

**South West and Welsh Forces – Police Federation Legal Training Day**

**8 October 2009**

**St Mellons Hotel, Castleton, Cardiff CF3 2XR**

**DEFAMATION, BREACH OF CONFIDENCE AND PRIVACY**

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**Introduction**

- The defamation team is based in London but covers claims arising from all the forces in England & Wales. If you have any questions about a possible claim or request for advice, feel free to contact me by email ([j.c.clarke-williams@rjw.co.uk](mailto:j.c.clarke-williams@rjw.co.uk)) or by phone (020 7657 1422) or one of the other members of the team (020 7657 1423).
- Legal areas we cover – (a) defamation, (b) invasion of privacy, (c) breach of confidence, (d) misuse of private information, (e) reputation management, (f) vetting press releases/articles/books etc, (g) stopping articles being published through negotiation or injunction; (h) data protection issues, (i) harassment.
- Who do the defendants tend to be in the claims we bring? (a) newspapers – local and national; (b) broadcasters; (c) radio stations; (d) private individuals (especially in relation to internet campaigns); (e) Chief Constables (particularly in relation to misuse of private information claims).
- Why does the Police Federation support its members in these kinds of cases? Because it recognises that the reputation of each individual officer is not just an essential personal asset but a vital requirement if police officers are going to be able to carry out their jobs effectively and with the consent of the general public.
- What I intend to cover today:-
  - (a) an outline of the relevant law in these areas with a few examples of relevant recent cases involving police officers which we have handled;
  - (b) funding – why it is now not such a daunting financial prospect for the Police Federation if we take on a case and litigate it through the courts, thanks to the

collective conditional fee agreement between Russell Jones & Walker and the Police Federation and the availability of after the event insurance.

## **OUTLINE OF THE LAW**

### **1. Defamation**

- A claim arises when there is a published attack on your reputation. If something is said or published to third parties about you which lowers you in the eyes of right thinking members of society then you have the basis for a defamation claim – **NB: THERE IS A LIMITATION PERIOD OF ONE YEAR FROM THE DATE OF PUBLICATION WITHIN WHICH TO ISSUE COURT PROCEEDINGS!** It means time is always of the essence in defamation cases.
- If the defamatory allegations are in writing or some other permanent form then you have a claim for libel. If the allegations are spoken, or are actions or gestures, then it is a claim for slander.

*EXAMPLE: DI Shane Ahmed, a South Wales officer, was accused in a Panorama programme “Fair Cops?” of perverting the course of justice by fabricating a conversation he claimed to have overheard between a murder suspect (Morris) and his solicitor, evidence which led or substantially contributed to the wrongful conviction and life imprisonment of an innocent man.*

- The meaning of the words complained of is always crucial in a claim for defamation. Words can bear a natural and ordinary meaning which the general reader will understand.

*EXAMPLE: The meaning attributed to the words complained of in the Shane Ahmed case set out above is ‘guilt’ – a very high meaning. The other possible levels of meaning are ‘grounds to suspect’ and ‘grounds to investigate’.*

- Alternatively, the words may have what is called an innuendo meaning which is where the defamatory or damaging meaning of the words will only be apparent to people who are aware of certain facts or circumstances which the general reader would not be aware of.

*EXAMPLE: A Leicestershire undercover plain clothes officer was a keen Leicester City fan. Leicester were involved in a hotly contested promotion battle to the top division. To show the city's promotion fever, the Leicester Mercury published a photo of the queue for tickets at Filbert Street which clearly showed the officer in the queue.*

*The next week another crucial game was due to be played. The tickets were on sale for a restricted period at Filbert Street, when this officer was on duty. The paper, by mistake, published the same photo of the queue for the previous game. Other officers at the station where my client was based saw him in the queue and knew he should have been on duty at that time. He attracted a lot of taunts and jeering and the picture went on the station notice board with suitable comments written on it.*

*Only people who knew this officer's working hours would have derived a defamatory meaning from the publication of that photo – a classic innuendo meaning.*

*We brought a claim and got the officer an apology published in the paper and some modest damages.*

- Identification is often an important issue. Just because you are not named or photographed in a defamatory article doesn't mean you are not identifiable from it.

However, the law requires that you must be able to prove identification by producing witnesses who can give evidence that they read the article (or saw the programme) and independently, without prompting from you, understood that you were the target of the defamatory allegations.

- If you have established that the words complained of were defamatory, were published to third parties and were about you, then you have a claim for defamation. The question then is what defences may be raised against you.
- Justification (truth) – if the defendant can prove the sting of the words is true then the claim will fail. The burden is on the publisher because the claimant is presumed to be of good reputation.

The precise meaning of the words will be crucial when there is a justification defence. For example, it is easier to prove that a meaning of 'grounds to suspect' is true than it is to prove a meaning of 'guilt' is true.

- Fair comment – if the defendant can show the allegations were clearly an expression of the author's opinion on a matter of public interest based on the true factual background then the defence of fair comment will apply.
- Opinions can be extreme but they must be objectively fair. A claimant can defeat a defence of fair comment by showing the words were published maliciously.
- This defence protects the outpourings of so many of the columnists that populate the popular press such as Richard Littlejohn and Allison Pearson.
- Privilege – there are two types of privilege:
  - (a) Absolute privilege – there are certain situations where the law recognises that for society to function, people have to be able to say whatever they like without fear of any legal action, even if what they say is defamatory, malicious or even completely without foundation.

The main examples are statements made in Court proceedings or in Parliament (and contemporaneous fair and accurate reports of these). Importantly from the point of view of police officers, statements made in relation to the complaint of, and investigation of, a crime are also protected by absolute privilege, including the first oral complaint to the police (Westcott v Westcott [2008 EWCA Civ 818]).

- (b) Qualified privilege – the other branch of privilege is known as qualified privilege – qualified because, like fair comment, it can be defeated by proof of malice. Qualified privilege applies where the maker of the statement can show they had a legal, social or moral duty to make their allegations and the person or people receiving them had a corresponding interest in hearing or reading about them. It protects the honest but mistaken publisher of defamatory allegations in certain circumstances – but

note that the privilege attaches to the occasion of the publication, not the publication itself. This means that words published to, for example, your line manager at work may be protected, but the same words published to the local paper would not.

This is the most technical and complicated of the defences and its boundaries are constantly being tested, especially by the media. A special branch of qualified privilege has effectively been developed in relation to journalism which is known as 'Reynolds' privilege after the leading House of Lords case in the area. This looks at what has been published against a number of prescribed factors and decides whether what was published was 'responsible journalism'.

*EXAMPLE: In April 2003, the Daily Telegraph published articles setting out documents found in the Iraqi Foreign Ministry after Saddam Hussein's fall, which suggested George Galloway had been receiving payments from the Iraqi regime. Galloway claimed the articles went beyond what was contained in the documents. The paper did not say the allegations were true but claimed qualified privilege. It failed because the Court held the paper had adopted and embellished the allegations – and that was not responsible journalism.*

- Malice – as mentioned previously, the defences of fair comment and qualified privilege can be defeated if you can prove malice on the part of the publisher.

This is not easy because it means proving someone's state of mind at a particular time in the past. One has to prove that someone published something they knew was false, or didn't care if it was false or not, or had some other dominant improper motive.

*EXAMPLE: Malice is much easier to prove if you have some documentary evidence. I acted for two Durham officers who said they were the subject of malicious complaints to their Professional Standards Department from a local solicitor. He accused them of theft and drug use among other things. He claimed he had been informed about these activities by his girlfriend who was a neighbour of the officers. Unfortunately for him, by the time of the claim she was an ex-girlfriend and happily provided me with a signed statement that she had never*

*told the solicitor any such thing. After disclosure of that statement the solicitor settled, paying damages and costs and apologising.*

- **Remedies** – all you can sue for in a defamation claim are damages for the harm done to your reputation and the distress and upset caused to you, and for an injunction to restrain further publication. If you win you will almost always be awarded your costs as well against the unsuccessful defendant.
- However, most claimants want an apology more than anything else, especially if something has been published in a newspaper. One can only get an apology through negotiation – and an apology is almost always sought as a term of settlement.
- If a defamation case goes to trial, then it is usually tried by a judge and jury, and most actions will be tried in the Royal Courts of Justice in London.
- The single most important thing to take away today is the limitation period for defamation. You must issue court proceedings within **1 YEAR** from the date of publication of the words complained of otherwise you lose your cause of action. So please always refer any potential claim to me and my colleagues as quickly as possible. Don't wait until the end of any criminal or discipline proceedings – it may be too late by then.

## **2. Breach of confidence**

The law of confidence can be used to prevent the disclosure of confidential information or compensate an individual who has suffered as a result of such a disclosure.

### **Ingredients of a claim in breach of confidence**

To establish a claim against a defendant for breach of confidence, the claimant must prove:-

- (a) the relevant information is of a kind capable of being confidential information (meaning it has the necessary quality of confidence about it) including “private

personal information”, eg. medical records, details of one’s sexuality or sex life etc;

- (b) that the information was communicated to, obtained, or otherwise in a person’s possession in circumstances imposing an obligation of confidence on that person;
- (c) that it has been used in an unauthorised way;
- (d) that the claimant has suffered a detriment from its unauthorised use; and
- (e) in circumstances where the defendant, if not the person using the information in the unauthorised way, is liable for that person’s actions.

A duty of confidence can arise irrespective of whether or not Article 8 of the European Convention on Human Rights (the right to respect for privacy – which is dealt with in more detail below) is engaged, although there may well, of course, be an overlap.

Confidential information is information which “...*is not public property and public knowledge*” and “*has the basic attribute of inaccessibility*”.

A claimant has **SIX YEARS** from the date of the breach of confidence in which to bring Court proceedings – but note the contradictory position with the limitation period under the Human Rights Act below. If in doubt, it is always safest to work to a **ONE YEAR** limitation period in this area of the law.

## **Defences**

A right to confidentiality can be overridden or ceases in the following circumstances:

- (1) Where the information is held not to be of a confidential nature.

This can include, for example, a consideration of the seriousness of the information. In the case of *McKennitt v Ash (2006) EMLR 178* some information was dismissed as “*trivial and of no consequence*” and described as “*anodyne and not such as to attract any obligation of confidence*”. However protection was afforded to details of running a household on the basis that it was “*intrusive and distressing....to be exposed to curious eyes and it is utterly devoid of any legitimate public interest.*”

- (2) The information is already in the public domain. However, the right to confidentiality may remain where the information is only known to a small group of people, or where it is technically accessible but not in a way which might realistically allow it to come to the attention of the public at large. The key question is whether further publication of the information could still be damaging.
- (3) There is a public interest in disclosing the information. To determine this, the Court will conduct a balancing act between the legitimate public interest and a Claimant's right to confidentiality.

The present defence of public interest to an action for breach of confidence stems from the so called 'iniquity rule', which covers circumstances where an individual has behaved disgracefully or criminally, so that it is in the public interest for this behaviour to be exposed. The defence may be raised in circumstances of investigative journalism in order to expose alleged double standards or hypocrisy. As police officers are public servants and upholders of the law, the courts are likely to hold that there is a public interest in the conduct of an officer, particularly when exposing corruption, negligence or incompetence.

Police officers are also often concerned when their name, and perhaps the road they live in, appears in a newspaper article. Generally, one's name does not have the necessary element of confidence to sustain a claim. However, to decide whether or not there may be a claim, one then has to look at the role the officer fulfils, for example, is he working undercover or in a dangerous area such as counter-terrorism?

## **Remedies**

- (1) If advance notice of a forthcoming breach is given, then an injunction may be obtained to prevent the publication (or future publication) of the confidential information.
- (2) Once a breach has occurred, a claim can be pursued to recover compensation for any quantifiable financial loss, the 'market value' of the information (in certain circumstances), and also distress and hurt feelings.

- (3) Legal costs are usually recoverable from the losing party.

### **Prevention rather than cure**

If advance warning of the impending publication is given, it may be possible to take preventative action. Such action can be invaluable, because the damage caused by a breach of confidence (and/or invasion of privacy) cannot be undone after the event. Therefore, an urgent request for advice should be made immediately if notice of a breach is obtained.

### **3. Privacy**

Under Article 8 of the European Convention on Human Rights, (incorporated into the laws of this jurisdiction in the Human Rights Act 1998), everyone the right to respect for his private life. This is balanced by other Convention rights such as Article 10 – the right to freedom of expression.

Article 8 of the Convention provides as follows:-

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Police officers should note in particular the circumstances in which this right may be interfered with, in particular *“in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime.”*

These defences are often raised in response to privacy claims brought by officers against their own forces, for example, where there has been covert surveillance in a professional standards investigation. Careful legal advice is needed in such circumstances.

Breach of privacy is closely linked to breach of confidence and claims are often pursued concurrently. The courts now tend to refer to such overlapping claims as “misuse of private information claims”.

Note that a stand alone Court action under the Human Rights Act must be brought within **ONE YEAR** of the date of the invasion of privacy. The position for a misuse of private information is more legally complex – but if in doubt assume a **ONE YEAR** limitation period!

### **Establishing a breach**

In a claim for breach of privacy, the Court’s task is to embark on a two stage process:

- (1) First it must identify whether there is a reasonable expectation of privacy such as to engage Article 8 at all. This is known as the ‘threshold test’.
- (2) If that hurdle is passed, then the competing Convention rights must be balanced, applying the test of proportionality to each. This is known as the parallel analysis or ‘balancing test’.

There are certain other issues which will be considered at both these stages, for example, the degree to which the invasion was trivial or serious and the question of whether the material was in the public domain.

*EXAMPLE: I recently succeeded in a claim against the BBC over footage shown in a news bulletin of my client outside a court building with this face obscured (but next to a woman whose face was shown) with commentary which suggested he had been giving evidence as an alleged victim of sexual assault at the trial of a surgeon who had treated him when he was a teenager. This was untrue – he is in fact the Court bailiff. He was identifiable because despite his face being obscured, he was over 6ft tall, weighed more than 20 stone and his wife was next to him with her face shown. We brought a claim for misuse of private information, albeit the information was false. The BBC paid damages and costs and apologised.*

### **False information**

The fact that information is false will not normally deprive the claimant of the protection of the law of privacy or confidentiality “...provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant

*cannot deprive the claimant of his Article 8 protection simply by demonstrating that the matter is untrue...”.*

## **Remedies**

As with breach of confidence, an injunction may be obtained if one has advance notice of a potential invasion of privacy and sufficient evidence can be put before the Court to persuade it to restrain a defendant’s actions.

Otherwise, one can pursue a claim for damages. These tend to be pitched at a relatively modest level and will take into account distress, hurt feelings and loss of dignity. It is also accepted that a claimant is entitled to vindication to mark the infringement of a right. Damages may be aggravated by conduct of a defendant which increases the hurt feelings or *“rubs salt into the wound”*.

Once again, if a successful Court action is pursued, the legal costs will normally be ordered to be paid by the losing party.

## **4. Funding defamation and related claims**

The funding of defamation claims is authorised by Rule 5.1 A.3 of the Police Federation Fund Rules 2007 in circumstances where the alleged defamatory statement relates to an officer's conduct as a member of a police force, or disparages him or her in the office of constable, or otherwise casts doubt upon his or her fitness to be a member of a police force. Claims for defamation which relate to an officer's off-duty activities, non-police offices held, private business interests, etc, will not generally be supported by Federation funds unless an argument can be successfully put forward by the member to the effect that the defamatory publication would not have been made but for the fact that he or she was a police officer.

There is also provision in the Fund Rules for the Joint Central Committee (JCC) to support members in legal action on matters of general principle (Rule 5.1 A.1(m)) and also in claims for negligence arising out of the provision of legal advice (Rule 5.1 A.1(t)). Additionally, the Fund Rules allow the rank committees to support legal advice and action by members (Rule 5.1 B (j), (l) and (m)).

## **The Collective Conditional Fee Arrangement (“CCFA”)**

Russell Jones & Walker (“RJW”) (who will always be the preferred choice of solicitors in defamation, privacy and related matters) have a CCFA with the Police Federation of England & Wales (“PFEW”).

This is sometimes known as a “no win, no fee” agreement.

It means that if RJW risk assess the merits and prospects of success of an officer’s claim as sufficiently good, then they will recommend that the funding of the claim is moved on to the terms of the CCFA.

From that date RJW will only get paid if the officer is successful in their claim and legal costs are recovered from the defendant.

In these cases, RJW will also ensure that any barrister instructed in the case is also prepared to act on a conditional fee agreement from the same date. The barrister too will then only get paid if the case is won and costs are recovered.

This arrangement assists the PFEW in reducing its potential financial exposure on a contested defamation/privacy action.

Funding of a defamation/privacy claim is further assisted by the after the event insurance arrangements which have been introduced during 2009, and which are explained in more detail below.

### **After the event insurance**

Previously the PFEW indemnified from its own funds a police officer it was supporting in defamation/privacy proceedings against any adverse costs order that might be made against the officer in the action.

If the action was lost at trial, that committed the PFEW to payment of a huge bill.

That financial exposure has now been addressed by the introduction of after the event (ATE) insurance.

The risk that an officer may lose his or her defamation/privacy action and be required to pay the defendant's costs is now protected by insurance. In the event that the action is lost, ATE insurers (rather than the PFEW) pay the adverse costs awarded against the officer (provided the CCFA and insurance terms are complied with).

The deferred premium system also means that in the event of a lost case, the premium itself is self-insured under the policy so the officer/PFEW do not have to meet that expense.

Since, in these cases, RJW and the barrister will be on conditional fee agreements (as explained above), it means that in a lost case the PFEW's financial exposure should be limited to the solicitor/client costs and disbursements incurred before the date that the funding was moved on to the CCFA and ATE insurance was implemented.

Of course, the rigorous risk assessment which RJW carries out before moving a case on to the CCFA should minimise the prospects of lost defamation/privacy cases in any event.

These funding arrangements are important in addressing the concerns some Joint Branch Boards have expressed in the past about the disproportionate financial impact that one lost defamation case can have on PFEW funds.

The funding issues are important and complex. If you need to have them explained in relation to a potential case for one of your members, then you can always contact the RJW defamation/privacy team.

## **5. Processing defamation claims**

Requests for legal advice should be submitted to the Deputy General Secretary of the Joint Central Committee on Form C2 accompanied by a full statement from the officer.

In his or her statement, the officer should:

- set out the alleged defamatory statement. If it was made in writing, then copies should be attached, and if the statement was spoken, then the words used should be set out as accurately as possible, and witnesses should be identified;
- show how the allegedly defamatory statement identified him or her and/or applied to him or her;
- identify the person who, or organisation which, made the defamatory statement and describe his, her or its status and circumstances;
- describe the circumstances which led to the publication of the defamatory statement;
- explain how his or her reputation and standing as a police officer has been affected by the alleged defamatory statement and the damage and distress caused as a result; and
- show how the allegedly defamatory statement is untrue and give his or her own full account of the matter. In connection with this, a chronology and any supporting documentation are of great assistance.

On receipt of the request for advice, the Deputy General Secretary of the JCC will decide whether it qualifies under the Fund Rules and, if so, will forward one copy of the documentation to RJW (or, in very rare conflict cases, to another firm). Any other solicitors will only be used in exceptional circumstances and then at the sole discretion of the Deputy General Secretary of the JCC.

At all times, the JCC, the Branch Board and the solicitors should be kept informed of the latest position. The solicitors will need to communicate directly with the member, who should at all times respond promptly and fully to any letter from the solicitors, and should provide copies of any documents requested. Frequently, the JBB Secretary plays an important role in the conduct of a claim, for example, with arrangements for the proofing of witnesses often taking place at the Federation offices.

When a claim has been finalised, all parties will be notified so that files may be closed.

### **Branch Board checklist**

Before submitting requests for defamation advice, Branch Boards should try to ensure that:

- the officer seeking advice was a subscribing member at the time of the subject matter of the allegations in the allegedly defamatory publication;
- the accompanying statement is legible. If not, please have it typed up; and
- a defendant has been identified, is available to be sued, and is likely to have the means to pay damages.

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