

What is Defamation?

- Is a tort which protects the claimants reputation.
- Does not directly protect claimants from intrusion into their private life, but against wrongful attacks on their reputation.
- Defamation will only occur when a third party knows of the allegations.
- It is irrelevant that the defendant did not intend to harm the claimant. (Although it could provide the defendant with a defence).

Defamation and the Human Rights Act 1998

- Paragraph 2 of Article 8 of the Human Rights Act 1998 states that the freedom of expression must be weighed against the need to protect the reputation or rights of others.
- The law of defamation, must therefore strike a balance between protecting claimants against untrue statements, which attack their reputation and the freedom of the defendant to express their views.

The types of defamation: Libel

- Libel generally takes permanent form.
- A text or a photograph in a newspaper will amount to libel.
- The courts will presume that harm occurs as a result of libel – It is actionable *per se*.
- The distinction between libel and slander is sometimes unclear. E.g. *Youssouf v MGM Pictures Ltd (1934)*, where a Russian princess, complained that the soundtrack in the film 'Rasputin' inferred that she had been raped by the 'mad monk'. The court took the view that speech which was synchronised with the film, took a permanent form, and should be treated as libel. If the film had broken down, and the words continued, it would be slander. See also section 4(1), Theatres Act 1968, and section 166, Broadcasting Act 1990 – where it provides that performances of a play and broadcasts on television and radio should be treated as libel.
- Libel unlike slander is also a crime, although few prosecutions are made.

The types of defamation - Slander

- Slander, due to its temporary nature, is considered less serious.
- Slander is not actionable per se – the claimant must prove that the slander resulted in special damage i.e. As a result of the slander, the claimant's business failed.
- Equally, the loss must not be too remote see *Lynch v Knight* (1861)
- See also *Youssouf v MGM Pictures* (1934) – where difficulties have risen in distinguishing slander from libel.

The 4 forms of slander – actionable per se

- Imputation of a criminal offence punishable by imprisonment
- Imputation of a contagious disease, for example, leprosy or plague.
- Imputation of unchastity or adultery by a female (s.1, Slander of Women Act 1891)
- Imputation of unfitness or incompetence (s.2 Defamation Act 1952)

The judge in defamation cases

- The judge will deal with questions of law e.g. Are the words used capable of being found defamatory? Could the conduct of the defendant be viewed as malicious?

The Jury in defamation cases

- Defamation is one of the remaining torts where the case will be heard by a judge and jury.
- The jury will deal with matters of fact. e.g. Are the words used in fact defamatory? What level of damages should be awarded? Was the defendant in fact malicious?

Judge and Jury – Important legal consequences.

- Note the division of roles between judge and jury. Whilst the former deals with questions of law, the latter deals with matters of fact.
- The judge can direct the jury as to the nature of damages, the jury will decide the level of damages, which raises some concern in relation to the enormous amounts awarded to the claimant.

Who can sue?

- Logically, any human being can sue, since the tort protects an individual's reputation, but it does not survive death (section 1 (1) , Law Reform (Miscellaneous Provisions) Act 1934)
- Companies who are deemed to have a business reputation.
- Does not extend to government bodies . See Derbyshire CC v Times Newspapers Ltd (1993), as this will be contrary to freedom of expression in a parliamentary democracy.
- Members of Parliament, individual councillors etc can sue.

What does the claimant have to prove?

- The statement must be defamatory
- Does the statement refer to the claimant?
- Publication.

The statement must be defamatory.

- Defamation is not confined to direct attacks on the claimant's reputation. To protect the claimant's reputation, defamation must also include implied or veiled attacks known as 'innuendo'.
- There are 2 types of innuendo – true (or legal) and false (or popular).
- A true innuendo is a statement where the attack is truly hidden in the absence of special facts and circumstances, which the claimant must show are known by some of the people to whom the statement is published. See *Tolley v J.S Fry and Sons Ltd* (1931) and *Cassidy v Daily Mirror Newspapers Ltd* (1929).
- A False innuendo is one which a reasonable person guided by general knowledge would infer from the natural and ordinary meaning of the words. See *Lewis v Daily Telegraph Ltd* (1964). The court does not have to be informed of any specific facts to draw this inference. The general test is : Would the reasonable person view the statement as defamatory on the particular facts of the case.

The statement must be defamatory contd.

- Considering the statement in context – The courts will not allow claimants to point to a particular sentence in isolation, but will examine the statement in its whole context. See the decision of the House of Lords in *Charleston v News of the World Ltd* (1995).

Does the statement refer to the claimant?

- The claimant in a claim for defamation needs to show that the words in the statement referred to him/her.
- This is not a problem when the defendant names the claimant in the statement, but difficulties arise, when the statement is general. See *Morgan v Odhams Press Ltd.* (1971).
- It is irrelevant, however, that the defendant did not intend to defame the claimant. See *Hulton & Co v Jones* (1910) and *Newstead v London Express Newspaper Ltd* (1940)
- **Group defamation** – Where the statement is general, the claimant will not be able to bring a claim for defamation unless he/she can show that it relates to him/her specifically. See the leading case of *Knuppfer v London Express Newspaper Ltd* (1944).

Publication

- Statements will only harm the reputation of the claimant, if third parties are aware of them.
- Publication, that is communication of the libel or slander to a third party, is therefore a vital component of the tort.
- This is satisfied by the printing of an article in a newspaper or book or shouting a remark in front of other people, provided the words are intelligible to the third party.
- Problems however arise, where the defendant alleges that he/she did not intend the third party to see the statement, and that it was a private remark between him and the claimant. See *Theaker v Richardson* (1962).

Publication – Repeating a defamatory statement.

- This will be regarded as a further publication, leading to liability.
- Repetition will increase the damage to the claimant's reputation.
- The original defamer may, however, still be found liable for the repetition if he or she has:
 1. authorised or requested publication
 2. intended that the statements should be repeated or republished, or
 3. informed a person, who is under a moral duty to repeat or republish the statement.

See *Slipper v BBC* (1991). However the Court of Appeal in *McManus v Beckham* (2002) doubted whether *Slipper* test was fair to the defendant.

Recommendation of the Court of Appeal in *McManus v Beckham* (2002)

- The defendant knew that what she said or did was likely to be reported and that if she slandered someone that slander was likely to be reported in whole or in part,
- A reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that would increase the damage done by the slander.

Defences

- **Justification or truth** – Defamation statements are presumed to be untrue, unless the defendant proves otherwise. Truth or justification is thus seen as a defence. It is irrelevant whether the defendant's intention was malicious. The only exception to this is found in section 8 (5) of the Rehabilitation of Offenders Act 1974. The defendant must show that the statements are true – *Alexander v North Eastern Railway Co* (1865) and section 5 of the Defamation Act 1952. Partial justification is not a defence. The defendant must justify every innuendo. The burden is therefore on the defendant to justify the truth or 'sting' of the allegations. To achieve this, the defendant may also wish to raise matters with a 'common sting' in support of his or her claim of justification. See *Williams v Reason* (1988) and *Cruise and another v Express Newspaper plc* (1999)

Defences.

- Fair comment – This defence serves to protect defendants who seek to criticise claimants, provided they act fairly, honestly and base their comments on true facts.
- It has 3 requirements, and a failure to show one of these requirements will result in the defence failing:
 1. The statement must be in the public interest – This does not translate into any topic which the public is interested, but matters in which people generally are legitimately interested or concerned: see *London Artists v Littler* (1969)
 2. The statement must be a comment on true facts – This can be inferred, for example, from a headline. See *Kemsley v Foot* (1952). See also *Telnikoff v Matusевич* (1992), where a letter written in response to an article in the Daily Telegraph was examined by the court without reference to the article it criticised. The House of Lords ruled that the statement must be read in isolation, as many of the readers will probably have limited collection of the article that was criticised. See also section 6 of the Defamation Act 1952.
 3. The comment must be fair and honest – The courts use an objective test – Was the opinion exaggerated, obstinate or prejudiced, honestly held by the person expressing it? See *Reynolds v Times Newspapers* (2001)

Defences - Privilege

- Absolute Privilege – Is the stronger form of privilege and applies on occasions, where the need to protect freedom of speech is paramount as to create an absolute defence to any action for defamation, irrespective of the motives or words of the author. e.g. Statements made in Parliament – *Hamilton v Al Fayed* (2000) and s.13 Defamation Act 1996. Also communication between high officers of state.
- Qualified Privilege – This is weaker than absolute privilege, and will only apply on occasions where it is desirable that freedom of speech should be protected, but not when the maker of the statement is activated by malice. See *Horrocks v Lowe* (1975). This type of defence exists at common law and under the Defamation Act 1996.

Qualified Privilege at common law.

- The courts look for 2 requirements;
 1. That X had a duty or interest in communicating the information to Y. This may be legal, moral or social.
 2. Y has a corresponding interest in receiving the information in question. See *Adam v Ward* (1917), *Osborn v Boulter* (1930). This relates to former employers giving a reference for a former employee, and sending it to the new employer.
 3. Writing such a reference with malice will not amount to a defence. See *Spring v Guardian Assurance* (1995)

Should the media always claim qualified privilege for any story they publish?

- Reynolds v Times Newspapers Ltd (2001) – The courts rejected any general head of qualified privilege, but Lord Nichols gave some guidance: deciding whether a duty to publish political discussion could be established, namely:
 1. The seriousness of the allegation – the more serious the charge, the more the public is misinformed, and the individual harmed, if the allegation is not true.
 2. The nature of the information – is it a matter of public concern?
 3. It's source.
 4. What steps had been taken to verify the information.
 5. The status of the information, that is how reliable is the report.
 6. The urgency of the matter.
 7. Whether comment is sought from the claimant.
 8. The tone of the article.
 9. Whether the gist of the claimant's side of the story has been told.
 10. The general circumstances and timing of the publication.
- This case has been applied subsequently. See Loutchansky v Times Newspapers Ltd (No 1) (2001)

Qualified privilege under statute

- Section 15 and schedule 1 of the Defamation Act 1996, section 15 provides that publication of any report or statement contained in Schedule 1 of the Act is privileged unless published with malice. (Further reading is page 188 of the study guide).

Innocent dissemination

- This defence is found in section 1, Defamation Act 1996. It is now a defence to show that:
 1. The defendant is not the author, editor or commercial publisher of the statement.
 2. The defendant took reasonable care in relation to the publication.
 3. The defendant did not know, or had no reason to believe, that what he or she did caused or contributed to the publication of a defamatory statement.
- This serves to protect parties in the distribution process.

Unintentional defamation

- Section 2 – 4 of the Defamation Act 1996 – A person who inadvertently defames another can publish an apology and correction and pay an agreed sum of compensation to the claimant.
- Not a defence, but a form of settlement avoiding potentially huge costs of litigation.
- If an offer under section 2 is made to make amends, and not accepted by the claimant, it will be a defence **unless** the defendant knew or had no reason to believe that the statement referred to the claimant and was false and defamatory of him or her. See *Milne v Express Newspapers (No 1)* (2004), applying section 4.

Consent

- It will be a defence if the claimant expressly or impliedly consented to the statement in question.
See *Cookson v Harewood* (1975)

Remedies

- Damages – assessed by the jury and may include an award for aggravated damages. However please pay attention to the Human Rights Act 1998, which asks the courts to have particular regard to freedom of expression, when considering whether to grant a remedy which might affect that right. There is also concern that the jury is not the right body to assess damages.
- Injunction relief – The courts are reluctant to grant these prior to trial (interlocutory injunctions), as this would amount to restriction of speech without the benefit of the full consideration by the court. See *Bonnard v Perryman* (1891) – the court has the jurisdiction to restrain by injunction the publication of a libel, but the exercise of this jurisdiction is discretionary.
- Claims may also be dealt with summarily under sections 8 – 10 Defamation Act 1996.