

# A Libel Revolution?

ADAM SPEKER AND FELICITY MCMAHON, 5RB

On New Year's Day the Defamation Act 2013 came into force.

Prompted by concerns from the United States about so-called libel tourism and nearer to home by worries about the high cost of libel litigation and excessive zeal of claimants, the new Act is meant to tilt the balance away from the protection of reputation in favour of the free exchange of ideas and information.

At the time of writing there have been two first instance decisions under the new Act: *Cooke v MGN* and *Yeo v Times Newspapers*. Both decisions suggest that predictions that there will be significant changes to defamation practice will prove to be correct.

The most important practical reform can be found in s11 which reverses the presumption in favour of jury trial. In *Yeo v Times Newspapers*, the claimant, an MP, is suing over allegations that he had breached parliamentary rules to act as a paid advocate. The Times' application for the trial to be heard by a jury was rejected in August of this year. The court (Warby J) said that there was no longer a constitutional right to trial by jury in defamation cases and the reasoning in the authorities dating from before the 2013 Act no longer apply. In practice, the scope for a jury trial has been reduced almost to vanishing point. This change allows a court, as has in fact already been happening in a number of cases where the parties consented, to rule at the outset on issues such as the actual meaning of a publication, as Warby J did in *Yeo*, rulings that should further the overriding objective and save costs.

One other reform which is likely to prove significant is the introduction, in s1 of the Act, of a 'serious harm' threshold. A publication is now not defamatory and is therefore not actionable unless it has caused or is likely to cause serious harm to reputation. If the claimant is a body which trades for profit, the statement will not be actionable unless it has caused or is likely to cause 'serious financial loss'. In *Cooke v MGN*, a housing association and its chief executive sued the publishers of *The Mirror* in respect of references to them in an article which focussed upon another landlord associated with a television programme called *Benefits Street*. The Judge (Bean J) held that the publication bore defamatory meanings about both claimants but neither had not been caused or was likely to be caused serious harm. The Judge considered that the court had to assess the position from

the date of issue of the claim form and attached particular importance to the apology published by the newspaper following publication and before issue of the claim form. The decision raises a number of questions, not least in respect of what evidence might be adduced by a claimant to satisfy s1.

Defences which had previously been developed by the common law have been repealed but their re-enactment in statutory form is said in most cases to reflect the existing law. One new provision likely to be of interest to claimants suing media organisations allows a judge to order a summary of a judgment to be published. There is also a new defence available to website operators where the content being sued upon is user-generated. The aim being to ensure the dispute is decided between the true author of the statement and the claimant.

Whilst some of these reforms should assist in the free exchange of ideas and information as intended, the Act's introduction has not been part of a co-ordinated or coherent strategy and developments in other areas of media law appear to point in other directions (see Guy Vassall-Adams' article on the Google Spain decision). Whilst the Defamation Act may lead to fewer high-profile libel cases, the need for the law to resolve the tension between free speech and legitimate restrictions upon it, such as reputation, privacy and harassment, will continue.



Adam Speker was Called to the Bar in 1999. He specialises in defamation, privacy, media law and harassment from 5RB.



Felicity McMahon was Called to the Bar in 2008 and joined 5RB in 2012. She also specialises in defamation, privacy, media law and harassment.