

Protect against Defamation and Privacy actions



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Introduction

The law of defamation and also the law of privacy is at a watershed. Since the beginning of 2010 the media have stepped up their campaign for a change in our laws, for more flexibility and a greater ability for freedom of expression to be paramount. This has been much more evident since the Human Rights Act 1998 incorporated the European Convention of Human Rights.

This inbrief is intended to show how best to try and avoid a letter before action and a claim, when legal advice is appropriate and what to do when you get a complaint.

Protection and Prevention

In both defamation and privacy "protection" and "prevention" are watchwords.

In the event of a claim speedy action must be taken. What follows are some hints and reminders as to what to do in the event that potentially defamatory material may be published or if rights to privacy may be breached.

When looking to publish an article or if you are a PR agency, trying to promote your client, the first question to ask yourself is what are you trying to say, what point are you trying to make? It is vital that if you are using facts that your facts are accurate.

With regard to research being carried out through the use of a cuttings service, or on the internet, try to ensure that you establish some degree of corroboration and do not lift a quote without double checking it.

The internet is now frequently used as a source of material and contains a lot of false and misleading information e.g. Wikipedia has in the past been subject to false entries because of the free ability to edit information.

Reliance on somebody else's material is not a defence to any libel action because your use of the other information amounts to repetition. That means all you are doing is republishing the libel and the fact that you were not the original author is irrelevant. It may serve to mitigate damages if your innocence is established but was it responsible to republish without checking?

In defamation justification - what you have said is true - is a complete defence to any claim in defamation but not in privacy. The truth of what is revealed is not the issue but whether it is appropriate in the circumstances and is in the public interest.

Qualified privilege is a defence open to publication in the public interest where there is said to be a "duty and interest" relationship e.g. publishing information about giving financial support to terrorists.

Fair comment is a defence available when you are 'expressing' an opinion e.g. in a restaurant review or about a product.

What is in the public interest covers most things which are in the public eye and which are important because of political, moral or other reasons. The debates over parliamentary expenses or assisted suicide are obvious examples.

But the public interest does not necessarily cover those whose private lives are being investigated; we all have our own private space and a reasonable expectation of privacy which can be protected. In assessing rights to privacy the golden rule is to carry out a balancing exercise between freedom of expression on the one hand and privacy on the other. The well known model Naomi Campbell was photographed attending a drug rehabilitation clinic. Such an occasion was obviously protected as it was an occasion when she could have expected privacy.

Responsible journalism is a defence in defamation actions but being responsible is not confined to just journalists.

Whatever you write think about what you are saying and how it will be, or could be, interpreted.

This is particularly so when you write an email, use Twitter or go on a blog. Think before you write!

Never assume that because it has been said somewhere else that it must be correct.

If it is a potential privacy matter, check whether this information is sensitive, in the public domain, or otherwise in breach of the PCC (the Press Complaints Commission) Code.

Where possible keep contemporaneous records of all telephone and face-to-face interviews.

You should be careful in actually recording conversations made without consent and remember that the speaker does have copyright rights.

Checklist

Do you want to express an opinion or make an allegation?

- What are you saying and is what you are writing the best way of saying it?
- Are the facts correct?
- Are the sources honest and can they be corroborated?



- Have you kept all the relevant documents? (Pictures, texts, paper work, telephone recordings.)
- Always keep interview notes, tapes, emails, drafts and source materials. (Not just for your use but because they will be subject to disclosure if the case proceeds.)
- Always check your copy as if you might have to defend it in court.
- Always be careful with reliance on others' material. Remember repetition is republication.
- Check sensitive data and whether information is in the public domain. Remember the terms of the Data Protection Act 1998 which gives wide protection for sensitive data e.g. matters of medical and sexual information.
- Ensure allegations made are put to the subject before publication.
- If expressing an opinion is it an honest opinion that someone else could hold or are you making a statement of fact?
- Check whether or not you are insured for libel/privacy infringement. You must inform your insurers immediately if you are. Does the insurance cover the defence of all proceedings? Is there an excess?
- Create a line of communication and responsibility within your organisation, and a strict procedure to follow. Make sure that the left hand knows what the right hand is doing.
- Before responding to a complainant, consider and discuss with colleagues and if in doubt take legal advice at the earliest opportunity. Too much litigation results from inadequate action being taken at an early stage. It is generally cheaper to take action sooner rather than later.
- Note and acknowledge the complaint but do not make any admissions.
- Do not agree to any demands made without first giving full consideration to the facts.
- Check the offending words about which the complaint is made to see if they are factually accurate.
- Retain all documentation concerning the publication (including drafts).
- If a formal complaint is made through solicitors, remember that there are "Pre-Action Protocols" which apply to defamation claims, and which set out the procedure that should be followed in relation to a complaint and a response to such a complaint. Your lawyer will be aware of these protocols but try to familiarise yourself with them. If they are not followed there could be costs implications.
- The fact that a complaint is made does not mean that it is justified or that it cannot be defended.
- Contact your defamation/privacy lawyer. An experienced lawyer will give you immediate guidance, will doubtless get a "feel" straightaway and could be far more effective as well as saving you far more money and time than your handling the matter yourself.

Defamation and privacy actions are frequently used as a device by those who wish to conceal the truth or to defend inappropriate or unacceptable conduct. Responsible companies and individuals should have nothing to fear if their article or publication has been carefully researched and published in a balanced manner. Responsible behaviour is the best defence of all against any libel action.

Privacy is different because the truth of the publication is not the central issue. Only the public interest or freedom of expression can justify its breach and the requirements are becoming more difficult to satisfy.

Defamation and privacy actions can be like a game of poker. The stakes can be very high.

- Don't play the game without an expert by your side.
- Always refer to a lawyer experienced in media law if in doubt.
- The money spent in the short term will reap dividends in the long term and save much executive time and effort.

Publications at risk

- Letters
- Articles
- Emails – internal or external
- Blogs; Bulletin boards; YouTube; Facebook; Twitter
- Press statements
- Conference calls
- TV and radio
- The Internet generally

Action

What to do if a complaint is made

- Don't panic. A lawyer's letter is intended to create it but keep calm.
- Remember time is of the essence. Where the offending material is available online you should consider removing that material from your website immediately pending investigation. It may prove to be unnecessary but it is prudent. Better playing safe than sorry.

A complaint should set out in detail the objections that have been raised and the remedy that is sought. It should stand on its own and be able to be taken as the basis upon which any action might be taken.

To state the obvious, as soon as you get a complaint you should read it through carefully and draft a response to each and every point to the best of your ability, whilst the complaint is fresh in your mind to assist your lawyers before carrying out further investigations. This will be privileged on the basis it is done in anticipation of legal action.

Authors Comment

Changes may come with the new Coalition Government. If they do there may be changes to the success fee in Conditional Fee Agreements and the recovery of After the Event Insurance as recommended in Jackson Report but, given the state of the nation, it will clearly not be a priority.

There is a strength of feeling that more needs to be done to control costs in defamation and privacy actions and to stop so called "jurisdiction shopping" where foreigners start proceedings in this country for libels published abroad.

Be that as it may, or in any event, there is, more than ever, every reason to be vigilant so that defamation and privacy lawsuits can be avoided. In hard times there is a greater willingness to litigate.

There is no doubt that costs in litigation are at the root of the problem. The recent furore over allegations made by a scientist is a good example of why it is important to get proper legal advice before publishing allegations which could result in a lawsuit.

In a libel action brought by the British Chiropractic Association, it was alleged in a newspaper article that the Association was happily promoting bogus treatments. The writer did not qualify his language and he was sued by the Association for libel. He lost in the lower court but fortunately the Court of Appeal found in his favour and allowed an appeal on the basis that he was expressing an honest opinion as opposed to making a statement of fact.

The case proved very expensive and the doctor may well not recover all his costs (it is always more important to remember that, unfair though it is, you rarely recover all your costs even if you win).

Defamation lawyers seek to minimise the risk of litigation by the use of prudent language. If in doubt get advice.

It all goes to underline the importance of not taking risks, and being careful in what you say and what you do.

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