

Defamation & Malicious Falsehood



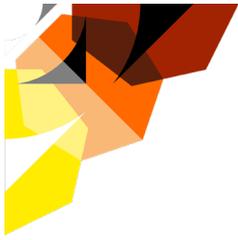
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Introduction

Reputation protection which embodies our law of defamation has become increasingly important. Together with the law of privacy, including confidentiality, reputation protection is a vital right for individuals and corporations, especially the advertising industry where image and celebrity rights attract so much attention.

The law of defamation is about an individual, firm or a company's right to have their reputation or goodwill protected and is balanced with the right to freedom of speech.

English law recognises that every adult has a reputation, and the right to have that reputation protected against false statements and imputations. The law assumes that everyone has a good reputation, until proved otherwise.

Defamatory statements

If the statement is written or is in any other permanent form, such as a picture or on television or on the internet, it is libel.

If it is spoken, it is slander.

- non-trading organisations (eg. charities can sue e.g. over a publication which discourages subscribers, or impairs its ability to carry out objectives)
- individual members of unincorporated associations, such as a sports club
- members of central or local government (eg. MPs)
- Who can't sue?
- dead people, or their relatives
- unincorporated associations, such as sports clubs
- central or local government (collectively, rather than as individuals who can sue)

What is defamatory?

A statement about a person is defamatory if it tends to do any one of the following:

- lowers him in the estimation of right-thinking members of society generally
- disparages him or it in their business, trade, office or profession e.g. to suggest that a company carries on its business in an incompetent, improper or dishonest way.

How should words be interpreted?

Many statements are capable of having more than one meaning. In defamation cases, a Jury or Judge must decide on the meaning of the publication to the average reasonable person.

The "natural and ordinary" meaning is the meaning of the publication on its face, excluding any extraneous matters outside the publication itself.

An apparently harmless statement may carry an inference or innuendo that is defamatory.

Who can sue?

Not everyone can sue. Those who can are:

- living individuals
- a company for damaging its trading reputation and goodwill

What must be proved to succeed in an action for defamation?

- publication to a third party
- of defamatory words or actions
- which are reasonably understood to refer directly or indirectly to the claimant

A claimant does not have to prove that the statement is false but he does have to prove the words are defamatory of him. If a statement is defamatory, it is assumed that it is false until proved otherwise.

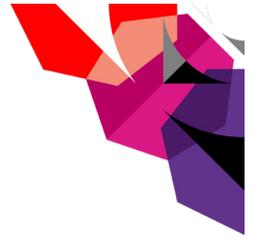
The claimant does not have to prove intent so he can sue even if the publication was an innocent mistake.

Nor does he have to prove any damage. He only needs to show that the statement defames him. He may sue for defamation even though the people to whom the statement was published knew it was untrue.

What is 'publication'?

Publication to a third party is the communication of a defamatory statement other than the person/ company claiming to be defamed. Every time a defamatory statement is published, it amounts to a "publication" giving rise to a fresh complaint.

The "publisher" can be anyone who assists in the publication: the magazine journalist who writes



an article is liable and his sub-editor, editor and magazine. Likewise a claim brought against those responsible for an advertisement could involve as “publisher” the advertiser, the agency and/or the media owner involved (which is why warranties are important).

Magazine printers, distributors and broadcasters are “publishers” but they can avail themselves of the defence of innocent dissemination by proving they were not the author, or editor of the statement complained about - and took reasonable care in relation to its publication and did not know that their actions contributed to publication (Section 1 Defamation Act 1996).

Meaning

The meaning is that of a “reasonable person” who is not unduly suspicious but who is willing to read between the lines. This is generally known as the “natural and ordinary meaning”. The defamatory statement will be read as a whole together with words and pictures, rather than only a few lines.

In addition to the natural and ordinary meaning, an apparently harmless statement can carry an inference that is defamatory where those with special knowledge of particular facts or circumstances understand the defamatory meaning. Where there is such a hidden meaning this is known as an “innuendo meaning”. It is of course important to remember that statements are frequently capable of more than one meaning. But the jury must decide what the “sting” of the words is or the principal meaning.

What is ‘identification’?

A claimant must show that he has been or can be identified.

Identification does not mean there has to be a name. It can be made in order ways. These include identification: by name or picture; by description; by direct reference; or by reference to small groups. It can also be done by “jigsaw identification”.

Special Cases

Defamation of a business

It is not actionable to merely disparage a product (for example “our burgers are better than theirs”) but it is to disparage business methods, competence, judgment, honesty and/or uncreditworthiness (eg. “their burgers are made from beyond sell-by date meat” and/or “that firm is a bunch of crooks – they have ripped me off”). It can damage goodwill and in the case of corporations their share price.

The publication of unsubstantiated rumour is dangerous because of the obvious risk it may be false. The suggestion that a business is in trouble, or laying people off or going bust, are obvious examples. Likewise, allegations of using sweated labour or dirty tactics if untrue invite a libel action. The fact that you are not the author and are merely repeating what you have heard is irrelevant.

It is important, therefore, to remember that companies like individuals are entitled to recover damages and they do not have to prove loss as it is presumed though evidence usually has to be provided. A company’s goodwill and reputation is regarded as being as important as that of an individual.

Defamation on the Internet

The law of defamation also applies to the Internet. The parties involved in publication, apart from the author, can be the Internet Service Provider and the website owner. Given its almost limitless potential to reach people all over the world, defamation on the internet throws up other issues, including jurisdictional ones.

Through chat rooms, bulletin boards and social networking sites, rumours can spread swiftly, and as soon as a story disappears from one website it can pop up on another. Each time the offending webpage is accessed it constitutes a fresh “publication”.

Internet Service Providers have long been susceptible to defamation actions despite the protection afforded to them by English legislation and the EU E-Commerce Directive. They are easily identifiable and are assumed to have deep pockets, and are therefore an obvious target.

Whilst S1 Defamation Act can provide an innocent discrimination defence, great care should be taken.

What are the defences to a defamation claim?

The main defences to an action for defamation are:

- justification
- fair comment
- privilege
- offer of amends
- limitation (i.e. the expiry of time)
- consent etc

Justification - Justification is a defence of truth. It can be successfully relied upon if a statement made, or at least the essential elements of it (the “sting”), can be proved to be true. Intention is irrelevant. If what is alleged is true then the claimant has no reputation to defend but he may be able to establish a breach of privacy.

Fair comment - It is a defence to a defamation action for the defendant to establish that the words complained of were comment on a matter of public interest. The burden of proof is therefore on the defendants.

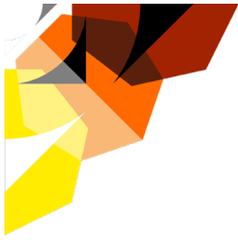
A defence of fair comment requires the author to prove that what he said was:

- comment as opposed to a statement of fact
- on true facts which an honest person could make
- a matter of public interest
- made without any malice

Privilege - There are situations where the public interest requires an ability to speak fully and frankly about matters without raising the risk of legal proceedings for defamation. Such situations are treated as privileged.

The defence of privilege is split into two parts: absolute privilege and qualified privilege.

Absolute Privilege - This is a complete defence provided by statute and protects statements made



in judicial proceedings (or similar) such as evidence given in court and statements made for the police. It is effective regardless of whether the defamatory statement was made maliciously. It also protects fair and accurate contemporaneous reports of court proceedings and decisions. It provides complete immunity. The law extends to tribunals with quasi judicial functions.

Qualified Privilege - Qualified privilege is a defence available in circumstances where it is considered important that facts should be freely known and publication is in the public interest and for "the general interest of society".

The purpose of the defence at common law is to allow a person with a duty or obligation to publish information where there is a corresponding interest in receiving it without risk of being successfully sued for defamation, where the publication is untrue. A reference given by an employer is an obvious example.

The Media qualified privilege defence is available, if it can be shown to have behaved responsibly and complied with some, if not all, of the guidelines laid down by the courts.

Other defences

Offer of Amends - This is a statutory defence which requires the offer of an apology and payment of compensation which can be decided by the court. It is not a defence in the true sense of the word but can halt legal proceedings as if not accepted it is a complete defence unless the claimant can show it was made in the knowledge that it was false. It must be an offer in writing and served before service of the Defence.

Limitation – one year limit - The law of defamation is there to protect reputations. Proceedings must generally be commenced within one year of publication. Each new publication will give rise to a fresh one-year limitation period. This is particularly an issue with regard to the internet and archives on the internet where republication can occur many years later as a result of an archive search by a user.

Consent - You can't complain about a publication to which you have expressly or impliedly consented.

Response to attack - If you are defamed you can respond in similar terms about your attacker, and in certain circumstances, about third parties. But you must make sure the reply is relevant to the attack and its circulation proportionate. The defence can also extend to statements made by close family or associates of the person attacked. This is part of a qualified privilege defence.

Abuse of process - A defamation claim cannot be brought if the cost of the complaint is out of all proportion to the damage or likely vindication of the complainant. Equally, a claim cannot be brought to "get your own back".

The purpose of the proceedings must be to protect your reputation, not to rubbish someone else's.

Remedies

Damages - In libel damage is presumed and in slander there are certain categories where damage is also presumed. Damages are "at large". That means that a jury will award what they think is appropriate, though tariffs are now applied.

Injunction - This is a restraint preventing publication by order of the court, breach of which is a contempt. If a matter goes to trial and the action is won a claimant usually gets a permanent injunction.

If an injunction is applied for at an early stage it is called an interim injunction. Where a defendant intends to justify the alleged defamation an application for an injunction will not succeed. Likewise, if in the absence of malice, a qualified privilege defence is pleaded.

Apologies and Statements in open court - A claimant will often seek an apology either publicly or privately. If publicly, it is by seeking to make a statement in open court which is usually done by mutual agreement with the defendant and is made to a judge.

What is malicious falsehood?

It is possible that a false statement made about an individual or business, although it is not defamatory, may still be damaging.

For example, to say an opera singer has retired from performing could cause financial loss through lost bookings etc, if it is a false statement. However it is not defamatory because it does not suggest anything bad about the singer.

In a comparative advertisement, a false statement about a competitor's products, price or attributes is unlikely to be defamatory, but if false may give rise to an action for malicious falsehood. For malicious falsehood, the claimant must prove that the statement was untrue and published maliciously. It is important to note that this is different from the position in defamation, where the claimant does not have to prove that the statement is false or malicious.

What you have to prove

Unlike defamation, a claimant has to prove that he/she has suffered actual damage/loss in order to be able to bring an action for malicious falsehood, subject to certain exceptions EG It is not necessary to prove actual damage/loss if the words in dispute are:

- calculated (i.e. likely) to cause pecuniary (i.e. financial) damage to the claimant and are published in writing or other permanent form
- calculated to cause pecuniary damage to the claimant in respect of his office, professional calling, trade or business (whether published in writing, orally or otherwise)

The time limit for bringing an action is the same as for defamation.

The Defamation Bill

A bill was introduced in May which, if passed may make radical changes in the law. However, it is likely to take some time before any change is made, if at all.

For further information on this subject please contact:

Adam Glass

Partner

+44 (0)20 7074 8447

adam.glass@lewissilk.com

