

A BRIEF GUIDE TO THE TORT OF DEFAMATION

Professional Guidance: Legal 1

Original Publication Date: May 2017©

Revised: November 2020

Defamation is governed by common law and statute law. The most recent statute is: the Defamation Act 2013 (the Act).

WHAT IS DEFAMATION?

Defamation occurs when there is publication to a third party of words or matters containing an untrue imputation against the reputation of individuals, companies or firms which serve to undermine such reputation in the eyes of right thinking members of society generally, by exposing the victim to hatred, contempt or ridicule.

The tort of defamation acts to redress unjustified injury to the claimant's reputation and can be divided into two areas, slander and libel. Slander is the publication of defamatory words or actions in a temporary form, for example by spoken word. Libel is the publication of defamatory materials in permanent form.

Defamation relies on the meaning of the words or actions in question to establish slander or libel. Defamation trials are heard without a jury unless the court orders otherwise. The court decides the natural and ordinary meaning as a question of fact by ruling on the meaning that the ordinary reasonable reader would find the publication to bear. The judge will then determine whether the words given their ordinary and natural meaning would damage the claimant's reputation.

Slander

- There must be an accusation;
- Requires proof of special damage (there are limited exceptions to this);
- Must be made against an identifiable individual or individuals; and
- Must be a statement which would cause someone to think less of the individual/individuals to whom it refers.

Libel

- Is not limited to the written word;
- Must be made against an identifiable individual or individuals; and
- Must be a statement which would cause someone to think less of the individual/individuals to whom it refers.

SERIOUS HARM

Section 1 of the Act 2013 sets the requirement that a statement must have caused or would be likely to cause serious harm to the claimant's reputation. If serious harm to the reputation of the client cannot be established then that statement is not deemed to be defamatory.

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SERIOUS FINANCIAL LOSS

In order for legal entities to bring an action for defamation the damage that they must prove is serious financial loss.

PUBLICATION

The claimant must establish that the words complained of are published to a third party and that the defendant published or is responsible for the publication of the words. Each communication of the defamatory material constitutes a separate publication and technically gives rise to a separate cause of action.

SANCTIONS AND REMEDIES

- **Damages** - Damages seek to compensate the claimant for harm caused by the defamatory material and to vindicate their reputation. There are three types of damages: general, aggravated and exemplary.
- **Injunctions** - An injunction can be sought by a claimant to prevent further publication of the defamatory material. The claimant must prove that the defendant was acting in bad faith. Injunctions may be granted on an interim basis.
- **Summary of Judgment** - The court can order a defendant to publish a summary of the court's judgment when the judgment has found in the claimant's favour.
- **Order to remove statement** - the court can order for a defamatory statement to be removed from a website or for a third party to stop distributing, selling or exhibiting material containing the statement.

ELIGIBILITY TO BRING AN ACTION FOR DEFAMATION

The following classes of persons are entitled to bring an action:

- An individual or class of individuals
- Any legal entity
- Trade Unions
- Patients
- Minors

The following are ineligible:

- Governing bodies
- Political bodies
- Unincorporated associations

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Defamatory statements regarding a deceased person are not actionable, regardless of how malicious or damaging the defamatory statement is, this is because only the person who believe they have been defamed can bring an action for defamation.

LIMITATION

A claimant has one year to bring an action for defamation against the alleged defendant from the date the defamatory material surfaced. The court has the discretion to hear a claim if this period has lapsed but only in limited circumstances where it is deemed equitable to do so. The individual who is the subject of the defamatory material should seek to bring an action as soon as practicable.

DEFENCES

Truth

Truth provides a full defence to an action of defamation. It requires the defendant to show that the imputation conveyed by the statement complained of is substantially true. Therefore, the onus is on the defendant.

Honest Opinion

This defence replaced the common law defence of fair comment, however previously established common law principles are still applicable to the new statutory defence. A defendant has to meet the following three conditions to establish the defence of honest opinion:

- a) The statement complained of must be an expression of opinion.
- b) The statement complained of must indicate the basis of the opinion.
- c) The opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or a privileged statement published before the statement complained of.

However, the defence will be defeated if the claimant shows that the defendant did not actually hold the opinion.

Privilege

Privilege acts to balance the human rights of those who are the subject of the defamatory material and freedom of information. In certain circumstances privilege can be raised as a defence to defamation. There are two standards of privilege: absolute and qualified.

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- **Absolute privilege:** Absolute privilege applies in situations such as judicial proceedings, parliamentary proceedings, reports of judicial proceedings and communications between solicitors and their clients. If absolute privilege applies, an action for libel or slander cannot succeed irrespective of dishonesty or motive.
- **Qualified privilege:** defendants can rely on either statutory qualified privilege or common law qualified privilege.

a) Statutory qualified privilege: Publication of a report or statement as set out in Schedule 1 of the Act is covered by statutory qualified privilege if it is fair and accurate, published without malice and a matter of public interest.

b) Common law qualified privilege can arise in a variety of different situations, but as a general rule the communication has to have been made by a person that has an interest or duty to make it to a person and that person has a corresponding interest or duty to receive it and there must be no evidence of actual malice.

Publication of Matter for Public Interest

This defence applies to those who are publishing material which they reasonably believe is in the public interest. The defendant must show that: the statement complained of was, or formed part of, a statement on a matter of public interest; and the defendant reasonably believed that publishing the statement complained of was in the public interest. Section 4 of the Act provides a non-exhaustive list of matters and circumstances the court should have regard to when determining whether the defendant acted responsibly in publishing the information.

Innocent dissemination

An individual can plead innocent dissemination if he can demonstrate that: he is not the author, editor or publisher of the statement in question; 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.

Consent

Consent excludes the individual subject to the alleged defamatory statement from bringing an action. Likewise, if the individual accepts an apology he cannot then bring an action for defamation.

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Operator of a website

This is a defence to a claim of defamation if the operator of a website can prove that he did not post the content himself. However this is subject to exceptions and this defence may be defeated if: It was not possible for the claimant to identify the person who posted the statement; the claimant gave the operator a notice of complaint; or he failed to respond to the notice of complaint in accordance with any provision contained in regulations.

If you would like more information or advice on defamation please contact the Blake Morgan Intellectual Property team.

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