

Defamation in England and Wales in the Aftermath of Covid-19: What is the Trend in Nature and Numbers?

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Aims and Objectives

This paper aims to analyse whether Covid-19 has had an effect on the number and type of defamation cases and if the principle of serious harm set out in the 2013 Defamation Act, regardless of the pandemic, has in any way curtailed the increase in libel cases seen in the peak years of 2018-2019.¹ It also examines the possibility of other factors which might influence the trend in libel cases in the aftermath of Covid-19. Furthermore, it tries to underline that there has been an increase in defamation on social media networks carried out through homemade journalism due to the myriad of social media platforms that have come into existence after the advent of the 2.0 web. Anyone can now be a journalist and with a click of a button defamatory statements can propagate causing the grapevine effect.

Methodology

Statistics from previous years will be examined and compared with those of 2020 to discover if there are any changes in numbers. Examples of recent defamation claims are illustrated from the peak year of 2019 and then from the period 2020-2021 to see if the nature of cases has been in any way affected by the pandemic. This is especially interesting concerning loss of earnings to discover if Covid-19 is taken into consideration and not just the defamatory statement when awarding damages.

The Defamation Act 2013

Before analysing the number and nature of defamation claims² it is necessary to understand what the Act set out to achieve. Legislation concerning defamation tries to establish a balance between the right to freedom of expression and the protection of reputation. The 2013 Act came into force in January 2014 and it tries to tackle the 'chilling effect', where freedom of expression could be stifled by the rich and powerful who could afford to embark on very costly libel suits. In s. 1 the serious harm test is established which

¹ The analysis will not take into consideration Ireland and Scotland which did not adopt the 2013 Defamation Act. Scotland only recently published the Scottish Defamation and Malicious Publications Act in 2021.

² Defamation can be defined as content that would cause 'right-thinking members of society generally' (*Sim v Stretch* [1936] 2 All ER 1237) to have a lower opinion of the person in question. For defamation to occur there must be a written publication to a third party and the defamed person must be identifiable, even by innuendo.

aims to raise the threshold of seriousness since a statement is not defamatory unless it ‘has caused or is likely to cause serious harm to the reputation of the claimant’ and proof of this has to be given. If businesses are involved serious financial loss has to be proved. This raises the bar considerably compared to previous legislation. The test was deemed necessary so that once meaning is established trivial cases like *Jameel v Dow Jones and Co*³ would be struck out because there would be an abuse of process since minimum harm had been caused and there was no substantial tort. The statute also makes long overdue provisions for the operators of websites which host a great volume of social networks and user-generated platforms. Certain defences are provided to avoid their liability as secondary publishers and so allow for the growth of the digital economy.

Fluctuations in defamation claims: 2013-2020

The table below reports the Royal Courts of Justice statistics for the number of libel cases from 2013 to 2020.⁴

YEAR	CLAIMS
2013	142
2014	227
2015	135
2016	112
2017	156
2018	265
2019	323
2020	152

When analysing the figures, it is evident that over the years there have been fluctuations. There seem to be several main reasons for these changes which will be analysed below. They include the rise in the use of social media, the Defamation Act 2013 which abolishes juries but also gives way to conflicting interpretations of serious harm, and the creation of the Media and Communications List 2017. Other factors could be the high costs of libel

³ [2005] EWCA Civ 75.

⁴ The table is an adapted version from Robert Sharp, Judicial Statistics, ‘Defamation Claims in 2020: A Libel Thaw’ (*Inform’s Blog* 8 June 2021)

<<https://inform.org/2021/06/08/judicial-statistics-defamation-claims-in-2020-a-libel-thaw-robert-sharp/>> accessed 28 June 2021.

cases and the fact that claims are brought under the Data Protection Act 1998 (DPA) or the DPA 2018 instead of the Defamation Act.

Analysis of the number of defamation claims before Covid-19

Even after the Defamation Act which raised the serious harm threshold, there is an increase from 142 in 2013 to 227 in 2014 which was a 60% rise, probably due to the increasing use of social media and the abolition of juries whereby claimants wasted less time and money.⁵

The drop in 2015 and 2016 could be explained by the unknown territory of the 2013 Defamation Act. The unpredictability of the serious harm test which was interpreted case by case could have been a deterrent for potential claimants who did not want to take part in risky test cases without case law being available.⁶ Pinsent Masons view the fall as being due to the high costs of libel suits and the sometimes relatively low amount of damages awarded along with increasing number of claims being brought under the Data Protection Act 1998, which has a lower bar for 'damage'. However, it is pointed out that even though there was a slump, social media cases increased and there were 13 in 2015/16, compared to 11 in 2014/15 and eight in 2013/14.⁷

The rise in 2017 could be explained by the creation of the Queen's Bench Media and Communications List, which streamlines proceedings and comes to an early decision about the meaning of words, making litigation appetising for claimants because it is quicker and less costly.⁸ Other contributing factors are again probably the increase in social media use and the abolition of juries.

⁵ Stewarts, 'Surge in defamation claims: What is causing the increase?' (20 June 2020) <<https://www.stewartslaw.com/news/what-is-causing-the-increase-in-defamation-claims/>>; '2019 figures show highest volume of defamation cases in a decade' <<https://www.stewartslaw.com/news/high-volume-of-defamation-claims-issued-in-england-and-wales-in-2019/>> both accessed 22 June 2021.

⁶ The Guardian, '23 % increase in defamation actions as social media claims rise' (20 October 2014) <<https://www.theguardian.com/media/greenslade/2014/oct/20/medialaw-social-media>> accessed 13 July 2021.

⁷ Pinsent Masons, 'Range of factors behind fall in defamation cases, says expert' (7 June 2017) <<https://www.pinsentmasons.com/out-law/news/range-of-factors-behind-fall-in-number-of-defamation-cases-says-expert>> accessed 25 July 2021.

⁸ Stewarts (n 4).

There is a noticeable peak of 265 in 2018 culminating in 323 in 2019 making defamation claims the highest of the last decade, as Stewarts notes.⁹ The increase in 2018-2019 can probably be explained by four factors: The first is the increasingly wide use social media and the trend in the never ending discussion about current affairs.¹⁰ Interestingly, JMW Solicitors¹¹ states it has dealt with 90% more cases since 2018, featuring all of the main social media platforms and compared to 2018 there was a 22% increase. It is to be noted that in 2019 the volume of libel cases is 127% higher than it was in 2013.¹² A big jump in just six years. The second factor could be the 2017 Media and Communications List, speeding up procedure and the third the abolition of juries as highlighted above. An overriding factor however is probably the fourth which is the often conflicting way the courts interpreted serious harm established in the 2013 Defamation Act. It would have been logical to think that there would be fewer libel suits because of the serious harm test. However, the broad interpretation demonstrated in the landmark case of appeal in 2017 against the ruling of *Lachaux v Independent Print & Anor* 2015¹³ caused the contrary.

In the first hearing in 2015 Warby J examined 'serious harm' in 5 publications and found that the serious harm had been caused in four of them. He upheld that in order to pass the serious harm test a claimant must prove the injurious words had caused serious harm on a balance of probabilities and that harmful words must be supported by evidence. It is not enough to infer harm. An appeal in 2017¹⁴ overturned the 2015 judgement and Davis L J stated that a claim can be successful if there is a just 'a tendency to cause harm' and that inference could be made about harm through the meaning of the words with no

⁹ Ibid.

¹⁰ Robert Sharp (n 3).

¹¹ JMW, 'Social media blamed as defamation cases almost treble in three years' <<https://www.jmw.co.uk/services-for-you/media-law/news/press-releases/social-media-blamed-defamation-cases-almost-treble-three-years> > ; Jamie Harris, 'Rise in defamation disputes 'linked to social media disputes' (27 August 2020) <<https://uk.news.yahoo.com/rise-defamation-cases-linked-social-112917274.html>> accessed 25 June 2021.

¹² Stewarts (n 4).

¹³ [2015] EWHC 2242 (QB) [31], [36].

¹⁴ [2017] EWCA Civ 1334.

further proof needed. Therefore, this probably encouraged claimants to file suits causing a rise in claims.¹⁵

Analysis of the number of defamation claims in the aftermath of Covid-19

In 2020 there is a considerable drop from 323 in 2019 to just 152. One would expect the number to rise since during the pandemic and in its aftermath many people were glued to the Internet and if one was that way inclined, had more time to have malicious thoughts and pen nasty things about others. Or were people so preoccupied with catching Covid-19 that they could think of nothing else?¹⁶ The latter does not seem the case and there are probably several possible interwoven factors to be considered for the slump.

The first is the Supreme Court's ruling of *Lachaux v Independent Print & Anor in 2019*,¹⁷ which overturned the Court of Appeal's decision, as clearly underlined by Robert Sharp.¹⁸ Clarifications concerning 'serious harm' were made and Lord Sumption opined that just oral statements and injury to feelings are not a cause for action but that special damage to reputation must be proved and actual facts, not just the meaning of the words must be shown. Defamation is now no longer actionable *per se* and the inherent meaning of words is not enough to show serious harm. Claims must be supported by facts from the real world and these range from how many people read the publication, the number of online users who hit on the publication, how many people in the UK saw the publication and how many people who do not know the claimant now may in the future, along with the actual gravity of the allegations. Claimants intending to take legal action now had to back up their cases with actual facts. Besides the Supreme Court's ruling, another reason for the decrease is perhaps the fact that the Government changed the law and after April 2019 success fees could no longer be recovered from a losing defendant by the Claimant who had entered into a conditional fee agreement (no win, no fee) with a lawyer. Success fees were often 100% of the original legal costs.¹⁹ Now clients with limited funds may be

¹⁵ Robert Sharp (n 3).

¹⁶ *Ibid.*

¹⁷ [2019] UKSC 2 [5], [12], [16-17], [21-25].

¹⁸ Robert Sharp (n 3).

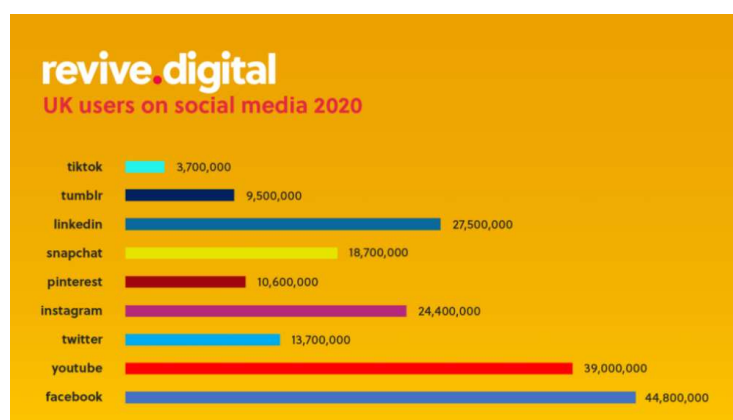
¹⁹ Betul Milliner, 'A blow for claimants? Success fees no longer recoverable in defamation and privacy claims' (*Dac Beachcroft* 4 April 2019)

<<https://www.dacbeachcroft.com/es/gb/articles/2019/april/a-blow-for-claimants-success->

less willing to pursue defamation claims and defamation lawyers may be less enthusiastic about taking on these types of clients. Additionally, lack of money due to loss of earnings after the pandemic might also dissuade possible claimants from embarking on costly cases. Other reasons may be that claimants prefer to take legal action through the DPA 2018 which replaced the 1998 Act and also cases may be settled out of court after the early determination of meaning to discover if serious harm occurs or not. A further final contributing factor could be that during the pandemic the courts were working remotely which could have slowed up the number of cases being heard, causing an unprecedented backlog which exacerbated the already existing one.²⁰

Analysis of the nature of defamation in the aftermath of Covid-19

The probable reasons for the decrease in the number of cases has been aforementioned but what is the nature of defamation being carried out in the aftermath of Covid-19? The trend still seems to be on social media due to its massive use which has continued and therefore much defamation occurs on the platforms as it did before the pandemic. It is evident from the table below²¹ just how extensive the use of social media is.



fees-no-longer-recoverable-in-defamation-and-privacy-claims/> accessed 13 July 2021; Stewarts (n 4).

²⁰ David Williams and David Johnson, 'Covid-19: Litigation in the time of a pandemic, latest updates' (*Dac Beachcroft* 6 January 2021)

><https://www.dacbeachcroft.com/es/gb/articles/2020/march/covid-19-litigation-in-the-time-of-a-pandemic-latest-updates/>> accessed 25 July 2021.

²¹ Reproduced by kind permission of Revive.digital, 'Most popular social media networks (updated 2020) – digital marketing's most powerful tool' <<https://revive.digital/blog/most-popular-social-media/>> accessed 12 July 2021.

The use of social networks has increased during 2020 since it is reported that in 2019 there were 40 million Facebook users and in 2020 44.800.00, so there is an increase of nearly 5 million and it is still the most visited site in the UK.²² According to Sharp other statistics for 2020 seem to confirm the fact that homemade journalism is still continuing to grow since the number of libel cases against national newspapers was relatively small. Only 10 claims were brought against national newspapers. He feels it seems that the typical defendant in a defamation claim is likely to be an individual rather than a journalist or media outlet. It is to be noted that corporate claims have gone down in 2020 with only 21 compared to 2019 with 33 and it is surmised that this is due to the *Lachaux v Independent Print* Supreme Court judgement in 2019 that moved away from the Court of Appeal's wide interpretation to the more rigid concept of giving proof of financial harm. In fact, this is difficult for businesses to prove and may cause corporations to abstain from lodging a case.²³

Cases

The study will now examine in more detail some examples of the numerous social media cases to illustrate that both in the peak period and in the aftermath of Covid-19 libel suits continued to involve social media.

An example during the peak time is *Stocker v Stocker*²⁴ which involved allegedly defamatory posts on Facebook. An ex-wife published a post saying that her ex-husband Mr. Stocker "tried to strangle me". The lower courts interpreted this statement as the Oxford dictionary definition "tried to kill me" but the Supreme Court upheld that meaning is how the ordinary reader would interpret the statements and underlined the importance of context since the reader of Facebook would not interpret words so literally. Therefore, the claimant would not have to prove her ex-husband really had tried to kill her to prove her case.

An example in the aftermath of Covid-19 is *Blackledge v Persons Unknown*.²⁵ The claimant is a respected academic who was accused of being a sexual predator by an anonymous blogger on Blogspot a free Google platform and in tweets from a Twitter

²² Ibid.

²³ Robert Sharp (n 3).

²⁴ [2019] UKSC 17 [14,] [41-44], [62].

²⁵ [2021] EWHC 1994 (QB) [12-25], [38-48], [59].

account. Contact details were given as MeTooUCU@protonmail.com, an encrypted site. Saini J found that that serious harm had occurred and since it was unlikely the defendant could be found Google was ordered to take the post down under s.13 of the Defamation Act.

As can be seen in the above case the pandemic is not involved and has in no way been considered. However, one very interesting case did take Covid-19 into account and the case was a claim for loss of earnings. In *Kim v Lee*²⁶ the claimant was Mr. Lee who accused Mr. Kim of posting numerous defamatory statements on Facebook and Instagram. Both claimant and defendant were domiciled in the UK and worked as football journalists for Korean companies. Steyn J found that there was serious harm but due to the effect of the pandemic on Premier League football matches, the claimant would have suffered some loss of earning anyway and reduced the claimant's damages by £400. This judgement could certainly create a precedent for business claims concerning defamation and Howe feels defendants may maintain that there would have been a loss of earnings due to the pandemic regardless of their libelous publications.²⁷

Conclusion

In conclusion, it can be said that it is evident from the analysis of the statistics that defamation cases in the aftermath of Covid-19 have decreased in numbers. This fall in claims does not seem to depend on the pandemic alone but on a number of intertwining factors. The Defamation Act did curtail claims to some extent and the Supreme Court's ruling on actual facts to prove serious harm can be considered at the forefront, which is above all quite difficult for businesses. Another factor, as highlighted above, may be that success fees are no longer recoverable by claimants from losing defendants. Furthermore, perhaps the lack of money after the pandemic due to lost earnings might dissuade possible claimants from pursuing extremely costly libel cases and claims may be carried out under DPA 2018 or settled out of court. On top of this could be that courts had a backlog of cases made worse during Covid-19 because hearings were carried out remotely slowing up procedure.

²⁶ [2020] EW HC 2162; [2021] EWHC 231 (QB) [155].

²⁷ Matthew Howe, (*Samuels* 16 February 2021) 'The impact of Covid-19 on losses in libel cases' < <https://www.samuels-solicitors.co.uk/news/covid-19-losses-libel> > accessed 25 June 2021.

The nature of defamation has stayed the same and defamation through social media prevails. This is because, as seen in the recent statistics, an always larger slice of the public has access to the internet and visits to social media have increased, with homemade journalism made by individuals still on the up during the pandemic and in its aftermath.

It will be interesting to see if the 2022 statistics concerning 2021 confirm the downward trend and if any case for loss of earnings, similar to *Kim v Lee*, has the amount of damages reduced due to the consideration of the effects of Covid-19.

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