

DEFAMATION

(1) What is defamatory?

Defamation is all about reputation, and in particular about statements which damage others' reputations. The English courts have not settled upon a single test for determining whether a statement is defamatory. Examples of the formulations used to define a "defamatory imputation" include:

- an imputation which is likely to lower a person in the estimation of right-thinking people;
- an imputation which injures a person's reputation by exposing him to hatred, contempt or ridicule;
- an imputation which tends to make a person be shunned or avoided.

A statement that a person is an adulterer, a gold-digger or a drunkard may be defamatory, as may an allegation of corruption, racism, disease, insanity or insolvency.

(2) Libel v slander

The law of libel is concerned with defamatory writings; whereas the law of slander is concerned with defamatory speech. There are some differences in the laws relating to slander and libel. Because defamatory statements on a website will be libellous rather than slanderous, this article considers only the law of libel.

(3) Websites and "publication"

A defamatory statement is not actionable unless it is published. Unfortunately for webmasters, when libel lawyers say "published", they mean communicated to one person (not including the person defamed). You can libel someone by writing about them on a personal blog, providing at least one person accesses the defamatory material.

That is not to say that a defamatory publication on your personal blog carries the same risk as a defamatory publication on, say, the BBC website. Libels on high-traffic sites are more likely to be discovered by the person attacked than libels on low-traffic sites. Also, potential libel claimants may let a libel pass if it hasn't been widely disseminated - knowing that a court case would itself ensure the widest possible audience for the slur.

(4) Corporations and government

It is sometimes thought that you cannot libel a corporation. That is incorrect. A corporation has a reputation just like a natural person, and that reputation may be injured by a defamatory statement.

On the other hand, it is not possible to defame the government, or an arm of the government. You should still be careful about making allegations against government, as

in many circumstances the allegations could be interpreted as allegations against a particular individual (who will be in a position to sue).

(5) Truth and fair comment

Two of the most important defences to a libel claim are justification and fair comment.

The defence of "justification" arises where the defendant in a libel action claims that the statements are true. One might expect that in these circumstances a claimant would be obliged to demonstrate the untruth of the defamatory statements - but that is not so. It is for the defendant who relies upon a justification defence to prove the truth of the libel. This is often easier said than done.

The defence of "fair comment" may be available to a defendant who can show that the defamatory statement amounted to an opinion which was honestly held and based up facts which were true.

There are a range of other defences which tend to apply in specific circumstances. The most important of these other defences is "qualified privilege".

(6) Qualified privilege

There are three kinds of "qualified privilege".

The first kind, sometimes called "classic common law qualified privilege", protects disclosures in certain specific situations, but only where the person making the defamatory statement believes that it is true. For example, this kind of qualified privilege defence may protect statements made in an employee reference.

The second kind may be called "statutory qualified privilege". This refers to a range of specific defences under the Defamation Act 1996 relating to the publication of fair and accurate reports of the proceedings of certain public bodies.

The third (and most interesting) kind is sometimes called "Reynolds-style qualified privilege". This protects certain public interest stories published in the media, providing they adhere to the standards of responsible journalism.

(7) Liability of hosts

Website hosts may be liable for defamatory material created by someone else but which they host. However, there are special defences available to hosts under the Defamation Act 1996 and the E-commerce Regulations.

Under the Defamation Act 1996, a website host will have a defence to a claim for libel if he can show that (i) he was not the author, editor or publisher of the statement complained of, (ii) he took reasonable care in relation to its publication, and (iii) he did not know and had no reason to believe that what he did caused or contributed to the

publication of the defamatory statement. The defence under the E-commerce Regulations is expressed in similar terms.

In order to have the best chance of taking advantage of these defences, a host should not as a matter of course monitor/edit the content of websites that it hosts; however as soon as the host becomes aware of potentially defamatory content, that content should be quickly removed.

(8) Damages

Damages in defamation actions are intended to compensate the claimant for distress and hurt feelings and for actual injury to reputation, and also to serve as an objective sign of vindication.

Unusually for civil cases, defamation cases are tried in front of a jury, not a judge sitting alone. In part as a result, damages awards have traditionally been rather high - often much higher than in personal injury claims. However, the Court of Appeal has the power to overrule excessive awards given by juries.

