

# DATA PROTECTION AND THE RIGHT TO REPUTATION: FILLING THE GAPS AFTER THE DEFAMATION ACT 2013

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## Abstract:

Defamation law has traditionally occupied a position of overwhelming dominance in the vindication of the right to reputation. Nevertheless, liberalization of this legal framework including through the Defamation Act 2013 has led to a concern that, when analysed from a fundamental rights perspective, “gaps” in the protection provided for natural persons may have emerged. In this new context, there has been a renewed focus on whether data protection may fill the potential lacunae. Data protection law contains a number of important limitations and exceptions and its jurisprudence has been both limited and sometimes confused. Nevertheless, this article argues that its broad purpose and complex structure ensure it will play a significantly augmented role in the future, especially in actions against website operators facilitating the dissemination of information posted by a third party, the publication of opinion or where either injunctive relief or the correction of inaccurate information is sought (in particular in cases of continuing online disclosure).

Keywords: Defamation, Data Protection, EU Charter, Intermediary Liability, Multiple Publication Rule, Social Media, Website Operators

## I. INTRODUCTION

There is a widespread belief that London is the “libel capital of the world” and that both European and American defamation laws afford “better protection for media defendants”.<sup>1</sup> Nevertheless, for over a decade, English defamation law has been evolving in a more free speech friendly direction. The

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<sup>1</sup> G. Robertson and A. Nicol, *Media Law* (London 2007), 93.

Defamation Act 2013 not only consolidates that shift but furthers it considerably, thereby heightening concerns that gaps in the proper protection of natural persons’ rights to reputation may have emerged. In this changing context, it is important to explore whether such claimants might increasingly rely successfully on data protection in order to vindicate this right. As will be seen, the broad purposes of this statutory scheme together with its complex structure mean that such Claimants could seek to hang their argument on any one of a number of its provisions. Recourse to data protection law may be particularly enticing due to the fact that, over the very same time that defamation law has been liberalizing, it has generally become more onerous. Both the broad scope and potential onerous depth of data protection was recently highlighted by the seminal Court of Justice of the EU judgment of *Google Spain* which found that search engines had significant and ongoing responsibilities when indexing material from the public web.<sup>2</sup> Nevertheless, it remains true that data protection law in the United Kingdom contains numerous limitations and exemptions which seek to constrain its effect. Moreover, national jurisprudence on data protection is both limited and sometimes confused. In spite of this, it is the central argument of this article that data protection law will assume significantly greater importance in vindicating reputation over the coming years, especially in actions against website operators facilitating the dissemination of information posted by a third party, those involving the publication of opinion or where either injunctive relief or the correction of inaccurate information is sought (in particular in cases of continuing online disclosure).

The article is structured into five sections. Following this brief introduction, section two explores both the fundamental concepts and historic contours of the law in this area. Section three then outlines the changes to defamation law made by the Defamation Act 2013 together with relevant developments within data protection, which largely arise from recent case law and changes in regulatory approach. This leads to section four which directly considers the way in which data protection might assume a greater role in vindicating the right to reputation in the future. Lastly, the final section draws the strands of the argument and offers some conclusions.

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<sup>2</sup> C-131/12 *Google Spain, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Judgment of 13 May 2014, not yet reported.

## II. FUNDAMENTAL CONCEPTS AND LAW

This article explores the role of two sets of laws – defamation and data protection – in protecting an individual’s “right to reputation” from publication which may violate it. Given this, it is important at the outset to explore in some detail the meaning and import of both the “right to reputation” and the right to freedom of expression which is in inevitable tension with it. Following this outline, the section then elucidates the historic purpose and contours of both defamation and data protection law. Finally, brief mention is made of the tort of malicious falsehood.

### A. *The “Right to Reputation” and Freedom of Expression*

Reputation is defined by the Oxford English Dictionary as “[t]he general opinion or estimate of a person’s character or other qualities; the relative esteem in which a person or thing is held”. Within the Western tradition, there is a long-standing and strong consensus that both reputation, and the right to it, are of foundational importance. Thus, Solove argues that

[o]ur reputation is one of our most cherished assets ... Our reputation is an essential component of our freedom, for without the good opinion of our community, our freedom can become empty ... Our reputation can be a key dimension of our self, something that affects the very core of our identity. Beyond its internal influence on our self-conception, our reputation affects our ability to engage in basic activities in society. We depend upon others to engage in transactions with us, to employ us, to befriend us, and to listen to us.<sup>3</sup>

In support of these arguments and assertions, Solove cites Shakespeare, Arthur Miller, President John Adams and the sociologist C. F. Cooley.

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<sup>3</sup> D. J. Solove, *The Future of Reputation* (New Haven, Conn., 2007), 30 - 31.

Notwithstanding the centrality of the right to reputation, its precise scope remains ambiguous. Firstly, it is unclear whether reputation *only* covers the dissemination of statements which either directly or by necessary implication reflect on a person's esteem. Secondly, to the extent that its ambit is so restricted, the standards by which such an evaluation is made must be determined. At one extreme, statements interfere with reputation even if a person's esteem is only negatively affected in the eyes of just one individual. Many, however, reject such an interpretation fearing that allowing for "a search for the few idiosyncratic individuals who would think less of the plaintiff for conduct that the overwhelming majority would find laudatory" would open the door to "chaotic individualism".<sup>4</sup> Jurisdictions, therefore, generally seek to restrict the situations in which such a right can be invoked. Indeed, rather at the other extreme, Claimants may have to demonstrate that the "right-thinking member of society generally"<sup>5</sup> would consider that the statement in question would reflect negatively upon them. Between these two poles, some jurisdictions require only that a 'substantial and respectable minority' of society would hold such an opinion.<sup>6</sup> Yet introduction of any such qualification poses difficult practical and theoretical challenges. Practically, published statements that, say, a person is a police informant or homosexual<sup>7</sup> may cause that individual considerable distress or even pecuniary damage. However, at least in 2013, it is not clear that any such statements would be actionable under the latter two standards detailed above. Moreover, at a theoretical level, it may be argued that the notion of a societal or communal consensus regarding estimation is a "myth" which often allows judges, even if unconsciously, to impose their values on the situation.<sup>8</sup>

One historic consensus within the English tradition, however, is that the *right* to reputation cannot restrict the distribution of accurate, even if negative, statements about an individual. As Rodgers notes, the law takes the view that "if people think the worse of [the Claimant] when they hear the truth about him that merely shows that his reputation has been reduced to its proper level".<sup>9</sup>

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<sup>4</sup> L. B. Lidsky, "Defamation, Reputation, and the Myth of Community" (1996) 71(1) *Washington L Rev*, 19 and 20.

<sup>5</sup> *Sim v Stretch* [1936] 2 All E.R. 1237 (HL).

<sup>6</sup> Lidsky (n 4), 7.

<sup>7</sup> *ibid*, *passim*.

<sup>8</sup> *ibid*, *passim*.

<sup>9</sup> W. V. H. Rodgers, *Winfield & Jolowicz on Tort* (London 2010), 601.

Nevertheless, and importantly, particular laws may differ as to whether they place on claimants a requirement to prove any such inaccuracy or whether, absent sufficient contrary evidence, this is simply presumed. Moreover, statements of *opinion* may also be published which, although clearly impacting on reputation, are intrinsically incapable of being either accurate or inaccurate. An example would be asserting that somebody is a “depraved” individual. In such cases, criteria other than truth or falsity *must* be used to determine the statement’s legality.

Irrespective of whether the statements in question are ones of opinion or alleged fact, there is also a consensus that the right to reputation is in necessary and fundamental tension with the right to “receive and impart information and ideas”,<sup>10</sup> a key aspect of another central value within Western society, namely, freedom of expression. A reconciliation between these values is, therefore, necessary. Lord Steyn provides a useful summary of the various rationales for according freedom of expression strong weight:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. Firstly, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market” ... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety value: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.<sup>11</sup>

The seminal importance of freedom of expression is recognised in the fact that it is set out as a stand-alone fundamental right within both the European Convention on Human Rights (ECHR)<sup>12</sup> and the EU Charter of Fundamental Rights.<sup>13</sup> At the same time, in cases where “an attack on a person’s

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<sup>10</sup> ECHR (ETS No. 5), Article 10.

<sup>11</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A. C. 115, 126.

<sup>12</sup> *ibid.*

<sup>13</sup> Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389), Article 11.

reputation” attains “a certain level of seriousness and in a manner causing prejudice to personal enjoyment of a right to respect for private life”,<sup>14</sup> the right to reputation is also recognised as falling within another right protected by both these instruments, namely the fundamental right to respect for private and family life. Additionally, as will be explicated below, the right to reputation of natural persons will generally fall within the right to the protection of personal data, which is recognised as a discrete fundamental right within the EU Charter<sup>15</sup> (but not the ECHR). When such fundamental rights are at stake, it is recognised that the courts must accord each right “equal respect”<sup>16</sup> and seek to strike a “fair balance”<sup>17</sup> between them in the concrete situation. In interpreting the law, courts should have recourse to an “ultimate balancing test” involving “an intense focus on the comparative importance of the specific rights being claimed in the individual case” coupled with a taking into account of “the justifications for interfering with or restricting each right”.<sup>18</sup>

### *B. Defamation*

Defamation law has long enjoyed a position of clear dominance in the vindication of the right to reputation. This is reflective not only of its historical pedigree – it can be traced back to the eleventh century within English law<sup>19</sup> – but also to the fact that it has traditionally afforded “greater weight to the rights of the claimant at the expense of those of the defendant”.<sup>20</sup> Historically, this law has provided protection against any *publication* of a statement which has a tendency to have an adverse effect on *reputation*. Publication here is defined broadly as any dissemination to a person other than

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<sup>14</sup> *Axel Springer v Germany* (Application no. 39954/28) (2012) 55 E.H.R.R. 6.

<sup>15</sup> Article 8, EU Charter of Fundamental Rights.

<sup>16</sup> *Axel Springer*, para. 84.

<sup>17</sup> *Axel Springer*, para. 87.

<sup>18</sup> *S (A Child) (Identification: Restrictions on Publication)*, *Re* [2004] UKHL 47; [2005] 1 A.C. 593 at [17] (per Lord Steyn). For further analysis of this approach see H. Fenwick, “Judicial Reasoning in Clashing Rights Cases” in H. Fenwick, G. Phillipson & R. Masterman, *Judicial Reasoning Under the UK Human Rights Act* (Cambridge 2011), ch. 10.

<sup>19</sup> Robertson & Nicol (note 1), 95.

<sup>20</sup> K. Rimel, 2000, “A new public interest defence for the media? The House of Lords’ decision in *Reynolds v Times Newspapers Ltd.*” (2000) 11(2) *Ent. L. R.* 36, 36. Whilst Rimel limited her evaluation to libel, it seems a fair analysis of the general nature of English defamation law prior to recent developments.

the claimant or one's spouse.<sup>21</sup> In contrast, *reputation* is defined relatively narrowly so as to protect only against statements which would "tend to lower the plaintiff in the estimation of right-thinking members of society generally"<sup>22</sup> or tend to lead members of society to shun or avoid him.<sup>23</sup> Thus the Court of Appeal held in *Byrne v Deane* that to say, even if manifestly falsely, of a person that "he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him".<sup>24</sup> On the other hand, the reputations of not only natural persons but also most artificial persons, including corporations, are covered. The law is also based on a presumption that statements are false. Therefore, although the substantial accuracy of a statement constitutes a complete defence, defendants must prove this according to the ordinary civil standard. Absent an appropriate defence, liability in defamation is strict.<sup>25</sup> Moreover, at least when the statement is published in "permanent form"<sup>26</sup> and therefore constitutes a libel, a "conclusive or irrebutable presumption of damage"<sup>27</sup> traditionally applied. Thus, defamation was generally actionable *per se*. Finally, English defamation law has adopted a generous approach to assessment of damages providing not only compensation for actual damage to reputation and mental distress but also acknowledging that "in case the libel, driven underground, emerges from its lurking place at some future date, he [the Claimant] must be able to point to a sum...sufficient to convince a bystander of the baselessness of the charge".<sup>28</sup> Both aggravated and punitive damages may also be awarded.<sup>29</sup> The generosity of defamation awards was also related to the fact that claimants in defamation actions were historically entitled to a jury trial "unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made by a jury".<sup>30</sup> If a jury is appointed then it has the responsibility of setting any award of damages in the first instance.

Although much of the core of defamation is stringently formulated, the law also includes important limitations which have been widened over time. The restrictive meaning given to the term

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<sup>21</sup> *Wennhak v Morgan* (1888) 20 Q.B.D. 635 (HC).

<sup>22</sup> *Sim v Stretch*.

<sup>23</sup> *Youssouppoff v MGN Pictures Ltd* (1934) 50 T.L.R. 581 (CA).

<sup>24</sup> *Byrne v Deane* [1937] 1 K.B. 818 (CA), 833 per Slesser L. J.

<sup>25</sup> D. Milo, *Defamation and Freedom of Speech* (Oxford, 2008), 11.

<sup>26</sup> Broadcasting Act 1990, s. 116; *Youssouppoff*.

<sup>27</sup> Milo (note 25), 11.

<sup>28</sup> *Cassell & Co. v Broome* [1972] A.C. 1027 (HL), 1071 (per Lord Hailsham).

<sup>29</sup> *ibid*.

<sup>30</sup> Senior Courts Act 1981, s. 69.

*reputation* has already been noted. Secondly, turning to the relief obtainable, under the rule in *Bonnard v Perryman*,<sup>31</sup> the court is essentially prevented from granting an interim injunction so long as the defendant contends that a defence of the words will be mounted at the full hearing. Moreover, even before the abolition of a right to jury trial in the Defamation Act 2013, Court of Appeal control of excessive jury awards has not only always been possible but such control had been strengthened as a result of both legislation and case law.<sup>32</sup> Thirdly, legal aid has never been available in defamation actions. Moreover, whilst introduction of Conditional Fee Arrangements (CFAs) in the 1990s did increase opportunities for individuals to pursue a remedy in defamation, there is increasing pressure to prevent the additional costs of these agreements (namely ‘success fees’ and after-the-event insurance) being passed on to the losing side.<sup>33</sup> Fourthly, in recognition of the potential “‘chilling’ effect” of its “rigorous, reputation protective principle”<sup>34</sup>, defamation law has long included a range of defences at both common law and in statute. Some of these provide absolute protections such as when parliamentary<sup>35</sup> or UK court proceedings<sup>36</sup> are being reported. Similarly, defendants are also free to disseminate opinions so long as these are based on facts which are both true and at least implicitly referred to, are held honestly and, prior to the Defamation Act 2013, involved a matter of “public interest”.<sup>37</sup> Both these latter concepts have been defined liberally. Thus, an opinion will still be “honest” if it can be said that some honest or fair man “however exaggerated or obstinate his views” would have made the statement.<sup>38</sup> Meanwhile “public interest” was interpreted as covering any matter which the public at large “may be legitimately interested in, or concerned at”.<sup>39</sup>

Other defences to a defamation action are qualified in that they may be defeated by the claimant demonstrating that the defendant’s dominant purpose was to use a privileged occasion for an

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<sup>31</sup> *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

<sup>32</sup> Courts and Legal Services Act 1990, s. 8, *Rantzen v Mirror Group Newspapers Ltd. (1986)* [1993] 4 All E.R. QB (CA) [670] and *John v Mirror Group Newspapers Ltd.* 2 All E.R. 257 (CA).

<sup>33</sup> As regards most legal actions, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 now generally prohibits such cost-shifting. However, as a result of Conditional Fee Agreements Order SI 2013/689, the commencement of this reform in relation to both defamation and privacy proceedings has currently been stayed.

<sup>34</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, 192 (per Lord Nicholls).

<sup>35</sup> Broadly construed under the Parliamentary Papers Act 1840, s.1.

<sup>36</sup> Defamation Act 1996, s. 14.

<sup>37</sup> *Joseph v Spiller* [2010] UKSC 53; [2011] 1 A.C. 852.

<sup>38</sup> *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] All ER 449 (HL) 461 (Lord Porter).

<sup>39</sup> *London Artists v Littler* [1969] 2 Q.B. 375 (CA) 391 per Lord Denning.



“indirect or improper motive”.<sup>40</sup> Thus, under statute, defendants are empowered to freely disseminate a wide range of specified material subject to this safeguard.<sup>41</sup> Moreover, under the common law, they also have a qualified right to convey information, even which turns out to be untrue, to anybody with an interest in receiving it so long as they also have a reciprocal moral, social or legal duty to provide such communication. Most significantly, in *Reynolds*, the House of Lords modified this common law doctrine so as to also protect “responsible”<sup>42</sup> journalistic publication in situations when “the public was entitled to know the particular information”.<sup>43</sup> The court, however, stressed that such matters could only be assessed by having “regard to all the circumstances”,<sup>44</sup> with Lord Nicholls providing a list of ten non-exhaustive, multi-factorial and illustrative indicia which might be taken into account in this regard.<sup>45</sup> *Reynolds*’ “lack of hard edges in respect both of its reach and its effect”<sup>46</sup> led to a rather uncertain legal landscape for the media. Nevertheless, post-*Reynolds* “the obvious trend in the case law is towards a more liberal understanding of press freedom in the libel law context”.<sup>47</sup> In particular, reversing both the High Court and the Court of Appeal, the House of Lords in *Jameel* stressed that ‘standard of conduct required’ must be applied in a “practical and flexible manner”,<sup>48</sup> with weight generally being given to the “professional judgement” of the relevant editor or journalist.<sup>49</sup> It was also clarified that the defence was not restricted to journalists but, rather, could be relied upon by “anyone who publishes material of public interest”.<sup>50</sup> Finally, the Defamation Act 1996 set out a special defence vis-à-vis the “innocent dissemination” of defamation material,<sup>51</sup> which

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<sup>40</sup> *Clarke v Molyneux* (1877) 3 Q.B.D. 237 (HC) 246.

<sup>41</sup> See Defamation Act 1952 and both Defamation Act 1996, pt 1 sch 1 (qualified privilege not subject to explanation or contradiction) and Defamation Act 1996, pt 2 sch 1 (qualified privilege subject to allowing for explanation or contradiction by those persons referred to).

<sup>42</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 1270 (HL) at 202 (per Lord Nicholls).

<sup>43</sup> *ibid*, at 197 (per Lord Nicholls). As Rimel (note 20) states, prior to this judgment, such privilege was “not recognised as applying to statements published by the media to the general public except, possibly, in cases of extreme emergency” (37).

<sup>44</sup> *Reynolds v Times Newspapers Ltd*, 202.

<sup>45</sup> *ibid*, 205.

<sup>46</sup> I. Loveland “The ongoing evolution of Reynolds privilege in domestic libel law”, (2003) 14(7) *Ent. L. R.* 178, 182.

<sup>47</sup> *ibid*.

<sup>48</sup> *Jameel & Or v Wall Street Journal* [2006] UKHL 44, [2007] 1 A.C. 359 at para. [56] (per Lord Hoffmann).

<sup>49</sup> *ibid* at [33] (per Lord Bingham).

<sup>50</sup> *ibid* at [54] (per Lord Hoffmann). See more specifically *Charman v Orion Publishing Ltd.* [2007] EWCA Civ 97; [2008] 1 All E.R. 750; *Seaga v Harper* [2008] UKPC 9; [2009] 1 A.C. 1.

<sup>51</sup> This defence can be claimed by a range of secondary publishers including “the operator of ... a communications system by means of which the statement is transmitted, or made available, by a person over

as a result of the EU e-Commerce Directive 2000, transposed into UK law by the Electronic Commerce (EC Directive) Regulations 2002, was augmented by a general “intermediary” liability shield for storing information provided by a recipient of an information society service.<sup>52</sup> In sum, within defamation law, the balance between the right to reputation and freedom of expression has significantly shifted in favour of the latter. As will be seen below, this trend is continued in the Defamation Act 2013.

### C. Data Protection

If assessing the contours of defamation law presents difficulties in light of the recent enactment of the wide-ranging Defamation Act 2013, then any analysis of data protection law poses even greater challenges. These challenges stem not only from the complex interface between national and European law in this area but also, as Lord Justice Leveson recently noted, from the reality that “[t]o say that it [data protection] is little known or understood by the public, regarded as a regulatory inconvenience in the business world, and viewed as marginal and technical among practitioners (including our higher courts) ... is perhaps not so far from the truth”.<sup>53</sup> It nevertheless remains true that “the subject matter of the data protection regime... could hardly be more fundamental to issues of personal integrity, particularly in a world of ever accelerating information technology capability”.<sup>54</sup>

In contrast to defamation law, data protection is of recent origin. It emerged globally in the 1970s from a belief that without a new system of regulation, the rise of new forms of information technology (notably computerised processing) would pose an unacceptable threat to the rights and

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whom he has no effective control”. However, such publishers must demonstrate that “took reasonable care in relation to its publication to its publication” and “did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement”.<sup>51</sup> In *Godfrey v Demon Internet* [2001] Q.B. 201 an Internet Service Provider (ISP) sought to rely on this defence in relation to the republication of an anonymous posting made on a United States-based newsgroup. However, the defence was struck out on the basis that the defendant had not removed posting on notice and, therefore, had *inter alia* failed to reasonable care in relation to it.

<sup>52</sup> See Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013). This “hosting” shield only applies if upon obtaining knowledge of illegal activity or information, or even facts or circumstances from which such illegality is apparent, the provider “acts expeditiously to remove or to disable access to the information” (para. 19 (a) (ii)). See also the related defences for mere conduit (para. 17) and caching (para. 18).

<sup>53</sup> B. Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (London 2012), 999.

<sup>54</sup> *ibid.*

interests of natural persons. Whilst protecting privacy was a principal concern, it was far from the only value which seen to be under threat by these new developments. Instead as the German Data Protection Act of 1977 stated, this law was to ensure against all “Mißbrauch” of personal data in order to “der Beeinträchtigung schutzwürdiger Belange der Betroffenen entgegenzuwirken”.<sup>55</sup> The French Data Protection Act of the same year required that information technology “ne doit porter atteinte ni à l’identité humaine, ni aux droits de l’homme, ni à la vie privée, ni aux libertés individuelles ou publiques”.<sup>56</sup> Rather more prosaically, the Council of Europe Convention on the subject finalised in 1981 simply stated that its purpose was to secure for every individual “respect for his rights and fundamental freedoms, and in particular his right to privacy”.<sup>57</sup> The EU Data Protection Directive 95/46, which was designed to “give substance to and amplify” the Convention’s provisions, essentially mirrored this objective referring specifically to the protection of “the fundamental rights and freedoms of natural persons, and in particular their right to privacy”.<sup>58</sup> Although the reference in both the Convention and the Directive to rights and freedoms may be thought to limit the purposive scope of these instruments, it should be stressed that these terms were construed extremely expansively. Indeed, both the Convention’s Explanatory Report<sup>59</sup> and the Directive<sup>60</sup> text even refer to mere personal “interests” apparently synonymously with such “rights”. Therefore, within its

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<sup>55</sup> Bundesdatenschutzgesetz (BDSG) 1977, s. 1 (1). This is translated as ensuring against “misuse”, “to prevent harm to any personal interests that warrant protection”. See Gesellschaft für Datenschutz und Datensicherung, *Law on the Protection Against the Misuse of Personal Data in Data Processing* (Frankfurt am Main 1977).

<sup>56</sup> Loi no. 78-17 du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés, art. 1 (“must not undermine human identity, nor human rights, nor privacy, nor individual or public liberties” (own translation)).

<sup>57</sup> Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), Art. 1.

<sup>58</sup> Council Directive (EC) No. 95/46 (OJ 1995 L 281 p. 31), Recital 11. Although the Council of Europe Convention remains in full force, it is the EU Directive which was assumed must the greater practical importance.

<sup>59</sup> Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108) Explanatory Report, para. 25 (“[T]he unfettered exercise of the freedom to process information may, under certain conditions, adversely affect the enjoyment of other fundamental rights (for example privacy, non-discrimination, fair trial) or other legitimate personal interests (for example employment, consumer credit). It is in order to maintain a just balance between the different rights and interests of individuals that the convention sets out certain conditions or restrictions with regard to the processing of information. No other motives could justify the rules which the Contracting States undertake to apply in this field”).

<sup>60</sup> Council Directive (EC) No. 95/46, Recital 30 (stating that processing otherwise compatible with the Directive will be lawful so long as it carried “in the legitimate interests of the natural or legal person, providing that the interests or the rights and freedoms of the data subject are not overriding”). Comparing the English language version of the Directive with that of the French and German, it is clear that, but for a typographical error, this same wording would be reflected in Art. 7 (f). Instead, this article refers to the “interests for fundamental rights and freedoms of the data subject”.

material scope, data protection's goals are certainly broad enough to encompass protecting a natural person's right to reputation not simply through its incorporation either of the law of defamation or the right to respect for private and family life but, rather, directly.<sup>61</sup> The autonomous nature of data protection is now reflected in the fact that it is protected as a separate fundamental right within the EU Charter of Fundamental Rights.<sup>62</sup>

Whilst the philosophical origin of data protection was rooted in lofty and wide-ranging human rights concerns, its subsequent spread was strongly related to concern that without harmonization of law in this area "trade would be fettered" as "information could not flow freely" between nations.<sup>63</sup> Thus, a number of countries drafted their data protection law principally out of a pragmatic concern to ensure compliance with transnational frameworks ensuring the free flow of data. It was in this context that UK first passed a Data Protection Act in 1984 to implement the Council of Europe Convention and replaced this with the Data Protection 1998 when the EU Directive was transposed into municipal law. As the quote from Leveson above indicates, the minimalist approach to data protection which this encouraged has generally been mirrored by our courts. At the same time, it remains a fundamental principle that, as far as possible, national legislation must be interpreted so as to give full effect to binding EU legal requirements.

Turning to the material scope of data protection, both the Data Protection Act (DPA) 1998 and Data Protection Directive regulate the *processing* of *data* which is *personal*. Although legal persons are clearly excluded, in other respects these terms are defined broadly. *Processing* covers every activity performed on personal data including recording, holding, disclosing, destroying and so forth.<sup>64</sup> Meanwhile, information will become *data* if it is processed on a digital device<sup>65</sup> or even

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<sup>61</sup> It should be noted that Data Protection Authorities (DPA) took an early interest in policing threats to such interests. For example, even in the mid-1980s, the French DPA when assessing a new electronic messaging service stressed the dangers of "risque de diffusion messages anonymes injurieux ou portant atteinte à la réputation des personnes" Commission nationale de l'informatique et des libertés, *7<sup>e</sup> rapport d'activité* (Paris 1986).

<sup>62</sup> Charter of Fundamental Rights, Article 8.

<sup>63</sup> R. Jay, *Data Protection Law and Practice* (London 4<sup>th</sup> ed. 2012), 1.

<sup>64</sup> DPA, s. 1(1). Cf. Data Protection Directive, art. 2 (b).

<sup>65</sup> Formally defined as "equipment operating automatically in response to instructions given for that purpose" (DPA, s. 1(1)).

within a structured manual filing system.<sup>66</sup> Thus, all information, whether in the form of words, sounds or images, will be data if included on a computer, mobile phone or digital camera. As the Court of Justice of the EU found in *Criminal Proceedings against Lindqvist*, even placing material on an unstructured internet page constitutes a processing of data.<sup>67</sup> Meanwhile data will be *personal* so long as it “relate[s] to a living individual” who is directly identified or who is identifiable.<sup>68</sup> This is wide enough to cover any information which is clearly about an individual, irrespective of whether this concerns private, professional or business life.<sup>69</sup> Published information, arguably even if as seemingly anodyne as the name of author coupled with a book title,<sup>70</sup> is also not excluded. Any “expression of opinion” about the individual is also specifically included.<sup>71</sup> Finally, it is the “data controller” who must generally ensure compliance with the data protection stipulations. This is defined as any “person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed.”<sup>72</sup> As a result of a specific exemption in both the EU e-Commerce Directive 2000<sup>73</sup> and the Electronic Commerce (EC Directive) Regulations 2002,<sup>74</sup> such data controllers cannot make use of the general intermediary liability shield in order to absolve them from any of their responsibilities vis-à-vis the processing of personal data under the DPA.

In substantive terms, all data controllers must generally ensure that processing complies with eight data protection principles<sup>75</sup> which stipulate *inter alia* that personal data be processed “fairly”,<sup>76</sup> be “adequate, relevant and not excessive”,<sup>77</sup> and be “accurate and, where necessary, kept up to

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<sup>66</sup> Defined as one which is ‘structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible’ (DPA, s. 1(1)).

<sup>67</sup> C-101/01, *Criminal Proceedings against Lindqvist* [2003] ECR I-12971, [26].

<sup>68</sup> DPA, s. 1(1).

<sup>69</sup> Jay (note 63), 171.

<sup>70</sup> “Amendments Likely on Data Protection”, *Bookseller*, July 5, 1991.

<sup>71</sup> DPA, s. 1(1).

<sup>72</sup> DPA, s. 1 (1).

<sup>73</sup> E-Commerce Directive, art. 1 (5) (b).

<sup>74</sup> Electronic Commerce (EC Directive) Regulations SI 2002/2013, para. 3 (1) (b).

<sup>75</sup> DPA, pt 1, sch 1.

<sup>76</sup> DPA, para 1, pt 1, sch 1.

<sup>77</sup> DPA, para 3, pt. sch. 1.

date”.<sup>78</sup> Inaccurate data is defined as that which is “incorrect or misleading as to any matter of fact”.<sup>79</sup> As an aspect of the fairness principle, the Act also requires that, as far as practicable, those who are the subject of the data must be notified of processing except where information was not collected from them directly and it is explicitly justified that such notification would constitute a “disproportionate effort”.<sup>80</sup> Subjects are additionally given specific rights to access their data,<sup>81</sup> stop processing which is causing or likely to cause unwarranted damage or distress<sup>82</sup> and obtain compensation for breach of the Act in certain circumstances.<sup>83</sup> Application may also be made for the rectification or erasure both of “inaccurate” data and data which contains “an expression of opinion which appears to the court to be based on the inaccurate data”.<sup>84</sup> In the case of inaccurate data and even in situations where this data has already been “rectified, blocked, erased or destroyed”, the court may further “order the data controller to notify third parties to whom the data have been disclosed” so long as it considers this “reasonably practicable”.<sup>85</sup> In addition, a supervisory authority,<sup>86</sup> the Information Commissioner, is established with wide-ranging powers to ensure compliance with the law including issuing enforcement notices requiring specific action of data controllers backed by criminal penalty<sup>87</sup> and serving monetary penalty notices in relation to ‘serious’ contraventions which are at least negligent in nature and are “of a kind likely to cause substantial damage or substantial distress”.<sup>88</sup> Data subjects may appeal to the Information Commissioner and he has a duty to assess their case and consider what action, if any, should be taken.<sup>89</sup>

In line with its ambitious purposes, the DPA is clearly very expansive both in terms of scope and substantive subject matter. Nevertheless, it also contains a number of important limitations and exemptions. Firstly, as regards the requirement for accuracy, in significant contrast to defamation, not

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<sup>78</sup> DPA, para 4, pt 1, sch 1.

<sup>79</sup> DPA, s. 70(2).

<sup>80</sup> DPA, paras 1-3, pt 2, sch 1 and Data Protection (Conditions Under Paragraph 3 of Part II of Schedule 1) Order, 2000, SI 2000/85.

<sup>81</sup> DPA, s. 7.

<sup>82</sup> DPA, s. 10.

<sup>83</sup> DPA, s. 13.

<sup>84</sup> DPA, s. 14(1).

<sup>85</sup> DPA, s. 13(3).

<sup>86</sup> Data Protection Directive, art. 28.

<sup>87</sup> DPA, s. 40.

<sup>88</sup> DPA, s. 55A.

<sup>89</sup> S. 42, DPA, s. 42.

only is there no presumption of inaccuracy, but Sch. 1 of the DPA also stipulates that this requirement will not be contravened so long as “the data controller has taken reasonable steps to ensure that accuracy of the data” and “if the data subject has notified the data controller of the data subject’s view that the data are inaccurate, the data indicate that fact”.<sup>90</sup> Moreover, if seeking compensation, subjects must generally first prove “damage”.<sup>91</sup> Proof of “distress” alone is only sufficient in relation to processing for the purposes of journalism, artistic purposes or literary purposes.<sup>92</sup> Data controllers may additionally defend against such action by proving they have taken ‘such care as in all the circumstances was reasonably required to comply with the requirement concerned’.<sup>93</sup> As regards the right to stop processing or to ensure the erasure or rectification of data,<sup>94</sup> the courts are also formally granted discretion as to whether to award a remedy. Finally, and perhaps most strikingly, where the processing is only for the purposes of journalism, artistic purposes and/or literary purposes, controllers need not comply with any of the substantive data protection principles so long as they reasonably believe both that publication would be in the “public interest” and that compliance with the provision or provisions in question would be “incompatible” with these purposes.<sup>95</sup> The courts are also under a duty to stay proceedings until twenty four hours after publication has taken place in these cases<sup>96</sup> and the Information Commissioner is somewhat restricted in the enforcement action that can be taken here.<sup>97</sup> Finally, domestic processing by an individual solely for his or her “personal, family or household affairs (including recreational purposes)” is exempt from all data protection restrictions.<sup>98</sup>

These significant limitations and exemptions have been augmented by the often reticent approach taken to data protection both by the English courts and indeed by the Information Commissioner. In particular, the Court of Appeal in *Durant v Financial Services Authority* used references to privacy in the recitals of the Directive to attempt to restrict the DPA only to regulating

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<sup>90</sup> DPA, para 7, pt 2, sch 1.

<sup>91</sup> DPA, s. 13(2)(b).

<sup>92</sup> DPA, s. 13(2)(b).

<sup>93</sup> DPA, s. 13(3).

<sup>94</sup> See DPA, s. 10(4) (right to stop processing) and s. 14(1) (right to erasure and rectification).

<sup>95</sup> DPA, s. 32.

<sup>96</sup> DPA, s. 32(4)(b).

<sup>97</sup> See DPA, s. 46.

<sup>98</sup> DPA, s. 36. Cf. Data Protection Directive, art 3(2).

“information that affects [the data subject’s] privacy whether in his personal or family life, business or professional capacity”.<sup>99</sup> This restrictive approach was echoed in the later case of *Johnson v Medical Defence Union*<sup>100</sup> where Buxton L. J. also argued *obiter* that claimants would have to actively prove rather than rely on a presumption of damage to reputation in order to secure DPA compensation. This restrictiveness has been mirrored in the approach of the Information Commissioner. In particular, as will be explored in subsequent chapters, the Commissioner has, at least until recently, proved very reluctant to respond to the publication of derogatory made by other individuals online.<sup>101</sup>

At the same time, however, the pan-European landscape has been much more forthright in its defence of the meaning and importance of data protection. In the first place, the European Directive itself places no limitations at all on the general obligation to ensure data is processed fairly and accurately<sup>102</sup> and that individuals have access to a judicial remedy for any breach of their rights.<sup>103</sup> Moreover, whilst Member States may derogate from these rights if such action is “necessary” to protect “the rights and freedoms of others”,<sup>104</sup> it is unclear whether the over-arching limitations found within the DPA are sufficiently tailored to the defence of specific rights or freedoms so as to benefit from this provision. After all, at the time of adoption of the Directive, the Council and Commission adopted a Statement for the Minutes stating unequivocally that “the derogation ... does not refer to rights such as the right to carry out data processing”.<sup>105</sup> In any case, the CJEU has consistently held that any exemption must comply with the “requirement of proportionality with respect to the public interest objective being pursued” and that the “national court must also interpret any provision of

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<sup>99</sup> *Durant v Financial Services Authority* [2003] EWCA Civ 1746; [2003] All E.R. (D) 124 (Dec), 28. The *ratio* of the *Durant* case appears to have been side-lined by later case law even in the domestic context. Thus, in the recent case of *Edem v Information Commissioner, Financial Services Authority* [2014] EWCA Civ 92, the Court of Appeal recently stated that all information which was “obviously about” an individual would be personal data (at [22]) and further found that even “[a] name is personal data unless it is so common that without further information ... a person would remain unidentifiable despite its disclosure” (at [20]).

<sup>100</sup> [2007] EWCA Civ 262, 78; [2007] 3 CMLR 9 [76].

<sup>101</sup> See Information Commissioner, *Line to take - Dealing with complaints about information published online* (2011)

[www.ico.org.uk/about\\_us/how\\_we\\_comply/disclosure\\_log/~media/documents/disclosure\\_log/IRQ0417298b.ashx](http://www.ico.org.uk/about_us/how_we_comply/disclosure_log/~media/documents/disclosure_log/IRQ0417298b.ashx) accessed 19 August 2014.

<sup>102</sup> Data Protection Directive, art. 6.

<sup>103</sup> Data Protection Directive, art. 22.

<sup>104</sup> Data Protection Directive, art. 13(1)(g).

<sup>105</sup> Council of the European Union, *Council Document 4730/95 (Annex I)* (8 February 1995) (on file with the author).



national law, as far as possible, in light of the wording and the purpose of the applicable directive, in order to achieve the result pursued by the latter”.<sup>106</sup> Even in relation to processing solely for the purposes of journalism, artistic purposes and/or literary purposes,<sup>107</sup> the court has argued that exemptions may be provided “only in so far as strictly necessary”<sup>108</sup> to achieve a balance between fundamental rights. The CJEU has further held that the domestic processing exemption, which is absolute in nature, can only be relied upon in relation to “activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people”.<sup>109</sup>

#### *D. Malicious Falsehood*

Although this article is principally concerned with a comparison of defamation law with data protection law, it is necessary finally to note briefly the contours of malicious falsehood, a traditional cause of action which, although little used, is related to the protection of reputation. This tort protects against dissemination of a statement to somebody other than the claimant of information which is false. The information need not have any tendency to lessen respect for that person but, unlike in defamation, the claimant must prove the relevant falsity.<sup>110</sup> In addition, the claimant must demonstrate actual, pecuniary damage or, alternatively, that the words either “are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form” or “are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication”.<sup>111</sup> Finally, and most significantly, the claimant must prove “malice”. In this context, this requires that the defendant either knew or was

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<sup>106</sup> C-465/00 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989, [91] and [93].

<sup>107</sup> The subject of specifically permissive regulation under the Data Protection Directive, art 9.

<sup>108</sup> C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-09831, [56].

<sup>109</sup> *Lindqvist*, [47].

<sup>110</sup> Robertson and Nicol (note 1), 113.

<sup>111</sup> Defamation Act 1952, s. 3(1).

reckless<sup>112</sup> as to whether the statement was false<sup>113</sup> or was actuated by some dishonest or improper motive.<sup>114</sup> Negligence is not enough and an “[h]onest belief in an unfounded claim is not malice”.<sup>115</sup> These restrictions have severely circumscribed the ambit of this action. Despite this, the tort remains relevant, not only because of its historic relationship with defamation, but also because as will be seen below it has been referred to in case law interpreting the requirements of data protection law.

### III. DEVELOPMENTS IN DEFAMATION AND DATA PROTECTION

Both defamation and data protection law are in a state of flux. On 1 January 2014 the Defamation Act 2013 came into force.<sup>116</sup> This Act effects a major reform of the law of defamation in England and Wales.<sup>117</sup> While there are no live legislative proposals for the reform of data protection, there have been important developments in domestic and European case law as well as regulatory stance here.

#### A. *Defamation Act 2013*

The Defamation Act 2013 arose from the initiative of a law reform coalition concerned that the current law on defamation was unduly curtailing freedom of speech.<sup>118</sup> The Act’s substantive reforms of relevance to this article are the introduction of a ‘serious harm’ threshold,<sup>119</sup> the crafting of new statutory defences of truth,<sup>120</sup> honest opinion<sup>121</sup> and publication on a matter of public interest<sup>122</sup> and the introduction of various new defences to defamation, most notably that applicable to “website

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<sup>112</sup> In other words, that the statement was made without caring whether it was true or false.

<sup>113</sup> *Shapiro v La Mora* [1923] All E.R. Rep 378.

<sup>114</sup> *Dunlop v Maison Talbot* (1904) 20 T.L.R. 579 (CA).

<sup>115</sup> *Greers Ltd v Pearman & Corder Ltd* (1922) 39 R.P.C. 406 (CA) 417.

<sup>116</sup> Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027.

<sup>117</sup> The Act has no application to Northern Ireland. As regards Scotland, only ss. 6, 7(9), 15, 16(5) and 17 (3) apply. These relate to the new defence for peer-reviewed statements in scientific or academic journals, a matter which has little relevance to the subject of this article. See Defamation Act 2013, s. 17 (2)-(3).

<sup>118</sup> G. Phillipson, “The ‘global pariah’, the Defamation Bill and the Human Rights Act” (2012) 63 *N.I.Q.L.* 146.

<sup>119</sup> Defamation Act 2013, s. 1.

<sup>120</sup> Defamation Act 2013, s. 2 (replacing common law justification).

<sup>121</sup> Defamation Act 2013, s. 3 (replacing common law fair comment).

<sup>122</sup> Defamation Act 2013, s. 4 (replacing the common law *Reynolds* defence).

operators”.<sup>123</sup> By crafting a new ‘single publication rule’<sup>124</sup> the Act also makes an important procedural change to defamation law. In addition, the right to a jury trial in defamation actions is abolished.<sup>125</sup>

As the explanatory notes to the Act makes clear, the new statutory defences of truth and publication on a matter of public interest are largely codifications of the existing common law justification (truth) and “*Reynolds*” defences.<sup>126</sup> However, the other changes are potentially much more significant. Firstly, section one of the Act establishes that a publication will not be defamatory unless it has caused or is likely to cause ‘serious harm to the reputation of the claimant’.<sup>127</sup> This stipulation reverses what has traditionally been seen as a cardinal principle of English law, namely that libel be actionable *per se*.<sup>128</sup> It is true that the Court of Appeal in *Jameel* did strike out a defamation claim for abuse of process due to its failure to disclose a “real and substantial tort”,<sup>129</sup> and also indicated that changes in the Civil Procedure Rules and the introduction of the HRA had rendered the court willing to take this, albeit still very rare, step more readily than in the past.<sup>130</sup> Moreover, in *Thornton v Telegraph Group* Tugendhat J held that defamation law “must include a qualification or threshold of seriousness, so as to exclude trivial claims”.<sup>131</sup> Nevertheless, *Thornton* remains a very recent decision at first instance<sup>132</sup> and, overall, it is clear that this new section “raises the bar” for bringing a defamation claim in the future.<sup>133</sup>

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<sup>123</sup> Defamation Act 2013, s. 5 (provision for a new defence to defamation action brought against operators of websites), s. 6 (qualified privilege in relation to peer-reviewed statements in scientific or academic journals) and s. 7 (provision for qualified or absolute privilege in relation to a range of either verbatim or summarised reports).

<sup>124</sup> Defamation Act 2013, s. 8.

<sup>125</sup> Defamation Act 2013, s. 11.

<sup>126</sup> As regards the latter, the wording that the defendant need only have “reasonably believed that publishing the statement complained of was in the public interest” (s. 4 (1) (b)) may be thought to have widened the defence by introducing a greater subjective element. However, the Government (which proposed the wording) was clear that “the intention in this provision is [merely] to reflect the existing common law as most recently set out in *Flood v Times Newspapers*”. See Ministry of Justice, *Defamation Act 2013 Explanatory Notes* (2013) <<http://www.legislation.gov.uk/ukpga/2013/26/notes>> accessed 10 April 2014.

<sup>127</sup> Defamation Act, s. 1.

<sup>128</sup> Milo (note 25), 11.

<sup>129</sup> *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] Q.B. 946, [70].

<sup>130</sup> *ibid*, [55].

<sup>131</sup> *Thornton v Telegraph Group* [2010] 1 W.L.R. 1986 [100].

<sup>132</sup> Phillipson (note 118), 168.

<sup>133</sup> Ministry of Justice’s Explanatory Note (note 126), 3.

Secondly, turning to the clause dealing with “honest opinion”, many of the details of this new statutory defence merely consolidate the current common law defence of “fair comment” which it replaces. Nevertheless, this restatement comes on the back of the Supreme Court’s expansive reading of this latter defence in *Joseph v Spiller*.<sup>134</sup> There, the court found that the potential to defeat the defence by showing “malice” had been ‘significantly narrowed’.<sup>135</sup> In particular, it was in no way relevant whether the defendant had been “motivated by spite or ill-will”.<sup>136</sup> Rather, it was only necessary that the comment was honestly held, based on true facts which were indicated (even if only implicitly and in general terms) to the receiver of the message and finally was on a matter of “public interest”. Whilst the court found that the scope of the latter requirement had been “greatly widened”,<sup>137</sup> this last requirement nevertheless imparted a critical objective element into this defence. Importantly, however, the new statutory defence entirely removes this “public interest” requirement.<sup>138</sup> As Phillipson noted during the lead-up to Bill’s enactment, this would appear to create a situation whereby the publication of “disparaging *opinions* on private life lacking a public interest would be lawful when the disclosure of the related private *facts* [at least when originally made] would not”.<sup>139</sup> As an example, Phillipson suggests that free-ranging defamatory comment on Max Mosley’s German prison themed sado-masochistic sessions would be legal even though the disclosure of the facts on which the comment was based were published in breach of the tort of the misuse of private information.<sup>140</sup>

Thirdly, the Act substantially broadens the range of defences to defamation action. There is an extension of absolute privilege to fair, accurate and contemporaneous reporting of courts worldwide as well as a broad range of international courts and tribunals.<sup>141</sup> Meanwhile, qualified privilege is extended to publication of fair and accurate copies, summaries or extracts of material

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<sup>134</sup> *Joseph v Spiller* [2010] UKSC 53; [2011] 1 A.C. 852.

<sup>135</sup> *ibid.*, [108].

<sup>136</sup> *ibid.*

<sup>137</sup> *ibid.*

<sup>138</sup> The rewording also allows defamatory opinions related to facts which, though false, were “asserted to be a fact” on a certain privileged occasion (Defamation Act 2013, s. 3(4)(b)) including publication on a matter of public interest or of a peer-reviewed statement in a scientific or academic journal (*ibid.*, s. 3(7)).

<sup>139</sup> Phillipson (note 118) 178.

<sup>140</sup> *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), [2008] E.M.L.R. 20.

<sup>141</sup> Defamation Act 2013, s. 7(1).

produced by any legislature or governmental body as well as reports of proceedings at a wide range of public meetings.<sup>142</sup> A specific qualified privilege defence is also set out for the first time in relation to the publication of peer-reviewed statements in scientific or academic journals.<sup>143</sup> By far the most significant new defence, however, is that provided to any “operator of a website in respect of a statement posted on the website”<sup>144</sup> where it did not itself post the statement. These entities have a complete shield from liability unless the claimant demonstrates that it was not possible for him to identify the person who did post the statement, the claimant gave the operator a notice of complaint and the operator failed to respond in accordance with the Defamation (Operators of Websites) Regulations 2013.<sup>145</sup> Where the operator has no electronic means of contacting the poster, these regulations require that to benefit from the defence the operator remove the statement within 48 hours of receiving notice.<sup>146</sup> In other situations, however, the operator only needs to notify the poster stating that the statement may be removed unless the operator receives a written response from the poster stating that he does not wish the statement to be removed and providing his full name and postal address.<sup>147</sup> The operator has to remove the material from the website 48 hours after the end of the period in cases where the poster fails to respond<sup>148</sup> or where the poster’s response is incomplete.<sup>149</sup> The latter does include situations where a “reasonable website operator would consider the name or postal address ... to be obviously false”.<sup>150</sup> However, in all other cases, the operator need only inform the complainant in writing within the same period that the poster does not wish the statement to be removed and that the statement has not been removed.<sup>151</sup> So long as the poster has not consented to the release of his name and/or address, the operator must simply notify the complaint in writing of

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<sup>142</sup> Defamation Act 2013, s. 7(4)-(9). In order to benefit from these new defences, however, the publisher must satisfy either a “public interest” or “public benefit” test (see s. 7(2) read with s. 15(3)) and also ensure that if the subject of the statement so requests he publishes “in a suitable manner a reasonable letter or statement by way of explanation or contradiction” (s. 15(2)(a)).

<sup>143</sup> Defamation Act 2013, s. 6.

<sup>144</sup> Section 5 (1), Defamation Act 2013.

<sup>145</sup> SI 2013/3028.

<sup>146</sup> *ibid*, para. 3 (1).

<sup>147</sup> *ibid*, para. 2.

<sup>148</sup> *ibid*, para. 5.

<sup>149</sup> *ibid*, para. 6.

<sup>150</sup> *ibid*, para.6 (3).

<sup>151</sup> *ibid*, para. 8 (2) (i).

that fact.<sup>152</sup> It will, therefore, be up to the complainant to apply for a court order for the possible release of this information. Even if these details, once released, turn out to be false, no further liability will rest on the website operator.<sup>153</sup> Thus, this new defence goes far beyond the “innocent dissemination” defence in the Defamation Act 1996 and the so-called intermediary liability shield under the Electronic Commerce (EC Directive) Regulations 2002 noted above.<sup>154</sup> Moreover, it is clear that the defence extends well beyond the kind of passive internet hosting protected by these latter Regulations. Indeed, the Act provides on its face that the defence “is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others”.<sup>155</sup> During the House of Commons proceedings, the Government stated that the clause was “intended to cover websites that directly host user-generated content” including “individuals or companies that run websites and exert influence over them”. This definition was further held to a wide range of interactive and social media outlets including “website operators such as Facebook and Mumsnet, and online newspapers and bulletin boards that enable users to post and read messages”.<sup>156</sup> Moreover, although this defence may technically be defeated if a claimant shows that the operator “had operated with malice in relation to the posting of the statement concerned”,<sup>157</sup> the Government correctly emphasised that “it is difficult to foresee circumstances” in which a website operator otherwise complying with s. 5 “could do so maliciously”.<sup>158</sup> Finally, it should be noted that, in addition to this defence, s. 10 also establishes that “[a] court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the

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<sup>152</sup> *ibid*, para. 8 (2) (ii).

<sup>153</sup> It should be noted that if a successful action is brought against the poster then the court is empowered to order the operator of the website to remove the statement (Defamation Act 2013, s. 13(1)(a)).

<sup>154</sup> SI 2002/2013. This “hosting” shield only applies if upon obtaining knowledge of illegal activity or information, or even facts or circumstances from which such illegality is apparent, the provider “acts expeditiously to remove or to disable access to the information” (para. 19 (a) (ii)). See also the related defences for mere conduit (para. 17) and caching (para. 18).

<sup>155</sup> Defamation Act 2013, s. 5(12).

<sup>156</sup> HC, Public Bill Committee, Defamation Bill Deb., 21 June 2012, col. 132 (Jonathan Djanogly MP, Parliamentary Under-Secretary of State).

<sup>157</sup> Defamation Act 2013, s. 5(11).

<sup>158</sup> HL Deb., vol. 742, col. GC 195 (15 January 2013) (Lord Ahmed of Wimbledon, Government Whip).

statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher”.<sup>159</sup>

Finally, the Act reforms the limitation period for claims brought in both defamation and malicious falsehood by introducing a ‘single publication rule’. There has long been a special one year limitation period for launching such actions.<sup>160</sup> However, this provision was almost entirely undercut by another rule under which a fresh publication is deemed to take place each time a statement is viewed, sold or otherwise republished.<sup>161</sup> Especially when applied to the internet,<sup>162</sup> this proved extremely onerous for publishers leading some to argue that “in effect, there [was] no limitation for libel”.<sup>163</sup> The Act addresses the situation by providing that once a statement is published to the public at large,<sup>164</sup> the limitation period will run from this time so long as, firstly, any subsequent statement is at least ‘substantially the same’<sup>165</sup> and, secondly, that the manner of subsequent publication is not “materially different” from the first.<sup>166</sup> Moreover, although the courts retain discretion to waive limitation periods in defamation where it would be “equitable” to do so,<sup>167</sup> in practice it is “rare” for such limitation periods to be set aside.<sup>168</sup> These new provisions, therefore, significantly restrict the right to a judicial remedy here.

### *B. Data Protection Developments*

Unlike in defamation, there have been no significant legislative changes to UK data protection within the past few years.<sup>169</sup> Nevertheless, there have been important developments both in the case law and

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<sup>159</sup> Defamation Act 2013, s. 10.

<sup>160</sup> Limitation Act 1980, s. 4A.

<sup>161</sup> For the seminal statement of this rule see *Duke of Brunswick v Harmer* [1849] 14 Q.B. 185 (HC).

<sup>162</sup> As it was in *Loutchansky v Times Newspapers Limited* [2001] EWCA Civ 1805.

<sup>163</sup> Phillipson (note **118**), 181.

<sup>164</sup> Or a ‘section of the public’ (Defamation Act 2013, s. 8(2)).

<sup>165</sup> Defamation Act 2013, s. 8(1)(b).

<sup>166</sup> Defamation Act 2013, s. 8(4).

<sup>167</sup> Limitation Act 1980, s. 32A. For a similar provision regarding personal injuries or death see Limitation Act 1980, s. 33.

<sup>168</sup> Phillipson (note **118**), 183.

<sup>169</sup> The last change in primary legislation was made in 2008 when provisions empowering the Information Commissioner to impose monetary penalties on data controllers were introduced. See Data Protection Act 1998,

in the broader context which relate directly to the role of data protection in protecting reputation. The case law will first be considered before briefly examining this broader context.

### Quinton v Peirce

Although there has been a greater recent focus within domestic law on the interface between data protection and the right to reputation, not all of the cases have been supportive of a significant role for the DPA in this area. In fact, *Quinton v Peirce*,<sup>170</sup> the first case centrally concerned with this issue, took rather the opposite viewpoint. This case concerned a local Conservative politician, Mr Quinton, who argued that certain misleading or even false (although not defamatory) statements had been included in his political opponent Mr Peirce's election leaflets during a hard-fought local government election campaign in 2007. Quinton not only claimed malicious falsehood but also breach of both the accuracy and fairness provisions of the DPA. Eady J, who heard the case, considered that the DPA was applicable,<sup>171</sup> that Mr Peirce was a "data controller"<sup>172</sup> and that the exemptions for "journalism" were not relevant.<sup>173</sup> In other respects, however, he reacted very unsympathetically to the data protection claim. In sum, as regards the alleged violation of the accuracy standard, Eady stated that he could 'see no reason to apply different criteria or standards in this respect from those I have applied when addressing the tort of injurious [malicious] falsehood'.<sup>174</sup> As noted in section two, this little used tort requires proof of "malice". According to Tomlinson this makes the tort "a "non-starter"...successful actions are vanishingly rare because the burden of proof is so high".<sup>175</sup> Meanwhile, as regards the argument that the DPA fairness principle's data subject notification provisions required that Quinton be informed of the leaflet in advance, Eady simply stated that he

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s. 55A as amended by Crime Justice and Immigration Act 2008, s. 144. These provisions were brought fully into force on 6 April 2010 as a result of The Data Protection (Monetary Penalties) Order, SI 2010/910.

<sup>170</sup> *Quinton v Peirce* [2009] EWHC 912 (QB), [2009] F.S.R. 17.

<sup>171</sup> *ibid* [59].

<sup>172</sup> *ibid* [57].

<sup>173</sup> *ibid* [4]. From the context it is clear that Eady was talking about the special provisions regulating processing for the purposes of journalism, artistic purposes and literary purposes as set out, in particular, in DPA, s. 32.

<sup>174</sup> *ibid* [92].

<sup>175</sup> Phillipson (note **118**), 186.



declined “to interpret the statute in a way which results in absurdity”.<sup>176</sup> Eady was clearly frustrated by the “fine and arbitrary distinctions” which the DPA appeared to require, distinctions which to him illustrated the “confusion and uncertainty attending the application of these legislative provisions”.<sup>177</sup>

Overall, it may be argued that *Quinton* “is an illustration of what happens to a data protection claim to which an English court has reacted unsympathetically, particularly when it is brought before a court unfamiliar with data protection issues and concerned to fit them into a familiar pattern of well-known torts, defamation and malicious falsehood”.<sup>178</sup> Given the overriding need to interpret the legislation in line with the purpose of the Data Protection Directive,<sup>179</sup> the court should really have addressed the completely different question of “whether the traditional torts are consistent and support the superior law derived from the European institutions”.<sup>180</sup> Indeed, as Tugendhat J stated prior to his elevation to the bench:

It is vital to note that the 1984 [Data Protection] Act created, and the 1998 Act continues, concepts entirely new to English law. These rights do not depend on whether the data subject (as the person to whom information relates is called) would have rights under the existing law of confidentiality or defamation or any other tort or statute.<sup>181</sup>

### *Clift v Slough Borough Council*

The other main English cases in this area have all centrally involved the participation of Tugendhat J who, as just mentioned, has long been on record as supporting a far more expansive interpretation of the data protection regime than that articulated by Eady. The first such case, *Clift v Slough Borough*

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<sup>176</sup> *Quinton v Peirce*, [93].

<sup>177</sup> *ibid*, [68].

<sup>178</sup> F. Aldhouse, “Political Opinions: Injurious falsehood: *Quinton v. Peirce & Cooper*” (2009) 6 *Data Protection Law and Policy* 7, 7 and 8.

<sup>179</sup> *Österreichischer Rundfunk* (note 106).

<sup>180</sup> Aldhouse (note 178), 8.

<sup>181</sup> M. Tugendhat “The Data Protection Act 1998 and the Media” (1999) *Yearbook of Copyright and Media Law* 115, 120.

*Council*, was considered in both the High Court<sup>182</sup> and the Court of Appeal.<sup>183</sup> This defamation case concerned a Ms Jane Clift who was placed on Slough Borough Council's Violent Persons Register as somebody posing a medium risk of violence. This outcome arose from a reference Clift had made to the Council's Anti-Social Behaviour Coordinator, Ms Rashid, regarding some criminal damage she had witnessed. This was acrimoniously dealt with and led Clift to make a complaint to the Council during the course of which she repeatedly expressed a desire to inflict physical violence upon Rashid. Clift's inclusion on the Register was circulated by the Council to a wide range of its employees and to four "partner organisations". Responding to Clift's action, the Council accepted that the publication was defamatory but sought to rely on a defence of justification (truth) and qualified privilege. Part of Clift's response to the latter was to claim malice which would have prohibited the Council's use of any privileged occasion. In fact, the jury rejected both the Council's defence of justification and Clift's allegation of malice.<sup>184</sup> The legal point of interest, which was considered at length by both Tugendhat in the High Court and Ward LJ in the Court of Appeal, concerns the scope of qualified privilege and, more particularly, the role of other legislation including potentially the DPA in constraining this.

The Council argued that following *Kearns v General Council of the Bar* [2003] EWCA Civ 331 it could claim a defence of qualified privilege in relation to all its communications since, according to the Council, they were in each case made within an "established relationship...which required the flow of free and frank communication between them on all questions relevant to the discharge of the defendants' functions".<sup>185</sup> Nothing short of malice could defeat this.<sup>186</sup> Clift in response argued that the defence could have no application where the communication was inconsistent with the duties of the Council to act compatibly with her European Convention right to

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<sup>182</sup> *Clift v Slough Borough Council* [2009] EWHC 1550 (QB); [2010] E.M.L.R. 4.

<sup>183</sup> *Clift v Slough Borough Council* [2010] EWCA Civ 1171; [2011] 1 W.L.R. 1774.

<sup>184</sup> *Clift v Slough Borough Council (HC)* at [128].

<sup>185</sup> *Clift v Slough Borough Council (HC)* at [55] (citing *Kearns v General Council of the Bar* at [53]).

<sup>186</sup> *Clift v Slough Borough Council (HC)* at [23]. However at [99] Tugendhat held that even if he had accepted such an "established relationship" approach, he would have rejected its applicability in the case of publication to partnership organisations or non-employees since these entities were not in an established relationship with the Defendant.

reputation<sup>187</sup> as required of public authorities by s. 6 HRA. This was accepted by both the High Court and the Court of Appeal. Furthermore, although the Council was found to have a legitimate aim in publishing the material, its publication of the statement to employees in the Council’s Licensing, Food and Safety and Children and Education Services as well as to Community Wardens, Trade Union Officials and anyone in the four partner organisations was found to be disproportionate and therefore in violation of Clift’s Convention rights.<sup>188</sup>

*Clift* did not directly concern pleadings related to the DPA.<sup>189</sup> Nevertheless, in the course of both the High Court and Court of Appeal judgments there were important *dicta* about the potential role of data protection in constraining the scope of qualified privilege especially vis-à-vis private actors (who are not directly covered by the HRA). In particular, responding to the argument made in *Kearns* that when common law qualified privilege applied “[t]he need to act responsibly will not arise”,<sup>190</sup> Tugendhat baldly stated “[i]n cases where the HRA or the DPA apply, that can no longer be said”.<sup>191</sup> To the contrary

[t]he DPA...requires attention to be focused on the rights of those who are the subject of references and warnings, as well as on the rights of those to whom the references and warnings are addressed. Personal data must be processed (which includes disclosed) “fairly and lawfully”, and it must be accurate: see Sch. 1.<sup>192</sup>

This was important since “[w]hen incorrect information is communicated, carelessness or innocent error is more likely than malice to be the explanation”.<sup>193</sup>

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<sup>187</sup> An aspect of her art. 8 right to respect for private life.

<sup>188</sup> *Clift v Slough Borough Council (CA)* at [38].

<sup>189</sup> As detailed at [43] of *Clift v Slough Borough Council (HC)*, Ms Clift had originally brought a claim under the DPA alleging that the Registrar acted in violation of the Act’s accuracy requirements. Moreover, it appears that separate from the defamation proceedings she was continuing to pursue proceedings specific to the DPA (at [71]). Tugendhat left open the possibility that she may have wider rights in relation to the DPA than were vindicated in her defamation action (at [88]).

<sup>190</sup> *Kearns v General Council of the Bar* at [45] cited in *Clift v Slough Borough Council (HC)* at [121].

<sup>191</sup> *Clift v Slough Borough Council (HC)* at [122].

<sup>192</sup> *ibid* at [120].

<sup>193</sup> *ibid* at [118].

In the Court of Appeal, Clift did rely in part on an argument that the narrow construction of qualified privilege favoured in the High Court was consistent with the Council’s duties under the DPA.<sup>194</sup> Moreover, in addressing the proportionality point, Ward LJ stated:

In my judgement it cannot be held to be disproportionate for a local authority to do what it is bound to do anyway whether in performance of its public law responsibilities, or its duty under the Data Protection Act 1998 or the Information Commissioner’s Data Protection Act 1998 compliance advice used in the public sector, each of which is to all intents and purposes to the same effect.<sup>195</sup>

It therefore seems that Tugendhat was right to make the, albeit rather understated, remark that “[t]he conclusions I have reached in this case may have some impact upon defences of qualified privileged [sic] raised by defendants who are not public authorities, but who have published information in breach of the DPA”.<sup>196</sup>

### Law Society v Kordowski

The High Court case *Law Society, Hine Solicitors & Kevin McGrath v Rick Kordowski*, which did directly include a DPA claim brought against a private sector actor, concerned an action, brought on a representative basis, to injunct the Defendant from publishing the website ‘solicitors From Hell’ and to restrain him from publishing any similar website in the future.<sup>197</sup> Founded in 2005, this website comprised of a ““blacklist” of law firms and solicitors that should be avoided”<sup>198</sup> collated from almost invariably anonymous postings made by disgruntled members of the public who were invited to ““NAME and SHAME your OPPRESSOR””.<sup>199</sup> Action was brought in libel, harassment under the Protection from Harassment Act 1997 and also breach of requirements to process data “fairly and

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<sup>194</sup> *Clift v Slough Borough Council (CA)* at [19].

<sup>195</sup> *ibid* at [35].

<sup>196</sup> *Clift v Slough Borough Council (HC)* at [104].

<sup>197</sup> *Law Society, Hine Solicitors & Kevin McGrath v Rick Kordowski* [2011] EWHC 3185 (QB) at [1].

<sup>198</sup> *ibid* at [10].

<sup>199</sup> *ibid* at [9]. It was also clear that, on occasion, the ability of the defendant to delete material from the website had “been used as a tool to demand money from those it names” (at [116]).

lawfully”, accurately and in accordance with data subjects’ rights under the DPA. It was brought not only on behalf of the named claimants themselves but also of “all those currently featuring on the website and those who might, in the future, feature on the website”.<sup>200</sup> The Law Society had previously sought to have their complaint resolved through enforcement action by the Information Commissioner.

As regards the specific statements complained of by the Second and Third Claimants, Tugendhat had little difficulty finding them actionable in libel and in violation of both the Protection Against Harassment Act 1997 and the requirement under the DPA to “fairly and lawfully” process personal data.<sup>201</sup> He was therefore prepared to grant perpetual injunctions requiring their removal from the website and prohibiting publication on a similar website under all these causes of action.<sup>202</sup> Matters were not so straightforward in relation to the representative action, necessary to get the website removed in its entirety. Tugendhat ruled that such action could be sustained under the DPA. This was because all the represented parties<sup>203</sup> had a “common interest” arising from the defendant’s “course of conduct, which includes data processing, which is the same or similar in relation to all”.<sup>204</sup> Crucially, he also found that under the DPA “whilst the falsity or inaccuracy of the words (the course of conduct complained of) is not irrelevant... truth is not of itself a defence”.<sup>205</sup> A perpetual injunction was therefore granted on this basis.<sup>206</sup> In contrast, following the rule against interim injunctions set out in *Bonnard*<sup>207</sup> no such relief could be granted in defamation.<sup>208</sup> This was because despite their being a similar “common interest”, in this case “[w]hether publication of those words is, or will be, unlawful does not depend on the conduct of the Defendant. It depends upon whether the

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<sup>200</sup> *ibid* at [1].

<sup>201</sup> *ibid* at [132]-[134]. Breach of the DPA’s accuracy provisions was not directly considered.

<sup>202</sup> *Ibid* at [139]-[142].

<sup>203</sup> For completeness it should be noted that Tugendhat found that the Law Society itself did not itself have such a common interest. He therefore held that the action for the Represented Claimants (i.e. the other solicitors) should be continued by the Second and Third Claimants rather than the Law Society as the Claimants themselves had proposed. See *ibid* at [165].

<sup>204</sup> *ibid* at [163].

<sup>205</sup> *ibid* at [164].

<sup>206</sup> *ibid* at [184].

<sup>207</sup> *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

<sup>208</sup> It should be noted that Tugendhat did find it possible to grant a perpetual injunction under the Protection from Harassment Act 1997 (see *ibid* at [163]-[164]). Consideration of this statute, however, is outside the scope of this article.

words are true or false, or whether they can be defended under one or other established defences in libel”.<sup>209</sup>

A further notable feature of this case was that, during the course of his judgment, Tugendhat made some highly critical remarks about the approach the Information Commissioner had taken to the Law Society’s complaint. In this context it should be noted that the Commissioner had written to the Law Society in early January 2011 in the following terms:

The inclusion of the ‘domestic purposes’ exemption in the Data Protection Act (s. 36) is intended to balance individual’s rights to respect for his/her private life with the freedom of expression. These rights are equally important and I am strongly of the view that it is not the purpose of the DPA to regulate an individual right to freedom of expression – even where the individual uses a third party website, rather than his own facilities, to exercise this ... The situation would clearly be impossible were the Information Commissioner to be expected to rule on what it is acceptable for one individual to say about another be that a solicitor or another individual.<sup>210</sup>

In contrast, Tugendhat stated that he did “not find it possible to reconcile the views on the law expressed in the Commissioner’s letter with authoritative statements of the law”,<sup>211</sup> that “[t]he DPA does envisage that the Information Commissioner should consider what it is acceptable for one individual to say about another”<sup>212</sup> and that he did “not understand how it could be said that s. 36 has any application to the present case”<sup>213</sup>

### Google Spain

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<sup>209</sup> *Law Society v Kordowski* at [166].

<sup>210</sup> Quoted in *Law Society v. Kordowski* at [96].

<sup>211</sup> *ibid* at [100].

<sup>212</sup> *ibid*.

<sup>213</sup> *ibid*.

On 13 May 2014 the Grand Chamber of the CJEU handed down a path-breaking preliminary reference judgment, *Google Spain, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, a case which arose from Costeja’s demand that information originally published sixteen years previously related to ‘a real-estate auction connected with attachment proceedings for the recovery of social security debts’<sup>214</sup> be deindexed from Google search engines. The Court found that even when mirroring in unaltered form material published live on the internet, search engines were not only data controllers<sup>215</sup> but operated outside the special shield established for journalistic and allied purposes.<sup>216</sup> As a result, the Court held that “[i]nasmuch as the activity of a search engine is ... liable to affect significantly, and additionally compared with that of publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine ... must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirement of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.”<sup>217</sup> Not only its purpose, but also data protection’s substantive requirements were interpreted expansively. In particular, the judgment stressed that (unless excused by specific derogations in national law justified under Article 13 of the Data Protection Directive) data controllers had to ensure that personal data are processed fairly and lawfully, that they are adequate, relevant and not excessive and that they are accurate. It was particularly emphasised that “even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive”,<sup>218</sup> an understanding which may prove especially helpful to an individual wishing to get removed, or at least deindexed, statements especially of opinion rather than fact which are having an ongoing negative impact on their reputation. It was stressed that not only was it not necessary for the data subject to prove that the processing “causes prejudice” but that, in light *inter alia* of the fundamental right to data protection set out in the EU Charter, “those rights override, as a rule, not only the economic interest of the operator of the search

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<sup>214</sup> *ibid* at [98].

<sup>215</sup> *Google Spain* at [33].

<sup>216</sup> *ibid* at [85].

<sup>217</sup> *ibid* at [38].

<sup>218</sup> *ibid* at [93].

engine but also the interest of the general public in finding that information upon a search relating to the data subject's name".<sup>219</sup> Finally, as regards the concrete claim at issue, the court found that Costeja had established 'a right that the information should no longer be linked to his name by means of such a list'.<sup>220</sup>

### *Broader context*

This burgeoning data protection case law has been mirrored by broader developments which have also indicated the potential for a much greater role for the DPA in the area of reputation rights in the future. Firstly, in December 2010, the extent of the European Commission's infringement proceedings against the UK's potentially incorrect transposition of the Data Protection Directive finally came to light. These proceedings, which began as far back as 2004, alleged, in particular, that the DPA's "domestic purposes" exemption was phrased too broadly, that the Act incorrectly granted courts a discretion in relation to the updating, rectification, erasure or blocking of personal data, that it incorrectly limited rights to compensation in relation to non-material damage and that the Commissioner appeared to have been granted inadequate investigative powers.<sup>221</sup> Even if this action is not finally pursued before the CJEU, both the depth and breadth of these concerns suggests that UK courts may have wide-ranging obligations to expansively interpret the DPA in order to ensure, as far as possible, that proper effect is given to the Directive which it is meant to implement.

Secondly, in late 2012, Lord Leveson published his report on press regulation, produced as a result of an inquiry commissioned by the Government in July 2011. The report gave prominence to data protection, expressing criticism both of the current legislation and of the timid approach taken to it by legal practitioners, the higher courts<sup>222</sup> and most particularly the Information Commissioner himself.<sup>223</sup> The Leveson Report also specifically cited the *Kordowski* case considered above, arguing

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<sup>219</sup> *ibid* at [97].

<sup>220</sup> *ibid* at [98].

<sup>221</sup> Jay (note 63), 20.

<sup>222</sup> B. Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, 999.

<sup>223</sup> *ibid*, 1061.



that it also “took a wider view of the ICO’s functions in relation to journalism than it was minded to take itself”.<sup>224</sup> For the future, Leveson proposed significant reform of both the Information Commissioner’s approach and the legislative framework. Regarding the former, Leveson recommended that the ICO take immediate steps “to prepare, adopt and publish a policy on the exercise of its formal regulatory functions in order to ensure that the press comply with the legal requirements of the data protection regime”,<sup>225</sup> that it likewise “prepare and issue comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data”<sup>226</sup> and finally that it “publish advice aimed at individuals (data subjects) concerned that their data have or may have been processed by the press unlawfully or otherwise than in accordance with good practice”.<sup>227</sup> Meanwhile, as regards the DPA itself, Leveson recommended that the exemptions provided for the purposes of journalism, artistic purposes and literary purposes be significantly narrowed including in particular removing all of the special limitations on the requirement to ensure the accuracy of personal data.<sup>228</sup> He further recommended that it be made clear that compensation under the DPA be generally available for pure distress<sup>229</sup> and that the procedural restrictions on the courts issuing injunctions and the Commissioner using his enforcement powers in relation to the purposes of journalism, artistic purposes and literary purposes

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<sup>224</sup> *ibid*, 1107. It should be noted that in *Kordowski* actually rejected the proposition that the website Solicitors From Hell could benefit from the DPA’s special protections for processing for the purposes of journalism, artistic purposes and literary purposes (s. 32). Whilst acknowledging that “[t]oday anyone with access to the internet can engage in journalism at no cost”, it also found that the “[j]ournalism that is protected by s. 32 involves communication of information or ideas to the public at large in the public interest” (at [99]). It is certainly true that the DPA requires that the data controller has a reasonable belief that publication is the public interest to benefit from s. 32’s substantive protections (s. 32(1)-(2)). This requirement was clearly not met in this case. As regards the procedural protection from injunctive relief, however, s. 32 only expressly requires that the data controller claims or it appears to the court that processing is only for the purposes of journalism, artistic purposes and/or literary purposes and with a view to the publication of material not previously published by the data controller twenty-four hours previously (s. 32 (4)-(6)). It seems, therefore, that Tugendhat implied into the DPA’s definition of the purposes of journalism, artistic purposes and literary purposes some kind of public interest threshold.

<sup>225</sup> *ibid*, 1811.

<sup>226</sup> *ibid*, 1811.

<sup>227</sup> *ibid*, 1812.

<sup>228</sup> *ibid*, 1810.

<sup>229</sup> *ibid*, 1810.

be repealed.<sup>230</sup> Finally, Leveson proposed that the judiciary's Civil Justice Council review the level of damages generally available for breach of data protection.<sup>231</sup>

Although the Government initially committed to consulting on the Leveson's recommendations for legislative reform,<sup>232</sup> this has not been forthcoming and it seems unlikely that significant statutory change will ultimately eventuate. In contrast, following both the *Kordowski* judgment and the Leveson Report, the ICO has been engaging in a process of reanalysis of its stance vis-à-vis free speech issues. Related principally to the former, in May 2013 the Office published new guidance on social networking and online forums.<sup>233</sup> In stark conflict with the CJEU's holding in the *Lindqvist* case (see above), this guidance maintained the Office's former position that as a result of the DPA's "domestic purposes" exemption, individuals "who have posted personal data whilst acting in a personal capacity" would not themselves need to comply with the DPA's data protection principles in any case.<sup>234</sup> On the other hand, the Guidance also held that, additionally to any responsibilities they had under *inter alia* defamation law,<sup>235</sup> social networking and online forums were themselves data controllers subject to the DPA including in relation to information posted by either individual or corporate third parties.<sup>236</sup> Such websites therefore had a duty to take "reasonable steps to check the accuracy of any personal data that is posted."<sup>237</sup> Even in relation to forums where the vast majority of

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<sup>230</sup> *ibid*, 1810.

<sup>231</sup> *ibid*, 1813.

<sup>232</sup> Letter from Rt Hon Chris Grayling, Lord Chancellor and Secretary of State for Justice, to the Chair of the House of Commons Home Affairs Select Committee, 22 September 2013 <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/524/524we29.htm> > accessed 20 August 2014.

<sup>233</sup> Information Commissioner's Office, 'social networking and online forums – when does the DPA apply?' <[ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/social-networking-and-online-forums-dpa-guidance.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Data_Protection/Detailed_specialist_guides/social-networking-and-online-forums-dpa-guidance.ashx)> accessed 9 April 2014.

<sup>234</sup> *ibid*, 15. At other times, however, the Office has acknowledged the validity of the CJEU's *Lindqvist* ruling (also confirmed in *Satamedia*). For example, giving evidence to the House of Commons' Justice Committee on 4 September 2013, the current Information Commissioner Christopher Graham stated: "There is European case law that says – in a nutshell – that open online publication means the processing of personal data done in connection with this falls outside data protection laws 'domestic purposes' exemption." House of Commons, Justice Committee, *The Committee's Opinion on the European Union Data Protection framework proposals Volume I* (London, 2010), Ev 57.

<sup>235</sup> Information Commissioner's Office (note 233), 16.

<sup>236</sup> The rationale offered by the guidance was as follows: "If the site only allows posts subject to terms and conditions which cover acceptable content, and if it can remove posts which breach its policies on such matters, then it will still, to some extent, be determining the purposes and manner in which personal data is processing. It will therefore be a data controller." Information Commissioner's Office (note 233), 11.

<sup>237</sup> Information Commissioner's Office (note 233), 12.

site content is posted by third parties, the volume third party posts is significant and the site is not pre-moderated, the guidance suggested that “reasonable steps” would include having clear and prominent policies for users about acceptable and non-acceptable posts, having clear and easy to find procedures in place for data subjects to dispute the accuracy of posts and ask them to be removed and responding to disputes quickly and having procedures to remove or suspend access to content, at least until such time as a dispute has been settled.<sup>238</sup> Finally, as regards non-factual posts, the guidance added that policies must also be in place that are sufficient to deal with “complaints from people who believe that their personal data may have been processed unfairly or unlawfully because they have been the subject of derogatory, threatening or abusive online postings by third parties”.<sup>239</sup> This broad understanding of the scope of the data controller responsibility vis-à-vis corporate online actors who play an active role in the facilitation of information dissemination originating from others has clearly also been vindicated in *Google Spain*, a judgment which the Office also welcomed.<sup>240</sup>

Meanwhile, in January 2014 the ICO published its draft guidelines on data protection vis-à-vis the media.<sup>241</sup> Although acknowledging that the s. 32 provision for the purposes of journalism, artistic purposes and literary purposes was “one of the broadest exemptions”,<sup>242</sup> the draft guidance also stressed that to benefit from s. 32’s substantive protections the data controller must prove a reasonable belief as to both the public interest of publication and also as to the incompatibility of

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<sup>238</sup> Information Commissioner’s Office (note 233), 13-14. Seemingly as an alternative to the stipulation to remove material, the guidance states that the site “might wish to set up a mechanism which allows it to add a note to a post indicating that a data subject disputes its factual accuracy”. The ICO’s position nevertheless remains that “it will be probably be more practical for the site to simply remove or suspend access to the dispute post in this type of situation” (14). In any case, following the interpretation of “reasonable care” established in relation to the *Defamation Act 1996* in *Godfrey v Demon Internet*, it would appear that if the data subject presented clear evidence that the information processed was in fact inaccurate, the data controller would not have taken “reasonable steps” unless any note made clear that this was indeed the case.

<sup>239</sup> *ibid*, 14.

<sup>240</sup> Information Commissioner’s Office, *ICO response to the European Union Court of Justice ruling on online search results* <[http://ico.org.uk/news/latest\\_news/2014/ico-response-to-european-union-court-of-justice-ruling-14052014](http://ico.org.uk/news/latest_news/2014/ico-response-to-european-union-court-of-justice-ruling-14052014)> accessed 19 August 2014.

<sup>241</sup> Information Commissioner’s Office, *Data Protection and journalism: a guide for the media (draft for consultation)* <[ico.org.uk/~media/documents/library/Data\\_Protection/Research\\_and\\_reports/data-protection-and-journalism-a-guide-for-the-media-draft.pdf](http://ico.org.uk/~media/documents/library/Data_Protection/Research_and_reports/data-protection-and-journalism-a-guide-for-the-media-draft.pdf)> accessed 9 April 2014.

<sup>242</sup> *ibid*, 21.

compliance with general data protection principles.<sup>243</sup> Most significantly, these requirements were interpreted strictly vis-à-vis accuracy:

The DPA requires you to record details correctly and take reasonable steps to check your facts. You should also clearly distinguish between fact and opinion, and if the individual disputes the facts you should say so. ... We would not expect you to fall back on the [s. 32] exemption very often, as it is hard to argue it is in the public interest to publish inaccurate stories without making reasonable checks.<sup>244</sup>

#### IV. A DEVELOPING ROLE FOR DATA PROTECTION?

Over the past few years, a number of lawyers have increasingly vocalised concerns over whether defamation law provides sufficient protection for an individual's right to reputation in all circumstances. It has even been suggested that English defamation law may fail to fully vindicate the floor of reputation rights incorporated within Article 8 of the European Convention of Human Rights. Such concerns, which partly arise from the weakening of this law as a result of jurisprudential developments, will become more acute under the Defamation Act 2013. These developments, therefore, raise anew the question of whether data protection law can fill at least some of these potential protection "gaps" in the future.

##### *A. Perceived Gaps in Protection*

It is possible to locate a range of substantive and procedural limitations under the reformed law of defamation which are likely to prove irksome to a potential claimant. The key limitations, most of which were discussed in detail in the previous two sections, may be briefly summarised as follows. At a substantive level, defamation law will now provide no redress for publication of even a

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<sup>243</sup> *ibid*, 23.

<sup>244</sup> *ibid*, 38.

manifestly inaccurate statement unless this “has caused or is likely to cause serious harm”<sup>245</sup> to the standing of applicant vis-à-vis “members of society generally”.<sup>246</sup> Defamation also includes an expanding range of defences, particularly as regards communication on a privileged occasion, which will generally defeat any action. Moreover, in relation to factual statements, in those cases where defamation law provides for a full defence other than truth, it does not even provide for partial redress in the form of a declaration of falsity. This limitation has become more serious since *Reynolds* provided for a broad defence for publication to the world which was not dependent on the accuracy of the statements made. Thus, a “wrongly libelled reputation” may be “left besmirched” under current defamation law.<sup>247</sup> In addition, the Act’s new defence of “honest opinion” will allow for the broad publication of defamatory comment about purely private persons without any need for show a “public interest”.<sup>248</sup> The breadth of the Act’s new defence for website operators is of greatest concern.<sup>249</sup> This will leave claimants powerless to hold a wide range of online actors responsible under defamation law not only when they release the name and address of the original poster but even in cases where the claimant must obtain, undoubtedly at considerable expense, a court order to secure such details and, most worryingly, even when these details later turn out to be inaccurate and perhaps useless.<sup>250</sup>

Turning to the procedural aspects, *Bonnard*<sup>251</sup> already largely rules out the granting of interim relief in defamation. Tomlinson contends that

this rule proceeds on the basis that the claimant’s right to reputation is always over-ridden at the interim stage by the defendant’s right to freedom of expression. It is difficult to see how

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<sup>245</sup> Defamation Act 2013, s. 1.

<sup>246</sup> *Sim v Stretch*.

<sup>247</sup> A. Mullis & A. Scott, “Tilting at Windmills: the Defamation Act 2013”, *Modern Law Review* (2014), 107.

<sup>248</sup> Defamation Act 2013, s. 3.

<sup>249</sup> Defamation Act 2013, s. 5.

<sup>250</sup> Either because the Defendant cannot in fact be traced or is impecunious or is out of jurisdiction.

<sup>251</sup> *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

this can be consistent with the requirement to balance the rights under Article 8 [to reputation] and Article 10 [to freedom of expression] on the facts of each case.<sup>252</sup>

The law also includes a special provision requiring that claims in defamation be brought within the “relatively short window”<sup>253</sup> of one-year.<sup>254</sup> Although historically the effect of this provision was curtailed by rules allowing the founding of an action based on any re-publication of a statement, the Defamation Act 2013’s introduction of a ‘single-publication rule’ in many contexts ensures that this restriction will bite in a much wider range of cases. Finally, actions in defamation can be notoriously expensive, a fact which will increasingly trouble claimants if and when the reforms of Conditional Free Arrangements (CFAs) are commenced in relation to such actions.<sup>255</sup>

### *B. Can Data Protection Fill the Gaps?*

At a purely conceptual level, it is possible to envisage data protection filling many of the gaps elucidated above. Turning to the substantive issues first, any inaccuracy, even if it alleges a state of affairs which would encounter no opprobrium within majority society, can in principle found an action under the DPA. There is also no over-arching requirement to demonstrate that ‘serious harm’ has resulted. Moreover, the courts’ right, which applies even when inaccurate personal data has already been “rectified, blocked, erased or destroyed”, to order the data controller “to notify third parties to whom the data have been disclosed”<sup>256</sup> of this inaccuracy, means that the DPA does provide for the possibility of a declaration of falsity. Thirdly, as signalled in *Clift*, the making of a statement of an occasion of qualified privilege does not absolve a data controller from compliance with the data

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<sup>252</sup> H. Tomlinson, *Revisited and Updated: Strasbourg on Privacy and Regulation Part 3: A balance between reputation and expression?* (Inform’s Blog 23 June 2010) <<http://inform.wordpress.com/2010/06/23/revisited-and-updated-strasbourg-on-privacy-and-reputation-part-3-%E2%80%9Ca-balance-between-reputation-and-expression%E2%80%9D/>> accessed 17 April 2013.

<sup>253</sup> A. Hurst and J. Gilbert “Using DP Act to protect reputation” (2013) 66 *Privacy Laws & Business United Kingdom Newsletter* 16, 16 and 18.

<sup>254</sup> Limitation Act 1980, s. 4A.

<sup>255</sup> For full details see note 33.

<sup>256</sup> DPA, s. 13(3). The court must consider such an understanding “reasonably practicable”.

protection principles, including the duty to process data “fairly”.<sup>257</sup> Such requirements may limit the scope of this privilege in defamation as well as founding a separate action under the DPA itself.<sup>258</sup> Regarding the latter, the DPA may also provide redress in cases where an opinion, as opposed to a fact, about a purely private person is widely published in a way which clearly will have a disproportionate and, therefore, unfair effect on that individual.<sup>259</sup> Court judgments such as *Kordowski* and *Google Spain* as well as recent guidance from the ICO also highlight that many website operators will have data controller responsibilities under the DPA as a result of playing an active role in facilitating the dissemination of information originally posted by third parties. These responsibilities apply irrespective of whether they benefit from the new defence included within the Defamation Act 2013.

The DPA’s potential procedural flexibility should also be noted. Firstly, as the *Kordowski* case vividly illustrated, interim and other injunctive relief is available here in a much broader range of situations than in defamation. Indeed, in marked contrast to the approach taken in *Bonnard*, data protection is premised on the belief that

in many circumstances it will be of the utmost importance that a defendant is prohibited as soon as possible from continuing to process data in a way that is inconsistent with the DP Act. Employing such a remedy in a defamation context can therefore provide a claimant with the powerful remedy that would not be available under traditional libel proceedings.<sup>260</sup>

Secondly, not only does action brought under the DPA benefit from the general six-year limitation period in tort<sup>261</sup> but, due to the broad meaning of the term “processing”, it encapsulates as *Google Spain* again highlighted a mirror of the old “multiple publication rule” in defamation. Finally, turning to the legal cost issue, in the case of data protection there is an alternative to court action in the form

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<sup>257</sup> *Clift v Slough Borough Council (HC)* [120].

<sup>258</sup> *ibid* [70].

<sup>259</sup> As previously noted, given removal of the “public interest” requirement from the “honest opinion” defence in the new Defamation Act 2013 (s. 3), it seems clear that defamation law will no longer provide any redress in these cases. The possibility of the DPA stepping into the breach as a result has already been briefly mooted by Phillipson (note **118**), 178.

<sup>260</sup> Hurst and Gilbert (note **253**), 18.

<sup>261</sup> Limitation Act 1980, s. 2.

of making a cost-free complaint to the Information Commissioner requesting that he deploy his extensive regulatory enforcement powers to provide redress.<sup>262</sup>

### C. *The Broader Context*

Notwithstanding the clear potential outlined above, it is also necessary to take into account a broader context filled with a range of obstacles placed in the way of any claimant seeking to use data protection to vindicate reputation. Firstly, as outlined in section two, the DPA is replete with limitations and exemptions. Although these are almost always significantly qualified, they are wide-ranging. One important example is the special provision for the purposes of journalism, artistic purposes and literary purposes found in s. 32. This reality is reflective of the fact that the Act was generally designed to “implement the [Data Protection] Directive in the least burdensome way for data users”.<sup>263</sup> As a result, there remain major uncertainties as regards when a court will actually find a violation of the Act, when and according to what metric compensation should be awarded and, finally, in what circumstances a non-financial remedy such as rectification of data is available. Although the legitimacy of many of these restrictions under EU law may be questioned, the effect of them on the domestic claimant is nevertheless very real. Secondly, again as noted previously, at least until recently, the English courts have generally adopted a narrow and even hostile interpretation of the DPA and even the Information Commissioner has also historically proved reluctant to support the deployment of the DPA in this area. Nevertheless, whilst the full extent of any shift remain unclear, in the wake of *Kordowski*, the Leveson Report and *Google Spain* there are signs that that data protection is being taken more seriously in this area, including by the Commissioner himself.

## V. CONCLUSION

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<sup>262</sup> DPA s. 42. Moreover, although his powers are somewhat circumscribed where the processing in question is solely journalistic, literary or artistic, in these cases the Commissioner can also be required to consider providing assistance to the claimant in DPA civil proceedings against the relevant data controller. See DPA, s. 53.

<sup>263</sup> Home Office *Consultation Paper on the EC Data Protection Directive (95/46/EC)* (London 1996), 5.



Traditionally, defamation law has occupied a position of overwhelming dominance in the legal framework for vindicating the right to reputation. Nevertheless, the past decade has seen a liberalisation of this body of law, a development which is substantially extended by the Defamation Act 2013. This has led a number of legal commentators to argue that English defamation law may fail to adequately protect the right to reputation even as instantiated in Article 8 of the European Convention on Human Rights.

Historically, the potential for UK data protection law to safeguard the reputation of natural persons has been largely overlooked. This reflects not only of the minimalist transposition of the EU Data Protection Directive made by the DPA but also the constrained interpretation adopted of it by both the courts and the Information Commissioner. Nevertheless, concerns that the rights to reputation of natural claimants may not be being adequately protected have led to pressure on data protection to fill the relevant gaps. There are now signs in both the case law and in broader policy thinking that such pressure is beginning to bear fruit.

Data protection certainly offers the natural person claimant a number of tantalizing potential advantages including general applicability as regards its material scope and breadth as regards its substantive standards as related to both accuracy and fairness. Moreover, even if a website operator benefits from the new liability shield under the Defamation Act 2013 vis-à-vis content originally posted by a third party, this will in no way absolve them from having responsibilities under data protection if they are playing an active role in facilitating the dissemination of this information. Finally, there is the potential remedial flexibility of data protection including through the granting of injunctive relief as demonstrated in *Kordowski*. It seems therefore clear that claimants will increasingly seek to use DPA to vindicate their reputation in proceedings before both the courts and the Information Commissioner. Despite this, the legislative and other obstacles placed in the way of their success remain formidable. Consequently, although data protection will undoubtedly assume significantly greater importance in this area in the future, both the extent and precise modalities of this change remain more uncertain.