Universities Online: Reputation, Risks, and Reaction

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Introduction

Universities are increasingly using social media, blogs and other online vehicles as academic, marketing, and student resources. They are an effective (and largely free) way of promoting research, prompting debate and generally drawing attention to an institution which may otherwise not have the global reach that the Internet provides. The price to pay for such a powerful resource is that, unlike print publications, what is said on Twitter, Facebook, or an online blog is often not subject to the same pre-publication checks and, once published, is very difficult to control. This short paper aims to give an overview of the law on defamation and in particular what universities are able to do in response to defamatory posts – and whether it is always wise to react.

Reputational harm – when is it defamatory?

The common law in relation to defamation has been largely superseded by the Defamation Act 2013, which came into force on 1 January 2014 ("The Act"). The Act is widely considered as making it harder to found an action in libel (or slander) and offers wider protection to publishers, including a specific defence for Internet Service Providers. Indeed, the Act now introduces a requirement that anyone claiming to have been defamed must show that their reputation has suffered "serious harm".[1] This is a more stringent requirement than previously and contains an additional hurdle for bodies trading for profit that they show "serious financial harm".

It is not clear whether universities may fall within the "body trading for profit" category. In *Duke -v- The University of Salford* [2013] EWHC 196 (QB), Eady J had little difficulty in finding that as a matter of principle at least, universities were capable of suing in respect of *organizational* damage precisely because they were not akin to central or local government and so were not caught by the *Derbyshire County Council v Times Newspapers* [1993] AC 534 principle (preventing public authorities suing for libel). However, universities are bound by the Human Rights Act 1998 and for the purposes of anti-

[1] Section 1

discrimination legislation. Some universities have charitable status and so would appear not to be caught by s.1(2).

Nonetheless, where a university sues to protect its reputation as an organization (and following *Duke* it would be an abuse of process if in reality the claim related to the individual reputation of staff members, see below), one struggles to imagine a scenario where the reputational impact is not linked to profit: reputational damage, results in fewer students, hits on research grants etc. It is arguable that universities *would* be considered bodies trading for profit at least in the context of the Act and therefore have to show that the publication in question has caused it serious financial harm, which is not defined in the Act but would appear to require (a) a direct causal link; and (b) strong evidence of a significant loss. It remains to be seen how this provision is interpreted as the Act is applied by the courts.

Who's reputation?

As noted, the case law is clear that universities may sue in respect of defamatory publications (*Duke*). Nothing in the Act alters this principle. However, universities must look carefully at the words complained of in order to ascertain whether they are infact damaging of the institution as a whole or in reality reflect upon the reputation of an individual or individuals.

In *Duke,* the Claimant university sued in respect of words published on a website, which contained a blog allowing students or members of the public to contribute publicly or anonymously. The blog's main function was described by the court as being to "provide a platform for criticism of various aspects of the University's administration".[2] The blog clearly referred to the university in a negative light and in particular, the way it was administered. However, a "persistent theme" was a focus on two named senior figures in the university. Indeed, the Defendant stated he did not hold any particular grudge against the university in general, although the primary focus had to be on the words themselves.

It was against this background that Eady J found that *"any adverse comments about the University are, in context, really incidental to the attacks made upon the conduct attributed to the two*

[2] *Duke,* para. 9.

individuals."[3] It was therefore an abuse of process for the university to bring the claim as the only Claimant.

This judgment may cause difficulty for universities as, generally speaking, criticism is levied against individuals – often staff members – without distinguishing them from the institution itself. Blogs such as "The Student Room" are prime examples of criticisms damaging to individuals but as a consequence the university. In *Duke,* the words complained of were obviously aimed at individuals with the university not directly referred to but, as accepted by Eady J, that did not mean the university was not also capable of suffering reputational harm. What he was concerned about in that case was the appearance of the university acting as a "guardsman" for its employee's reputation.

Yet, these were two senior officials within the administration (Vice-Chancellor and Chancellor). It surely is conceivable that the more senior the staff member defamed, the more inextricable the link between individual and organizational reputation. Although every case will be fact-specific, this decision, read together with the extraordinarily stringent threshold for harm set out in the Act means that in reality, universities may well fall at the first hurdle in respect of any defamatory material published online.

Other Defences

The Act also codifies defences previously available at common law, as well as providing for some new ones. They are:

1. Truth – requirement that the Defendant shows the allegations are "substantially" true;
2. Honest Opinion;
3. Publication on a matter of public interest;
4. Special defence for operators of websites

Of these, universities are likely to be most concerned with the application of (2) and (3). Honest opinion requires (1) a statement of opinion; (2) the basis of the opinion to be indicated (whether in general or specific terms); (3) showing that an honest person could have held the opinion on the basis of (a) any fact existing at the time the statement

[3] *Duke,* para. 10.

complained of was published; or (b) anything asserted to be a fact in a privileged statement published before the statement complained of. The defence is defeated if the claimant shows that the defendant did not hold the opinion.

On its face, this defence appears wide ranging. It modifies the "fair comment" defence which existed at common law and seems to be easier for a defendant to establish. The standard is "honest" not "reasonable" and so it is at least conceivable that an unreasonable opinion, if honestly held, would be caught by the defence, although that is unlikely to find favour with the courts in practice.

Posts about university administration etc. may also be caught by the new "public interest" test. The criteria for this defence are twofold:

(1) the statement complained of was, or formed part of, a statement on a matter of public interest; and
(2) the defendant reasonably believed that publishing the statement complained of was in the public interest.

This abolishes the common law "Reynolds" defence. It requires the court to look at "all the circumstances" when determining if a belief was reasonable. Again, this will be a very fact-specific exercise but it would suggest that a large range of issues which are likely to be the subject of posts causing harm to universities would be caught by this defence.

Alternatives to legal action

For the reasons already set out above, the law as it stands makes it very difficult for universities to sue in their own right. Furthermore, legal action, while having some exoneratory effect, is a generally unsatisfactory means through which to protect one's institutional reputation. It is lengthy, costly, and by the time vindication occurs, much of the damage has been done with lasting effect. There is furthermore occasionally a reputational risk involved in suing when done by institutions such as universities as it can create a suggestion of censorship (on which see further below).

Most of the time, the concern is to remove damaging material quickly. This is particularly so with online publications as the "viral" effect of Tweets etc. increase the damage and are difficult to control through litigation. Furthermore, once information is online, there is no "right to be forgotten" and it is generally difficult to force online search engines

such as Google to take action to remove offending material (see, for example, the recent CJEU decision in Case C-131/12: *Google Spain SL & Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González*.

Twitter and Facebook can be more willing to take down defamatory posts but this is not always the case. Often, court orders are required and even then, their reach is limited. Practically speaking, there are ways of minimizing harm, for example by altering "search hits" so that a Google search for a particular institution brings up more positive material, effectively "burying" the defamatory posts.

Balancing freedom of expression

It is also important to remember that universities, while not held to be "public authorities" in *Duke*, are bound by the Human Rights Act. They should therefore think very carefully before embarking upon measures aimed at removing offending posts. In the Canadian case of *Pridgeon v University of Calgary* [2012], the Court of Appeal in Alberta held that the University had infringed the freedom of expression rights of twn brothers who had been disciplined for criticising a professor on Facebook. The allegations made were seriously critical of the tutorship they had received under one particular professor. However, it was disproportionate for the university to take the action it did.

There has been no comparable case in the UK in relation to universities. However, the courts will always balance the seriousness of the interference against the legitimate aim it was intended to achieve. In the case of action taken in respect of "defamatory" posts, it is suggested that in light of the Act and the approach of the courts, unless there is "serious harm" to the institution, any action aimed at removing the content may be dimly viewed by the courts.

Conclusion

Universities are particularly at risk of online criticism. Their students are more online-literate than ever before and there are many outlets for their views. The "viral" nature of online media means that the reach of those comments is extremely wide. Yet universities are in a difficult position: the law makes it difficult to sue and the balance seems to side with those making the comments. It remains to be seen how the courts interpret and

apply the new Act. However, it may be that in many cases, universities do their reputation more good by doing nothing at all.