held that a cause of action was required to give effect to article 8 (Right to respect for private and family life) of the European Convention of Human Rights (ECHR).

Misuse of private information can consist of the publication of private information, but also unlawful access to such information or intrusion into a person's activities.

The test to determine whether an individual's privacy has been infringed is:

- whether the person in question had a reasonable expectation of privacy in the information (this is an objective test); and
- if so, the court must perform a balancing act between the claimant's privacy rights and the rights of any third parties, including a defendant's right to freedom of expression and the public's right to receive information under article 10 of the ECHR.

There is also a cause of action for breach of confidence; this can arise where:

- there is information that is confidential in nature;
- the information is disclosed in circumstances where the recipient would have reasonable grounds to believe the information was being provided in confidence; and
- the information is used or disclosed without authorisation.

Importantly, unlike misuse of private information, breach of confidence can protect the rights of companies and other

organisations, not just individuals.

*Law stated - 16 May 2023*

## Private information

Are any types of information automatically considered to be private?

There are certain categories of information that are generally recognised as being private, such as:

- health and medical records;
- private physical characteristics;
- psychological or emotional state;
- matters relating to personal and family relationships;
- sexual orientation;
- political opinions;
- religious commitment; and
- financial information.

Following recent cases (including in particular *ZXC v Bloomberg LP* [2022] UKSC 5 ), it has also been established that there is a general rule whereby a person under criminal investigation (before being charged) has a reasonable expectation of privacy in respect of information relating to that investigation. Further, information pertaining to children is usually considered private by the courts.

*Law stated - 16 May 2023*

## Privacy rights

Do the attributes of the claimant affect their privacy rights? For example, do public figures have a lower right to privacy?

A key question in determining whether an individual has a reasonable expectation of privacy of information relates to their own attributes. The extent to which a person has a public profile or has placed information voluntarily into the public domain may impact upon what amounts to a reasonable expectation on the facts of the case.

It is clear that any public position or 'celebrity status' will expose an individual to more scrutiny. However, public figures are still entitled to a private life, particularly in relation to matters that are endemically private (such as medical information and details relating to their sex life).

Even where a reasonable expectation of privacy is engaged, there will still be a question of whether there is an overriding public interest in the relevant information or whether it could be said that there is a public interest in the manner in which the claimant is conducting themselves.

*Law stated - 16 May 2023*

## Injunctions

What steps can an individual take to prevent the publication of private information? If applicable, what is the test for a privacy injunction and can it be obtained from the courts on an urgent basis?

It is possible for an individual to apply for an injunction to prevent misuse or publication of private information. An interim injunction may be sought on an urgent basis (and, very occasionally, without notice) to prevent a defendant from publishing information relating to the claimant, pending a final decision on the claimant's misuse of private information claim. The purpose of an interim injunction is to 'hold the ring' and provide protection in relation to the information until the full claim is decided. A final injunction can only be granted after a trial and is granted to last perpetually or until a date chosen by the court.

To obtain an interim injunction in a privacy claim, the test under section 12 of the Human Rights Act 1998 must be fulfilled. The court must be satisfied that the claimant is likely to establish at trial that publication of the information should not be allowed. The court must also have particular regard to:

- the right of freedom of expression;
- the extent to which the information is already available to the public; and
- whether it would be in the public interest for the information to be published.

*Law stated - 16 May 2023*

## Other remedies

What other remedies are available for breach of privacy?

General compensatory damages and special damages (ie, financial losses caused by the infringement) are also available for breaches of privacy. Where appropriate, destruction of the relevant material or information may also be ordered by the court.

*Law stated - 16 May 2023*

## Protecting company information

Privacy is generally regarded as a right of the individual. Do companies have separate means of preventing the disclosure or misuse of confidential or commercially sensitive information?

There are several options available to companies to protect their information. While companies themselves do not have a right to privacy (either pursuant to article 8 of the ECHR or applicable data protection laws), privacy and data protection rights of employees may be engaged in any given scenario.

However, where it is the company's own information that is affected, the main means of protection is an action for breach of confidence. The test for breach of confidence is:

- the information must have the necessary quality of confidence;
- the information must have been imparted in circumstances importing an obligation of confidence (eg, through a contract or where the recipient, acting reasonably, should know that the information is confidential); and
- there must be an unauthorised use of that information to the detriment of the rights holder in that information.

Other options for the company may include breach of contract, reliance on intellectual property rights or actions under the Trade Secrets (Enforcement, etc) Regulations 2018.

*Law stated - 16 May 2023*

## DATA PROTECTION LAW

### Causes of action

Can data protection legislation be relied on for separate causes of action outside of other more recognised legal avenues for protecting reputation and privacy?

Yes. In the past, it was most common to rely on defamation or misuse of private information to tackle reputational issues. However, with an increasing reliance on the internet for information, there are many circumstances in which these legal avenues will be inadequate.

In any event, recent case law has cemented the idea that actions under data protection legislation can be used alongside more traditional causes of action (either as an additional, standalone or fallback claim), and demonstrates how claimants are increasingly seeking a combination of the various remedies.

*Law stated - 16 May 2023*

### Right to be forgotten

Does your jurisdiction have the 'right to be forgotten' or similar? If so, how has this been applied by the courts?

Yes. The right to be forgotten is codified in article 17 of the UK GDPR , and is a notable element of the UK data protection landscape. Broadly speaking, this provides individuals with the right to have personal data erased that is:

- irrelevant;
- outdated;
- inaccurate; or
- unlawful.

Under the principles of the right to be forgotten, online search engines such as Google may be required to delist search results from name searches carried out within the UK and EU. This is helpful for subjects of damaging or intrusive press or social media coverage where there are no legal grounds to seek removal of the content from the source website or where attempts to do so have failed.

However, the right to be forgotten is not absolute, and there are a number of qualifications and exemptions in both the UK GDPR and the Data Protection Act 2018 , for example where the data is processed:

- to exercise the right of freedom of expression and information;
- to comply with a legal obligations; or
- for the establishment, exercise or defence of legal claims.

The right to be forgotten is not often the subject of litigation in the UK. The English courts ruled on the application of the right to be forgotten to online search engine results for the first time in *NT1 & NT2 v Google LLC* [2018] EWHC 799. Here, both NT1 and NT2 (whose identities were anonymised) brought claims against Google after it refused to remove information about their spent convictions from search results. Only one of them succeeded. In both cases, the court balanced the claimants' rights to have historic personal data removed against Google's legitimate interest in processing the information. Influential factors included:

- the role of each claimant in public life and the extent to which they had accepted their wrongdoing and were rehabilitated;
- the accuracy, relevance and sensitivity of the data;
- the harm caused to NT1 and NT2 by continued processing; and
- the extent to which the information continued to be in the public interest.

The factors considered are by no means exhaustive, but these cases demonstrate that the success of a request to exercise the right to be forgotten will depend heavily on individual circumstances.

Although these cases were decided before the UK GDPR came into force, subsequent cases have confirmed their continued applicability, for example the recent case of *ABC v Tony Palmer* [2022] EWHC 3128, which explicitly applied the factors discussed in *NT1 & NT2 v Google* as part of the balancing exercise in arriving at the decision that ongoing publication of a court report was not unlawful, despite the conviction that it related to becoming spent.

*Law stated - 16 May 2023*

## Journalistic protections

Do journalists have specific protections against claims brought pursuant to data protection law?

The 'special purposes' exemption under the Data Protection Act 2018 disappplies certain requirements of data protection law for journalists, such as the data protection principles and the requirement to comply with data subject access requests. Journalists can avail of this exemption where they are processing personal data for journalistic purposes, and:

- are acting with a view to publication;
- reasonably believe publication is in the public interest; and
- reasonably believe that compliance with any relevant data protection provision would be incompatible with journalism.

*Law stated - 16 May 2023*

## HARASSMENT

### Regulation

How is harassment regulated? Is it always a criminal matter or does a private right of action exist?

Under the Protection from Harassment Act 1997, it is a criminal offence for someone to pursue a course of conduct that they know (or ought to know) amounts to harassment. This includes conduct causing alarm or distress that takes place on at least two occasions, and would encompass acts committed online, for example through the repeated sending of threatening messages.

While extreme cases might warrant involving the police, it is possible to pursue a civil claim for damages and an injunction ordering the perpetrator to cease. If the injunction is breached, the claimant can immediately apply for a warrant for the defendant's arrest. While that application can be made directly to the civil court that issued the injunction, breaching a civil injunction against harassment without reasonable excuse is automatically a criminal offence.

While not explicitly defined in the legislation, case law in the Supreme Court has described harassment as 'a persistent



and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress’.

Harassment is also unlawful under the Equality Act 2010, which applies to employees who are subjected to unwanted behaviour relating to a personal attribute known as a ‘protected characteristic’. Examples of protected characteristics include age, disability, pregnancy and maternity, race and sexual orientation.

*Law stated - 16 May 2023*

### **Published material**

**Can the publication of information about a person constitute harassment? Can journalists and media organisations be sued for harassment?**

While the Protection from Harassment Act 1997 has the potential to catch a range of journalistic activities (including persistent photography, individuals being followed and door-stepping), successful claims for harassment by publication will be rare and exceptional. Recent case law confirms that ‘nothing short of a conscious or negligent abuse of media freedom’ will justify a finding of harassment by publication, affording a wide margin to freedom of expression.

In addition to action under the Protection from Harassment Act 1997, individuals can make complaints to the Independent Press Standards Organisation (IPSO), which governs most mainstream media organisations in the UK. IPSO has enforcement powers, including in relation to its own Editors’ Code of Practice, which sets out the minimum expectations in relation to the conduct of those employed by certain organisations. Clause 3 forbids harassment by journalists (subject to an exception where the public interest is engaged).

*Law stated - 16 May 2023*

### **Claims by companies**

**Can companies bring an action for harassment of their staff as a result of (for example) aggressive correspondence or online postings?**

No. Organisations cannot generally bring a harassment claim against a defendant for harassing their staff. This is because under the Protection from Harassment Act 1997, a company cannot be a victim of harassment: only an individual can be a victim of harassment and rely on the Act as a claimant. (An exception to this is that a company could seek an anti-harassment injunction against a perpetrator in circumstances where a perpetrator was harassing individual employees as a means of seeking to pressurise the company not to do something that the company is entitled to do, or to do something it is not under an obligation to do.)

However, while a company cannot usually bring a harassment claim against a perpetrator for harassment of employees, an individual employee or employees could themselves bring a harassment claim against another member of staff.

Therefore, for example, if one employee were to direct unwarranted correspondence towards another employee, such as the CEO, or post negative reviews about the CEO online, and the particular conduct met the definition of harassment, the CEO could bring a harassment claim in his or her personal capacity against the employee.

An individual could also bring a harassment claim against the company itself given that under the Act a corporate entity can be a perpetrator of, and liable for, harassment of individuals and hence a company can be a defendant under the Act, just like an individual.

*Law stated - 16 May 2023*

## ONLINE DEFAMATION AND OTHER ADVERSE ONLINE CONTENT

### Key laws and regulations

Are there any specific laws or regulations that govern online content?

At the time of writing, there are no specific laws or regulations that govern online content, rather the law currently applies to online activities in the same way as to offline activities. However, at the time of drafting the Online Safety Bill is going through the UK Parliament. This is set to deliver the government's commitment to make the UK the safest place to be online, by imposing statutory duties on services that host user-generated content (such as social media platforms) and requiring search engines to have adequate systems and processes to protect individuals from certain types of illegal and harmful online content.

In the meantime, there are a range of causes of action that cover harmful content or abuse committed online, such as defamation, misuse of private information and harassment. There are also specific communications offences within the criminal law that prohibit communications that are menacing, grossly offensive, indecent, obscene or false. Although not formal law, most mainstream social media platforms also have terms of use that bind their users, prohibiting certain conduct and providing avenues to report problematic content for their review and action (which might take the form of suspending an account, or taking down the content complained of).

*Law stated - 16 May 2023*

### Liability for user-generated content and search results

Do companies that host user-generated content or search engines have special protections against being sued for the actions of their users or the results they generate?

Yes, certain defences exist to protect companies that host user-generated content and search engines from defamation claims in particular, given they will generally be unaware of the content in question (unless and until notified).

Website operators or hosts of user-generated content can rely on the general intermediaries' defence for defamation under section 1 of the Defamation Act 1996 (provided they take reasonable care in relation to a statement's publication, which includes acting expeditiously once on notice of a defamatory statement). A defence also applies to those individuals or entities who are not the poster of the defamatory material under section 5 of the Defamation Act 2013 (although this defence will be defeated if the correct procedure is not followed once on notice of the complaint).

The court may also not have jurisdiction in a defamation claim brought against a person who was not the author, editor or commercial publisher of the statement unless the court is satisfied that it is not practicable to bring a claim against that person (section 10 of the Defamation Act 2013).

In certain circumstances, the general intermediary protections under the Electronic Commerce (EC Directive) Regulations 2002 can apply to providers of information society services who merely host information, provided that, when put on notice of unlawful activity or information, they act expeditiously to remove or disable access.

*Law stated - 16 May 2023*

### Social media versus traditional media

How might a court approach a social media case differently from one involving traditional media?

First, it is worth recognising that social media cases have been part of the legal landscape for some time now.

However, it is certainly the case that courts may approach matters differently in these cases, in order to pay proper regard to the context and differences between traditional and social media. For example, judges may adopt a more creative approach when it comes to remedies, such as by ordering that a summary of the court's judgment be tweeted or even pinned on the publisher's profile.

There are also various specific differences, such as in the context of defamation, where the court has recognised that the 'advent of the 21st century has brought with it a new class of reader: the social media user'. In the case of *Stocker v Stocker* [2019] UKSC 17, this led the Supreme Court to remark that 'the judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read'.

*Law stated - 16 May 2023*

### **Identifying anonymous posters**

Where an individual posts content anonymously, are there any available legal procedures to obtain their identity?

Yes. There are ways of identifying anonymous posters, such as through obtaining a court order (known as a Norwich Pharmacal order) against a third party like a social media platform that requires them to disclose the information provided when the account was set up, which may reveal the culprit's identity. There are various requirements for obtaining a Norwich Pharmacal order, including that there is a good arguable case that there has been wrongdoing, that the third party against which the order is sought is inadvertently mixed up in the wrongdoing and that the order is not sought for an improper purpose.

*Law stated - 16 May 2023*

## **ANONYMITY AND PRIVACY IN LITIGATION**

### **Bringing claims anonymously**

Can litigation in defamation or privacy be brought on an anonymous basis? If so, in what circumstances?

Claims can only be brought anonymously in exceptional circumstances, where this is strictly necessary to secure the proper administration of justice and to protect the interests of the person involved (see Rule 39.2(4) of the Civil Procedure Rules (CPR)). A party wishing to bring a claim anonymously must lodge an application with the court explaining why the anonymity is critical in ensuring that justice be served and why alternative measures cannot be used.

The threshold for anonymity is a high one, and there is no general exception purely because privacy or confidentiality is in issue.

Interim injunctions to prevent publication of private or confidential information are an example of where such applications may be more likely to succeed, as publishing the claimant's identity may defeat the very purpose underpinning the claim.

*Law stated - 16 May 2023*

### **Public hearings and judgments**

Are hearings in these types of case open to the public? Even if not, does the court provide a public judgment?

Hearings are generally heard in public, in accordance with the open justice principle. However, hearings must be heard in private where the court determines that one or more prescribed matters applies and that it is necessary to sit in private to secure the proper administration of justice (see CPR rule 39.2(1) to (3)). In practice, this is very rare.

Generally, it will be for the party seeking a private hearing to apply for one and to set out (with accompanying evidence) why the application is necessary. The court must consider both the rights of the applicant and any duty to protect or have regard to a right to freedom of expression that might be affected (including the rights of the media).

The general rule is that there should be a public judgment following a hearing, even where that hearing is in private. However, a judge may decide to implement certain measures to protect the parties' rights when publishing the judgment, such as anonymising the judgment, publishing an abridged version (often accompanied by a confidential schedule) or redacting sensitive information discussed in the judgment.

*Law stated - 16 May 2023*

## **FREEDOM OF EXPRESSION AND THE RIGHTS OF THE PRESS**

### **Right to freedom of expression**

Is freedom of expression considered a fundamental right in your jurisdiction and does it have any kind of priority over other related rights, such as any applicable right to privacy or protection of reputation?

Freedom of expression is considered a fundamental right in the United Kingdom, as a result of the Human Rights Act 1998, the effect of which is to incorporate the European Convention on Human Rights (ECHR) into UK law.

However, the right to freedom of expression is a qualified right, which must be balanced against other fundamental rights, and sometimes these rights come into conflict. An obvious tension exists between the right to freedom of expression and the right to respect for private and family life (article 8 of the ECHR) and the right to reputation, which is explicitly contained in the list of qualifications to freedom of expression rights at article 10(2) of the ECHR. Neither right has automatic priority and so the question of where the balance lies is fact-specific, dependent on the circumstances of the case.

*Law stated - 16 May 2023*

### **Pre-publication notification of allegations**

Are journalists required as a matter of law to put allegations to the subject of a story before publication?

Journalists do not have a positive legal obligation to put allegations to the subject of a story prior to publication. There have been attempts (notably in the case of *Mosley v United Kingdom* [2012] EMLR 1) to seek the introduction of such an obligation, but they have not been successful. However, if a defamation complaint is made against a publisher, it will be highly beneficial, particularly in a public interest defence, if the publisher can demonstrate that the subject was invited to comment on the story prior to publication and that the subject's position is taken into account in determining whether and in what form to publish the article and their response was accurately reflected in the piece.

The extent to which a subject's position is set out in a story may impact upon the meaning of the story, and whether it is accurate. This is relevant when assessing adherence to the accuracy provisions in the Editors' Code of Practice (and most other guidelines utilised by news organisations) and in assessing any defence of truth in a defamation claim.

*Law stated - 16 May 2023*

### **Confidentiality of journalistic sources**

Are there specific laws protecting the confidentiality of sources?

As well as the moral obligation that journalists have to protect their sources, a court may not order the disclosure of a source's identity unless satisfied that the disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. This is set out in section 10 of the Contempt of Court Act 1981 and is a high threshold.

*Law stated - 16 May 2023*

### **Press regulator**

Does your jurisdiction have a separate press regulator? If so, what kind of role do they play?

The Independent Press Standards Organisation (IPSO) is the predominant press regulator in the UK. Most (but certainly not all) national newspapers have signed up to be regulated by IPSO, which applies the Editors' Code of Practice. IPSO can consider complaints on issues such as accuracy, invasion of privacy and the way in which children are reported on. It is, however, a voluntary regulator and not a statutory one. IPSO has introduced a separate arbitration scheme, but (to our knowledge) this is rarely if ever used. It would be fair to say that IPSO is not regarded as an especially robust regulator. The Independent Monitor for the Press (IMPRESS) is another press regulator that has several, mainly smaller, non-national titles signed up. Again, it is voluntary.

*Law stated - 16 May 2023*

## **REPUTATION MANAGEMENT**

### **Collaboration and cooperation**

How do media and reputation lawyers tend to work with other advisers, such as public relations and communications experts or investigators?

In some situations that present a reputational threat to individuals or their organisations, or both, an exclusively legal approach may not work or may prove counterproductive. Careful judgement calls are required to determine when to 'go legal' and when to adopt a more strategic approach in combination with other experts such as communications professionals and investigators. Lawyers may often advise on the legal position under the surface, while the client executes a communications strategy with the assistance of public relations experts. With anonymous threats to reputation, digital investigators may be engaged to hunt out online clues as to who the culprit might be, and obtain evidence of this, for example by analysing IP addresses and social media activity of anonymous accounts. Lawyers can then use these findings to contact the suspect, or as evidence. These days it is very rare for media and reputation lawyers to operate in isolation.

*Law stated - 16 May 2023*

## UPDATE AND TRENDS

### Key trends and developments

What are the most noteworthy recent trends and developments in defamation law and reputation management in your jurisdiction? What developments are expected in the coming year?

Reputation management now involves a much broader legal toolbox than simply defamation, encompassing the right to privacy, which has really come to the fore, data protection (including the right to be forgotten in relation to online search results and other content) and harassment.

Following section 1 of the Defamation Act 2013, claimants must now show that serious harm to reputation has been caused or is likely. Following the Supreme Court decision of *Lachaux (Respondent) v Independent Print Ltd and another (Appellants)* [2019] UKSC 27, it is clear that the tendency of the words (ie, their meaning) is not the sole factor, and the question of whether the test in section 1 is met requires 'a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated'. This means that a claimant who cannot show any actual adverse impact on their reputation will not get a claim off the ground, which is a higher threshold than prior to the Act. Nevertheless, the courts have shown themselves quite willing to infer serious reputational harm, or rely on a wide range of evidence as capable of demonstrating such harm. The situation is more difficult for companies, who must show actual or likely serious financial loss, albeit this can again be inferred from all the circumstances.

Two recent defamation trials in which the litigation had the opposite effect of restoring the claimants' reputations have demonstrated the very high stakes of litigating a defamation claim. The claimants were left with a court judgment that arguably caused them much more reputational harm than the publication they were suing over.

In 2020, Johnny Depp sued the publishers of *The Sun* newspaper in respect of an article in which the headline called him a 'wife-beater'. Mr Depp lost after the newspaper's truth defence succeeded ( *Depp v (1) News Group Newspapers Ltd (2) Dan Wootton* [2020] EWHC 2911 (QB) ). Notably, however, a jury in a defamation claim brought by Mr Depp in West Virginia reached an entirely different verdict on a similar allegation.

In 2022 Rebekah Vardy, wife of footballer Jamie Vardy, sued Coleen Rooney, wife of footballer Wayne Rooney, for an Instagram post accusing Ms Vardy of leaking stories about Ms Rooney to the press. After an extremely high-profile trial ( *Vardy v Rooney* [2022] EWHC 1017 (QB) ), the court found the allegation was true on the balance of probabilities and also criticised Ms Vardy for the loss of key evidence that should have been disclosed.

Both cases demonstrate the court's preparedness to undertake very detailed analysis of the evidence and reach a conclusion on serious allegations.

The public interest defence is a key alternative to defending a defamation claim on the grounds that a statement is true. Historically, this has been the preserve of traditional news and media organisations. However, citizen journalists and members of the public are increasingly relying on the public interest defence. One very notable recent example involved a claim where the defendant was a victim of historic sexual assault ( *Hay v Cresswell* [2023] EWHC 882 (KB) ). The man she accused of being her assailant brought a defamation claim against her after she published the allegations. The claim was dismissed both because the court concluded that, on the balance of probabilities, the allegation was true, and the defendant succeeded in her public interest defence (ie, the allegation was held to be on a matter of public interest, and she reasonably believed that the publication was in the public interest).




A very significant development has been the establishment (through case law rather than statute) of a general rule where suspects in a criminal investigation have a reasonable expectation of privacy. The two leading cases in this have been the very high-profile decision in Sir Cliff Richard's privacy claim against the BBC, and a decision of the Supreme Court in *ZXC v Bloomberg* [2022] UKSC 5. While not a blanket rule, this has greatly restricted the ability to name individuals under investigation before they are charged with an offence, and may also transmit to other types of non-police investigation.

An important new piece of legislation coming soon to the online sphere is the Online Safety Bill, which has engendered much debate and is still going through the UK Parliament.

While its predominant aim is to place social media companies under government regulation for the first time, the Bill is also of interest and value to reputation management lawyers as it contains a new set of laws to protect adults and children online. It will force online platforms to stamp out content that is unlawful, and to prevent it appearing in the first place. Platforms will also have to protect children from content that is lawful but harmful. Breaches of the new law will lead to huge fines.

*Law stated - 16 May 2023*

## Jurisdictions

	<b>Ireland</b>	William Fry
	<b>Japan</b>	TMI Associates
	<b>Poland</b>	.
	<b>Sweden</b>	Advokatfirman Delphi
	<b>United Kingdom - England &amp; Wales</b>	Farrer & Co LLP