

Libel Overview

1. What is defamatory?

What is defamatory? Any statement that makes people think worse of the subject or exposes them to hatred, ridicule and contempt. An allegation that a person has broken the law or committed a criminal offence is almost always defamatory—as are meanings that the subject is suspected of or under investigation, as they imply there are reasonable grounds to suspect or investigate. Incompetence in one's trade or profession is defamatory as is any allegation of want of integrity. Allegations of personal immorality such as lying, marital infidelity, racism, crude or anti-social behaviour are all capable of being defamatory. Homosexuality is not now defamatory unless it imports hypocrisy or marital infidelity. Unpleasant illnesses and mental conditions can also be defamatory. Allegations as to past acts or events, made without qualification, may also imply allegations as to the present.

2. What is libel

A defamatory statement to which there is no defence. See below as to the defences. However to be actionable (that is, to be suitable for a claim in the courts) a claimant for libel must make the following showing:

2.1 a defamatory statement *substantially* damaging reputation; and

2.2 *substantial* 'publication' of the statement by the defendant; and

2.3 understood to refer to/identify the claimant; and

2.4 has caused or is likely to cause serious harm to the reputation of the claimant; and is

2.5 a real and *substantial* tort the pursuit of which is proportionate, in accordance with Freedom of Expression (Art.10 ECHR) and a proper use of the courts' time and process to pursue vindication of the claimant's reputation.

Trivial claims will be struck out. Many claims will not get over the new serious harm threshold –which is a high standard. Where the publication has been removed from the internet or taken down, the court may take the view that the claimant has had the relief he seeks. Publication will need to be significant if the only further relief will be damages.

3. Defences

The main defences to defamation:

- (a) Truth.
- (b) Honest Opinion (based on true or privileged facts).
- (c) Privilege:
 - a. Absolute (statements to Police and in Court);
 - b. Qualified (a reciprocal legal, social or moral duty), so named, as it is defeated by Malice;
 - c. Responsible Publication (public interest plus

responsible journalism) including reportage.

- (d) Consent.
- (e) Innocent publication.
- (f) Takedown or section 5. Website Operators' defence.

4. Publication

A libel (written defamation) is published where and when it is read and slander (oral defamation) where it is heard. It is no defence that the maker of the statement is merely repeating the statement of another. This is *the Repetition Rule* --a speaker is responsible for statements he originates, and also those he repeats. When repeating, he must prove what was said was substantially true ---as if it originated with him.

"... you cannot escape liability for defamation by putting the libel behind a prefix such as 'I have been told that ..' or 'It is rumoured that ...' and then asserting that it was true that you had been told or that it was in fact being rumoured. You have ... to prove that the

subject matter of the rumour was true"
(Lewis v. Daily Telegraph Ltd [1964] AC
234 Lord Devlin at pp 283-4).

Another very important rule in libel law is *The Re-publication Rule*. A statement maker is liable for all the foreseeable re-publications of his statement. So a claimant can sue the original maker for all re-publications or sue each repeater as though he originated it. All parties who have any involvement in a publication can be sued and may be liable.

5. Who can sue

Governments (national and local) cannot sue for libel, see *Derbyshire CC v Times Newspapers* [1993] AC 534. This is for reasons of public policy –they should be open to criticism and not waste taxpayers' money suing for libel. Politicians and Government employees can sue and should be treated with care. Corporations cannot sue unless they have suffered, or will suffer, *serious harm* and *substantial* financial loss. Unincorporated associations cannot sue but individual members can.

6. Meaning of the statement

The court will look at what was said and whether it was defamatory at the date of its publication. This is not a subjective test – *it does not matter what you intend to say* rather what do you say—objectively viewed. Meaning in libel is highly technical. The natural and ordinary meaning is determined by the court putting itself in the position of the theoretical '*ordinary reader/viewer,*' who is famously not avid for scandal nor chained to literal meanings but can read between the lines, draw inferences and understand insinuations. If the ordinary meaning is not defamatory, then the issue may be innuendo meaning which applies when some readers or viewers have special knowledge—for example: to say C was seen at 26 Ealing Avenue is not defamatory to ordinary readers ---but is to those who know it's a brothel when the meaning becomes that C associates with prostitutes. The whole publication will be considered – both 'bane' and 'antidote' and the overall impression left on the ordinary reader.

7. Identification

Simply omitting a name does not prevent identification of a subject. Where certain

readers have other special knowledge, this can give rise to identification by innuendo. Any or all members of a class, if small enough, may be identified and sue. The classic case concerned allegations of misconduct against Banbury CID. Ten of the 12 Officers at the Station sued and succeeded on the basis they had been identified--*Riches v News Group Newspapers* [1986] QB256. The entire class may also sue on the basis that a cloud of suspicion has been cast over all of them or on the basis that the group condoned the misconduct.

8. Vulgar abuse

Statements which are merely rude or abusive are not defamatory and online statements must reach a much higher threshold. The courts have struck out or refused to hear cases arising from exchanges online akin to 'pub talk' and 'saloon bar moanings' see *Cliff v Clarke* (unreported) and *Sheffield Wednesday FC Ltd v Hargreaves* [2007] EWHC 2375.

9. Online libel

Most online libels are resolved by an internet site host or intermediary 'Taking Down' the statement on receipt of the complaint. They do that to claim the Ecommerce Defence and avoid becoming a knowing publisher. The new section 5 Defence will also give Website Operators protection if they follow a procedure and forward the complaint to the author/poster who then has the option to stand behind it and identify themselves or not.

10. The Responsible Publication defence for the media and journalists

The following matters are relevant to this defence. The topic must be of public interest, namely:

- a. To detect or expose crime or impropriety.
- b. Protect public health and safety.
- c. Prevent the public from being misled.

Where public funds are involved –the public interest will often be engaged.

The publication must also be responsible journalism and this can include a consideration of the following 10 matters:

10.1 The seriousness of the allegation.

10.2 Nature of the information and the extent to which it is a matter of public concern.

10.3 Source of the information – How reliable is it?

10.4 Who verified the information and what steps were taken?

10.5 Status of the information (rumour v. result of official inquiry).

10.6 Urgency of the matter – News is a perishable commodity but is there an urgent need for the public to be told where the information could be wrong?

10.7 Was comment sought from the claimant? A meaningful opportunity to respond to the precise allegations should be given.

10.8 Did the article contain the gist of the claimant's side of the story?

10.9 Tone of the article – defence may not operate if the writer steps in to the story and acts as judge and jury or adopts the allegations

10.10 other circumstances

This is not a checklist but these matters will be considered. This defence is not dependent on Truth and is sometimes called a right to get it wrong –provided that is, proper efforts were taken to get it right. In some cases, it will not be appropriate to verify (for example during an active criminal investigation). Reportage or neutrally reporting both sides of a disputed matter (provided no side is adopted) can also meet the test.

11. Remedies

These are:

- A Correction
- An apology
- Damages:

The court will not grant an injunction to stop publication. This is *The Rule against Prior Restraint*. A claimant must sue after

publication and within 1 year. Be aware that the formal court documents are public and may be reported in the media. Suing can spread the libel and do further harm. The Defence opens many trials and the initial media coverage will be negative and then the public often stop paying attention. Damages for individuals tend to be very limited and much less for companies who must prove their loss.

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