

DEFAMATION

Defamation is a complex and detailed tort. Below I will present only an outline of the law, which will be further explained in class. Therefore, essential reading is as follows:

Winfield and Jolowicz on Tort, Fifteenth Edition, 1998, ch 12, p390-461; or
Michael A. Jones, *Textbook on Torts*, Seventh Edition, 2000, ch 13, p495-534.

DEFINITION

A defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society (*Sim v Stretch* [1936] 2 All ER 1237, 1240, per Lord Atkin).

WHAT HAS TO BE PROVED

Subject to the differences between the two types of defamation, libel and slander (explained below), the claimant must prove:

- (1) that the statement was defamatory,
- (2) that it referred to him, and
- (3) that it was published, ie communicated, to a third party.

The onus will then shift to the defendant to prove any of the following three defences:

- (1) truth (or justification),
- (2) fair comment on a matter of public interest, or
- (3) that it was made on a privileged occasion.

In addition, some writers put forward the following as defences in their own right:

- (4) unintentional defamation, and
- (5) consent.

DISTINCTION BETWEEN LIBEL AND SLANDER

The basic differences between the torts of libel and slander are as follows:

- (1) Libel is a defamatory statement in permanent form, for example,
 - writing,
 - wax images (*Monson v Tussaud's Ltd* [1894] 1 QB 671),
 - films (*Youssouppoff v MGM Pictures Ltd* (1934) 50 TLR 581),
 - radio and television broadcasts (s16 Defamation Act 1952; ss166 and 201 Broadcasting Act 1990), and
 - public performances of plays (s4 Theatres Act 1968).

Slander is a defamatory statement in a transient form.

- (2) Libel is actionable *per se* whereas damage must be proved for slander, except in four instances:

- Where there is an allegation that the claimant has committed an imprisonable offence;
 - Where there is an imputation that the claimant is suffering from a contagious disease, such as venereal disease, leprosy, plague and, arguably, HIV/AIDS;
 - Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion (Slander of Women Act 1891); or
 - Where there is an imputation that the claimant is unfit to carry on his trade, profession or calling.
- (3) Libel may be prosecuted as a crime as well as a tort, whereas slander is only a tort.

FUNCTION OF JUDGE AND JURY

All actions for defamation must be commenced in the High Court, and it is one of the few civil actions that are still tried with juries. The Civil Procedure Rules have not removed this right:

Safeway plc v Tate [2001] The Times LR 25 January

It is the function of the judge to decide if the words were capable of being defamatory in the eyes of a reasonable person: (a) If the judge rules that no reasonable person would actually conclude that the words in question were defamatory, the case will fail at that point; (b) If the judge rules that the words are capable of being defamatory in the eyes of a reasonable person, the words will be put to the jury and the judge will ask them to decide whether the words were defamatory (*Capital and Counties Bank v Henty* (1882) 7 App Cas 741 and *Lewis v Daily Telegraph* [1964] AC 234). A recent case on this issue is:

Alexander v Arts Council of Wales [2001] The Times LR 9 April

Note that by s7 of the Defamation Act 1996, the court shall not be asked to rule whether a statement is arguably capable, as opposed to capable, of bearing a particular meaning or meanings attributed to it.

Juries also decide the amount of damages to be awarded to the claimant. It is well established that jury awards for defamation are excessive, especially when compared to judicial awards for personal injuries. The Court of Appeal now has the power to substitute an award of damages instead of ordering a new trial in cases where the damages awarded by a jury are excessive or inadequate (s8 Courts and Legal Services Act 1990).

Cases to look up on the award of damages include: *Rantzen v Mirror Group Newspapers* [1993] 4 All ER 975, *John v Mirror Group Newspapers Ltd* [1996] 2 All ER 35 and *Clark v CC of Cleveland Constabulary* [1999] The Times LR 13 May.

ESSENTIALS OF DEFAMATION

(1) WORDS MUST BE DEFAMATORY

The statement must be defamatory. According to Lord Atkin, the statement must tend to lower the claimant in the estimation of right-thinking members of society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem (*Sim v Stretch* [1936] 2 All ER 1237).

Mere abuse

Vulgar abuse is not defamatory. Mansfield CJ stated “For mere general abuse spoken no action lies” (*Thorley v Kerry* (1812) 4 Taunt 355 at 365, and also Pollock CB and Wilde B in *Parkins v Scott* (1862) 1 H&C 153 at 158, 159).

Winfield & Jolowicz (p406) states that spoken words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them. Further, the same applies to words spoken in jest (*Donoghue v Hayes* (1831) Hayes R 265).

Innuendo

Sometimes a statement may not be defamatory on the face of it but contain an innuendo, which has a defamatory meaning. Such a statement may be actionable. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant (*Lewis v Daily Telegraph* [1964] AC 234) and must be specifically pleaded by the claimant.

(2) REFERENCE TO THE CLAIMANT

The statement must refer to the claimant, ie, identify him or her, either directly or indirectly.

Defamation of a class

If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals. “If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual” (per Willes J in *Eastwood v Holmes* (1858) 1 F&F 347 at 349).

If the defendant made a reference to a limited group of people, eg the tenants of a particular building, all will generally be able to sue (*Browne v DC Thomson* (1912) SC 359).

This issue was considered by the House of Lords in *Knupffer v London Express Newspaper Ltd* [1944] AC 116.

Unintentional defamation

At common law it was irrelevant that the defendant did not intend to refer to the claimant. Section 4 of the Defamation Act 1952 provided a special statutory defence in cases of ‘unintentional defamation’, by allowing the defamer to make an ‘offer of amends’ by way of a suitable correction and apology and may include an agreement to pay compensation and costs. The defence is now contained in ss2-4 of the Defamation Act 1996, which was an attempt to modernise the law. The person accepting the offer may not bring or continue defamation proceedings. If the offer to make amends fails, the fact that the offer was made is a defence and may also be relied on in mitigation of damages.

A publication made ‘maliciously’ (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of unintentional defamation.

(3) PUBLICATION

The statement must be published, ie communicated, to a person other than the claimant.

For example, dictating a defamatory letter to a typist is probably slander (*Salmond and Heuston on the Law of Torts*, 1996, p154), but when the letter is published to a third party it is libel. However, in *Bryanston Finance v De Vries* [1975] QB 703 it was held that where a letter was written to protect the interests of the business there was a common interest between the employer and employee, and so a letter dictated to a secretary in the normal course of business was protected by qualified privilege.

Communication between husband and wife

A statement made to one’s own spouse will not be ‘published’ for the purposes of defamation (*Wennhak v Morgan* (1888) 20 QBD 635 at 639). Communication between husband and wife is protected as any other rule “might lead to disastrous results to social life”.

Distributors

The defence sometimes known as ‘innocent dissemination’ is designed to protect booksellers and distributors of materials which may contain libellous statements. The law is now contained in s1 of the Defamation Act 1996.

A person has a defence if he shows that he was not the author, editor or commercial publisher of the statement; he took reasonable care in relation to its publication; and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement (s1(1)). A person shall not be considered the author, editor or publisher of a statement if he is only the printer, producer, distributor, or seller of printed material containing the statement, or the broadcaster of a live programme (s1(3)).

An internet service provider was held not to be the publisher, within the meaning of s1, of defamatory statements posted on a newsgroup, and therefore was entitled to rely on s1(1)(a). However, on the facts the claimant had notified the defendants that the posting was defamatory and requested that they remove it, but they had refused to do so. Therefore, they could not rely on the defence in s1(1): *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342.

Consent

Consent of the claimant to the publication of a statement, by showing other people defamatory material which the defendant meant for the claimant only, will create a situation in which technically there has been no publication (*Hinderer v Cole* (1977) (unreported) – defamatory letter sent by the defendant to the claimant was shown by the claimant himself to third parties).

For further information look up *Chapman v Lord Ellesmere* [1932] 2 KB 431; *Tadd v Eastwood* [1985] ICR 132.

DEFENCES

(1) TRUTH (OR JUSTIFICATION)

Only false statements are actionable, so if the statement made about the claimant is true, there can be no action for defamation. The burden of proof is on the defendant to prove that the statement made is true, rather than on the claimant to prove that it was false.

If a number of imputations are made by the defendant but only one action is brought by the claimant in respect of them, then, by virtue of s5 of the Defamation Act 1952, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the claimant's reputation, having regard to the truth of the remaining charges.

The Rehabilitation of Offenders Act 1974 provides that certain criminal convictions, depending upon their seriousness, are to become 'spent' after certain periods of time have elapsed, and treated as if they had never happened. Section 8 provides that in defamation actions which are based on allegations that the claimant has committed offences which would otherwise be 'spent', justification can be used as a defence except where the publication was made with malice (ie, spitefully, or with ill-will or recklessness as to whether it was true or false).

(2) FAIR COMMENT ON A MATTER OF PUBLIC INTEREST

The defence of fair comment is frequently relied upon by the press, as it is designed to protect statements of opinion on matters of public concern. Lord Esher, in *Merivale v Carson* (1887) 20 QBD 275, stated that the test was:

"Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?"

However, Lord Porter, in *Turner v MGM Pictures* [1950] 1 All ER 449 at 461, said that he would adopt this test, but substitute 'honest' for 'fair' in order to avoid the suggestion that the comment must be reasonable. See also Lord Nicholls in *Reynolds v Times Newspapers* [1999] 4 All ER 609 (below).

The defence only applies to comments made on matters of public interest, eg comments on works of literature, music, art, plays, radio and television; and also the activities of public figures.

A publication made 'maliciously' (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defence of fair comment.

Where there are imputations partly based on fact and partly expressions of opinion, the defence of fair comment will not fail merely because the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved (s6 of the Defamation Act 1952).

(3) PRIVILEGE

(a) Absolute

There are certain occasions on which the law regards freedom of speech as essential, and provides a defence of absolute privilege which can never be defeated, no matter

how false or malicious the statements may be. The following communications are 'absolutely privileged' and protected from defamation proceedings:

- Statements made in either House of Parliament. However, by s13 of the Defamation Act 1996, this privilege can be waived.
- Parliamentary papers of an official nature, ie, papers, reports and proceedings which Parliament orders to be published (s1 of the Parliamentary Papers Act 1840). Extracts from parliamentary papers are covered by *qualified* privilege (s3).
- Statements made in the course of judicial proceedings or quasi-judicial proceedings.
- Fair, accurate and contemporaneous reports of public judicial proceedings before any court in the UK (s3 of the Law of Libel Amendment Act 1888). The same privilege was extended to radio and television broadcasts of judicial proceedings in similar circumstances by s9(2) of the Defamation Act 1952.
- Communications between lawyers and their clients.
- Statements made by officers of state to one another in the course of their official duty (*Chatterton v Secretary of State for India* [1895] 2 QB 189).

(b) Qualified

Qualified privilege operates only to protect statements which are made without malice (ie, spitefully, or with ill-will or recklessness as to whether it was true or false).

The judge must decide whether the situation is covered by qualified privilege. If so the jury must then decide whether the defendant acted in good faith or whether there was malice.

The following communications will be protected by 'qualified privilege':

- Statements made in pursuance of a legal, moral or social duty, but only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it.
- Statements made in protection of an interest, eg public interests or the defendant's own interests in property, business or reputation.
- Fair and accurate reports of parliamentary proceedings.
- Fair and accurate reports of public judicial proceedings in the UK, eg when the report is not published contemporaneously with the proceedings.
- Statements privileged by s15 of the Defamation Act 1996, which applies to statements made in newspapers and radio and television broadcasts. There are two categories:
 - (i) Statements having qualified privilege without explanation or contradiction: see Part I of Schedule 1 to the Act.
 - (ii) Statements having qualified privilege subject to explanation or contradiction: see Part II of Schedule 1 to the Act.

A case on qualified privilege specifically mentioned in the ILEx Part II syllabus is:

Reynolds v Times Newspapers [1999] 4 All ER 609.

This defence was recently tested in:

Loutchansky v Times Newspapers (QBD, 27 April 2001).

CRITICISM OF DEFAMATION LAW

See separate details of the proposals for reform made by the Faulks Committee (Cmnd 5909) in 1975.

DEFAMATION ACT 1996

Among other things, the 1996 Act:

- Modernised the law on innocent dissemination (s1).
- Reformed the 'offer of amends' defence for newspapers where the libel was unintentional and the newspaper is willing to publish a suitable correction and apology, with damages assessed by a judge (ss2-4).
- Provides a new fast-track procedure for the summary disposal of defamation cases, with judges assessing damages of up to £10,000 in these cases and dismissing claims which have no realistic prospect of success (ss8-10). This will reduce the cost of litigation. Part 53 of the Civil Procedure Rules gave effect to this reform as of 28 February 2000.
- Reduced the limitation period for defamation and malicious falsehood to one year, with a discretion for the court to allow later action to proceed if reasonable.

See the text of the Act provided in class.