

GOVERNANCE & LEADERSHIP

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A GOOD IMPRESSION

Top tips for shoring up your
charity's reputation

UPHOLDING YOUR good name

BEN HOLT and **RHIANNON LEWIS** examine some of the ways a charity's reputation can be tarnished and how the law can be used to respond



Charities face reputationally sensitive issues on a regular basis. Negative press can be hugely damaging and can harm the public trust and confidence placed in charities, which in turn can affect relationships with beneficiaries, donors, regulators and trustees.

In this article we explore various incidents and events that can harm an organisation's reputation and provide some practical tips to help charities respond and protect their good name.

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Defamation

People are much more willing to criticise charities than they used to be, and charities should be alert to this and able to respond quickly and effectively. In the most serious cases, charities might consider bringing a claim for defamation, but they should be aware that such action can be drawn-out, risky and expensive.

For a statement to be considered defamatory it must:

- Be identifiably about the claimant;
- Have caused or be likely to cause "serious harm" to the reputation of the claimant;
- Have been published to a third party; and
- Use words which, by their natural and ordinary meaning, are defamatory.

In addition, where a claimant "trades for profit", the defamatory statement must be considered to have caused or be likely to cause "serious financial harm". Although charities generally do not trade for profit, there could be some ambiguity as to whether serious financial harm must be shown by a charity bringing a defamation action. For example, some charities operate shops through a trading arm with a view to making profit.

The most common defences to defamation claims are:

- **Truth** – If the statement is and can be proven to be true, that is a defence. However, other claims such as privacy and data protection claims could still arise in respect of published statements where truth would not be a defence.
- **Honest opinion** – If the statement was an opinion held by the person making it, and was an opinion which an honest person could have held based on any fact in existence at the time the statement complained of was published, and the basis of that opinion was indicated, that can be a defence.
- **Public interest** – If the statement was on a matter of public interest and the

defendant reasonably believed publishing the statement was in the public interest, that can be a defence. Careful consideration would be needed ahead of publishing something which may require reliance on this defence.

- **Qualified privilege** – If someone is under a legal, moral or social duty to make the statement and the person it is being made to has a reciprocal interest in receiving it (eg reporting concerns to the Charity Commission), that can provide a defence. However, this defence can be defeated if it can be proven that the statement was made maliciously or in bad faith.

- **Website operator defence** – It is a defence if the website operator can evidence that it did not post the statement and the actual author can be identified – commonly used by social media platforms. The limitation period within which a claim for defamation must be commenced is one year from the date of first publication of a defamatory statement.

Harassment and online trolling

Harassment is a criminal offence that also gives rise to a civil action. In serious cases of harassment, it is often sensible to report the matter to the police for criminal action to be taken – this is quicker and cheaper than civil action and can achieve the same aim of stopping the harassment. Typical examples

of harassment include online trolling or abuse that targets particular (often senior) individuals within an organisation. There must be at least two instances of the offending conduct in order for it to be defined as harassment.

Although a charity cannot be the “victim” of harassment for the purposes of harassment legislation, individual employees and/or trustees affected could take action to protect themselves, or the charity may be able to bring an action on their behalf in a representative capacity.

Perpetrators are often anonymous. However, if you can lift the anonymity, the troll often stops. Ways to try to identify anonymous trolls include:

- Legal action against “persons unknown” (although this leaves the practical issue of how to enforce any decision obtained).
- Conducting a WHOIS search if the trolling is occurring on a particular website to identify ownership of the website (provided there isn’t a privacy service in place).
- Checking the user tag to see if the offending party has used the tag in other internet posts which could reveal their identity.
- Court applications against third parties who may hold information which identifies the individual.

Data breaches

Charities often hold a vast amount of sensitive data, including about their beneficiaries who may be vulnerable. In recent years we have seen a vast increase in claims against organisations arising from data breaches. These claims can be hugely time-consuming and costly for those defending them. However, we have recently started to see the tide turn in favour of defendants, as demonstrated by three recent cases.

The case of *Lloyd v Google LLC* [2021] UKSC 50 related to a Safari “workaround” software. It was installed by Google on some Apple iPhones and enabled cookies to track users across websites to improve targeted advertising. Mr Lloyd brought a representative claim for damages for breach of the Data Protection Act 1998 (DPA) on behalf of himself and millions of other individuals alleged to have been affected by the software. The Supreme Court held that in order to obtain compensation for breach of the DPA, each claimant would need to demonstrate wrongful use of their personal data and material damage or distress resulting from it, which was not compatible with a representative action.

In the case of *Warren v DSG Retail* [2021] EWHC 2168 (QB), Mr Warren brought a claim against DSG following a cyber-attack on DSG’s systems which contained his data. His claim was for breach of the DPA, misuse of private information, breach of confidence and negligence. All of these claims were struck out save for the claim relating to a failure to have adequate security in place as required under the DPA. The judge considered that DSG had been the victim to an attack and that of itself had not caused harm to Mr Warren. DSG (the data controller) had not carried out a “positive action” which resulted in loss to the claimant.

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Rolfe v Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB) was a claim against our firm relating to a mistyped email address which meant a letter of claim regarding unpaid school fees was sent to an incorrect recipient. The incorrect recipient was swiftly notified of the mistake and requested to delete the email, which she confirmed she had done. The intended recipient subsequently issued a claim against VWV, even though the information that was sent in error was minimal, and the error was quickly remedied. We made a successful application for summary judgment on the basis that the harm caused to the claimants as a result of the data breach did not meet the required threshold. The High Court concluded that the claim was plainly exaggerated and that it was not appropriate to claim for trivial breaches of this sort.


Damages awarded for data breaches tend to be relatively low and there have been other recent decisions indicating that the High Court is not the correct forum for low-value data protection claims.

Strategic thinking is needed to decide how to tackle and potentially settle data breach claims, particularly where there is a risk of opening the floodgates to more claims.

Top tips for protecting reputation and responding to a crisis

- Don’t panic or feel pressured into making a statement on the spot or giving detailed responses to initial enquiries from stakeholders or the press. First statements are often bland for good reason – not least because the full picture may not yet be clear and you should avoid saying anything inaccurate.

- Consider potential conflicts (or perceived conflicts) of interest if a senior individual within the charity is named in any complaint or allegation. Arrange for someone not named to lead on the response to protect both the named individual and the charity.
- Plan for situations posing the risk of reputational damage and coordinate so that if and when an incident does arise, the internal team is organised and there is a consistent message. Consider monitoring adverse comments in relation to the charity and set up automatic alerts for the charity’s name, such as Google alerts.

- Don’t ignore the situation. Consider putting together a draft press statement as, if the incident attracts attention, you will have limited time to give a response and you will want to ensure your communications are effective and timely.
- Investigate and follow policies. Check what the charity’s policies and procedures require and follow them – and consider whether an investigation is needed. Consider what documents will need to be produced and retain all relevant information.
- Take care when creating new documents relating to the matter as these could become disclosable if litigation is commenced further down the line.
- Be aware of reporting obligations, such as to insurers, serious incident reporting to the Charity Commission and any other regulatory and public bodies such as the Information Commissioner’s Office. Unless and until the insurance position is confirmed, nothing should be done which may prejudice the insurer’s position.
- Work out potential claims and consider strategy options early on. Bear in mind that approval may be needed from the Charity Commission and/or the courts in relation to incurring substantial costs on claims.
- Consider expert input (legal, public relations and IT expertise may all be needed). From time to time, things will undoubtedly go wrong for charities, but responding quickly and effectively can help minimise the damage to an organisation’s reputation. 

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