

The Tort of Defamation

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Introduction

The tort of defamation which has its roots in the protection of a person's reputation and good name in society is relatively old in origin and its doctrines and principles are well established, though complex. Defamation is concerned with any damage whether intentional or otherwise, caused by an injurious declaration or publication to the reputation of a person or a corporate entity. Under Common Law, to constitute defamation, a claim must generally be false and must have been made to someone other than the person defamed.

The law of defamation aims at compensating a plaintiff for the injury done to his good name and reputation due to the malicious/injurious publication of the defendant.² It should however be known that a person cannot recover damages for the loss of reputation which he does not have.³ Thus, where a man does not have a good reputation especially in relation to a matter in contention, the law has nothing to protect him for.

What is Defamation?

Defamation is any publication that damages the standing or reputation of another person. It is the publication of a statement that lowers the reputation of a person in the estimation of 'right thinking'⁴ members of the society and generally exposes him to hatred, contempt,

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² A Magalla Defamation, what a term? The true meaning of the term available at https://www.academia.edu/27371237/DEFAMATION_WHAT_A_TERM_A_TRUE_DEFINITION_OF_THE_TERM (3 September, 2017).

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Asheik v. Medi Trust Nig. Ltd. (2010) 15 NWLR 114; Din v. African Newspapers Limited (1990) 3 NWLR 392 SC.

⁴ The right-thinking person is essentially an average law abiding person of normal opinion and normal moral standards. The standard of the 'right thinking man' is used by the courts to not only ignore the opinion of people with extreme views who see nothing wrong in the conduct of a wrongful act on one hand but also to reject the view of people who are so censorious as to regard minute issues as monumental occurrences on the other.

ridicule, or damages/discredits his character either in his office, profession or business.⁵ A statement is defamatory if in its ordinary meaning, it renders the person about whom it was spoken to odium, shame and disgrace.⁶

According to Professor Salmond, the wrong of defamation consists in the publication of a false and defamatory statement in respect of another person without lawful justification or excuse.⁷ Blackburn and George on their part define defamation as the tort of publishing a statement which tends to bring a person into hatred, contempt or ridicule, or to lower his reputation in the eyes of right thinking members of the society generally.⁸ In addition to the above, defamation has also been defined as 'the publication of a statement which reflects upon a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him'.⁹

In *Benue Printing & Publishing Corp. v. Gwagwada*,¹⁰ the Supreme Court defined defamation as any imputation, which may tend to lower the reputation of the plaintiff in the estimation of right thinking members of the society or expose him to hatred, contempt or ridicule. Craig explains that a statement is defamatory when it impeaches any person's integrity, honesty, virtue or reputation.¹¹

Essentially, it is the transfer of any information that damages the character and reputation of a person. In other words, a person commits the tort of defamation when he publishes to someone, false and discrediting information about another person. Defamation is not limited to aspersions upon a person's character but may also occur if false accusations are made against a person's business, profession, office or trade and which causes him to lose business. A company can thus bring an action for libel or slander in respect of any publication that is calculated to injure its reputation in the way of its trade or business.¹²

⁵ See *Ologe & ors v. New Africa Holdings Limited* (2013) 17 NWLR 449 SC; *Atoyebe v. Odudu* (1990) 6 NWLR 384 S.C. See also *Complete Comm. Ltd. v. Onoh* (1998) 5 NWLR pt. 549, p. 197 C.A.

⁶ See *Suleiman v. Adamu* (2016) LPELR-40316(CA); *Akomolafe v. Guardian Press Ltd* (2000) 1 LHLR 41. See also Thomson Reuters *Defamation* p. 167 available at http://legal.thomsonreuters.com.au/product/AU/files/720502336/chapter_25.pdf (2nd September 2017).

⁷ Salmond on the law of torts (1961) 13th edition p.361.

⁸ Blackburn & George *Elements of the law of torts* (1949) 2nd edition p. 167.

⁹ W V H Rogers *Winfield and Jolowicz on Tort* (2002) 16th edition p. 405.

¹⁰ (1989) 4 NWLR.349

¹¹ B Craig *Cyber law: The law of the internet and information technology* (2013) 163

¹² See *South Hetton Coal Co. Ltd v. North-Eastern News Association Ltd.* (1894) 1 OB. 133 at 145(CA).

The need to protect the reputation of persons was explained by Lord Nicholls in *Reynold v Times Newspapers*¹³ where he explained that ‘reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation..’¹⁴

Standard of the Right Thinking Member of the Society

Since the tort of defamation is largely hinged upon the basis that the statement of the tortfeasor/defendant injures the reputation of the plaintiff and brings him to ridicule in the eyes of right thinking members of the society; it is pertinent to inquire about the appropriate standard that is used in determining whether a statement is defamatory or not. In order to determine the criteria used; it is necessary to highlight that as a result of the various types of people existing in the society, there is need for the existence of a uniform standard that is used in determining who the ‘right thinking member of society’ is in order to measure and decide whether statements made are in actual fact defamatory or not.

The criterion that is widely applied is that of the citizen with ‘fair average intelligence’ or ‘ordinary decent folks’ in the community. In *Ologe & ors v. New Africa Holdings Limited*,¹⁵ the Supreme Court on the test for determining whether statements made are defamatory or not explained that:

“ the test to be applied by the court in determining whether a publication is libellous or not is not that of highly educated and accomplished professors of various academic disciplines, but that of a reasonable man on the streets who comes into contact with the words in the publication. The reasonable man to be used by the court in determining whether the words are defamatory in their ordinary meaning are men of ordinary intelligence...”

Also in *Egbuna v. Amalgamated Press of Nig. Limited*¹⁶ the Supreme Court in finding out the standard of the right thinking members of the society declared that:

¹³ (2001) 2 AC 127.

¹⁴ (As above) 201.

¹⁵ (n 4 above).

¹⁶ (1967) ALL NLR 27

“the court usually rules out on the one hand, persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on other hand those who are so censorious as to regard even trivial accusations, if they were true as lowering another’s reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement... the ordinary citizen... is neither unusually suspicious nor usually naïve and he does not always interpret the meaning of words as would a lawyer, for he is not inhibited by a knowledge of the rules of construction”.

In other words, for a statement to be regarded as defamatory, it must pass the acceptable standard i.e. the statement must not only be false but also capable of harming the reputation of another in the view of the ordinary citizen or right thinking members of society.¹⁷ Thus, the ‘right thinking member of society’ is the reasonable man, who does not hold extreme views about any issue or subject matter. While he is not usually naive, he is fair minded and reasonable.

Types of defamation

Defamatory statements may be published either in writing (libel) or orally (slander). While libel is a defamatory statement made in a visible or permanent form of expression such as in books, newspapers etc., slander is defamatory words published in a temporary form through spoken words.

Libel

Libel is a defamatory statement that is made in a permanent form such as a written or printed statement. Libel as a tort occurs when the defendant makes a false or defamatory statement that is capable of destroying the reputation of a person to a third party or among reasonable members of the society.¹⁸ To be regarded as libel, the statement which must be in writing or in a fixed medium of expression such as in a book or newspaper article must be published to another person or several people.¹⁹

¹⁷ See Suleiman v. Adamu (n 5 above).

¹⁸ Note that section 373-380 of the Criminal Code regards libel as a crime where the defamatory publication breaches public peace.

¹⁹ It should be known that cartoons, signs, and artistic depictions can be treated as libel if they include false statements and are communicated to other persons.

It should be noted that libel also includes publications over the radio or television. Although this may be considered as an oral or verbal means of communication and therefore slander, it is essentially regarded as libel since it is published in a permanent form. *Section 3 of the Defamation Law of Lagos State*²⁰ provides that the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form.

In *Sketch Publishing Co. Ltd v. Ajagbemokeferi*,²¹ the court explained that in relation to the tort of libel, the defamatory statement made by the defendant tortfeasor remains in a permanent form long after publication and may be referred to by any person in future thereby lowering the reputation of the plaintiff in the eyes of right thinking members of the society except the publication is withdrawn from circulation or destroyed by the defendant at the order of the court.

The tort of libel is actionable *per se* as damages are presumed to have automatically occurred with the false publication.

Slander

Slander is the oral publication of a defamatory statement which injures the plaintiff's reputation or character to a third party. Unlike libel, slander is a statement made in a temporary or transient form. It is usually published through the use of spoken words or gestures. Generally, the tort of slander is only actionable upon proof of damages, unless in certain cases where it operates like a libel and is actionable *per se*.²² Instances where slander is actionable *per se* without need to prove damages includes where there is an imputation of the commission of a crime,²³ allegation that the plaintiff is suffering from a contagious disease,²⁴ allegation that a woman or girl is unchaste,²⁵ or a publication that damages a person's office, trade or profession.²⁶ In *Yesufu v. Gbadamosi*²⁷ it was held that in slander, the burden of proof is on the plaintiff as he has to proof the alleged defamatory words relied upon in evidence.

²⁰ Defamation Law of Lagos State Cap D2 Law of Lagos State 2004

²¹ (1989) 1 NWLR pt 100, pg. 678 SC

²² *Suleiman v. Adamu* (n 5 above); *Opara v. Umeh* (1997) 7 NWLR 95 CA.

²³ *Agboaka v. Ejiofor* (1972) 2 ECSL 109

²⁴ *Murray v. Williams* (1936) 6 JLR 180.

²⁵ *Kerr v. Kennedy* (1942) 1 KB 409 1 ALL ER 412.

²⁶ *Atoyebe v. Odudu* (1990) 6 NWLR 384 SC; *De Stemple v. Dunkel* (1938) 19 L.T. 158.

²⁷ (1993) 6 NWLR pt 299, pg 363 C.A.,

Electronic Defamation

Presently, the world has advanced into a global village with the means of communication evolving from the print and visual media to the social media with millions of people communicating through use of the internet daily. While online publication may be a powerful means of communication, it also invariably has its own challenges especially in relation to the tort of defamation. In fact, the rate at which defamation occurs is faster as the publication of false and damaging information once posted online results in damaging consequences almost instantaneously. Thus, with the onset of the internet many legal issues required a rethink and application of a different approach. Among these was the issue of electronic defamation.

Electronic defamation occurs where someone posts false information online about another with the aim of damaging the person's reputation in public. In cyberspace law, majority of defamatory publication is regarded as libel, although it may be argued, that words damaging a person's reputation contained in chat rooms or instant messengers which are not stored on servers or the hard discs drives of the users, are slanders because of their transient nature.²⁸

The earliest online defamation judgments delivered in the United States in *Cubby, Inc. v. CompuServe Inc.*²⁹ and *Stratton Oakmont v. Prodigy Services Company*³⁰ attracted worldwide attention as the principal issues before the court concerned the liability of internet service providers (ISPs) for defamation which occurred as a result of postings on the web and whether the rules applicable for determining liability in traditional libel and slander cases are applicable to the ISPs. While the court in *Cubby Inc.*'s case regarded the defendant as an ISP distributor and held that an ISP distributor must have demonstrable knowledge of the erroneous and defamatory content of the publication prior to dissemination in order to be held liable for releasing that content; in *Stratton Oakmont*, the plaintiff successfully argued that the defendant exercised editorial control over content and thus should be classified as a publisher instead of a distributor. This was because the defendant expressly made known

²⁸ D Price *et al Defamation law, procedure and practice* (2010) 447.

²⁹ 776 F. SUPP 135 (S.D.N.Y 1991) 10

³⁰ 1995 WL 323710 (N.Y. SUPP. CT. 1995)10

to its users that it retained the right to edit, remove and filter messages in its system in order to ensure a 'family' atmosphere online.

*Godfrey v. Demon Internet Ltd*³¹ provided an opportunity for the provision of guidelines to differentiate between publishers and distributors. The court in this case held that under Common Law, ISPs who host and make news available for users is a publisher of the content. In *Bunt v. Tilley*³² the court refused to attribute liability for defamation to a telephone company or other passive medium of communication, such as an ISP provider who is in the position of a distributor and no more. They cannot be regarded as publishers and are protected from liability. If however, a person knowingly permits another to communicate information which is defamatory even when there is opportunity to prevent the publication, there is no reason in principle why liability should not accrue.

Nigeria in 2015 promulgated the Cybercrime Act to regulate matters relating to internet and cybercrimes in Nigeria. While the Act makes it a crime punishable with fine or imprisonment for anyone to intentionally make a publication that he knows is false for the purpose of causing inconvenience, danger, insult, injury, hatred, ill-will etc.,³³ is yet follow in the footsteps of the rest of the world by specifically promulgating a law dealing with other matters relating the obligations and liabilities of Internet Service Provider (ISP), bloggers and other users of the internet especially in relation to civil issues including electronic defamation.³⁴

Elements of the tort of defamation³⁵

The plaintiff in a defamation action must prove the following elements:

- i. That the words complained of are defamatory.
- ii. That the words complained of refer to the plaintiff.
- iii. That the statement was published to third parties.

³¹ (2003) 3WLR 1020

³² *Bunt v. Tilley* (2006) EWHC 407

³³ Sec 24 Cybercrimes Act 2015.

³⁴ O Okunowo 'Constitutional provisions of the freedom of the press and their limitations in nigeria' (2014) 2 *International Journal of Management Sciences and Humanities* 147.

³⁵ *Ogbonu v. Senior Staff Association of Universities, Teaching Hospitals Research institutes & Associated Institutions* (2013) 3 NWLR 261N CA; *Iloabachie v. Iloabachie* (2005) 13 NWLR 695.

i. Words complained of are defamatory

The plaintiff has the burden to prove that the words published by the defendant are defamatory and lowers his reputation in the eyes of the right thinking members of the society. It is the court's duty to ascertain whether the words complained of by the plaintiff were defamatory or not. In doing this, it is necessary for the court to inquire whether the words are capable of defaming the plaintiff in their literal and natural meaning otherwise the claim of defamation will not succeed. An exception to this is where the plaintiff asserts that the words have a hidden or secondary meaning.³⁶

Innuendo

Defamation through the use of innuendo occurs where the words which are the subject matter of a defamation action have an ambiguous meaning or are defamatory only in the light of extrinsic circumstances. In this situation, the plaintiff must prove that as used, the words have a certain meaning or innuendo that makes them defamatory.³⁷ There are two types of innuendo; the true/legal innuendo and the false/popular innuendo.

a. True/legal innuendo

True innuendos are innuendos that do not appear defamatory on its face or when applying their literal meaning but they have a defamatory connotation to the person to whom it is published when combined with certain extrinsic or known facts.³⁸

b. False/popular innuendo

These are words which are defamatory because it has an implied meaning that people with the necessary knowledge can understand that the statement is defamatory i.e. the publication of the words will influence meanings and conclusions which reasonable people will infer from them.³⁹

ii. Words complained of refer to the plaintiff

³⁶ *Daily Times of Nigeria Plc & 3 Ors v. Maigoro* (2000) 15 NWLR 855 CA; *Din v. African Newspaper Ltd* (1990) 3 NWLR 392 SC; *Okolo v. Midwest Newspaper Corporation* (1974) 2 CC HCJ 203 at 205.

³⁷ See *Daily Times of Nigeria Plc & 3 Ors v. Maigoro* (as above); *Akintola v. Anyiam* (1961) 1 ALL NLR 529.

³⁸ *Akintola v. Anyiam* (1961) 1 ALL NLR 529; *Duyile v. Ogunbayo & Sons* (1988) 1 NWLR 601 SC.

³⁹ *Mutual Aid Society v. Akerele* (1966) NMLR 257; *Ashubiojo v. African Continental Bank Ltd* (1966) LLR 159 and *Adeleke v. National Bank of Nigeria Ltd* (1978) 1 LRN 157.

In order for a plaintiff to succeed in an action for defamation, he needs to demonstrate that the defamatory words published by the defendant specifically referred to him and no other.⁴⁰

iii. The statement was published to third parties

The basis of every defamation action is the publication of the words (whether through slander or libel) that injures the reputation of the plaintiff to third parties. So in order for a defamation action to succeed, the plaintiff needs to show that the defamatory words were communicated by the defendant to someone other himself. For example, once the plaintiff can prove that the defamatory words were actually seen or published to other people either through a television broadcast, newspaper publication, e-news etc., it is deemed that publication is complete. The plaintiff need not point to a particular person as the person to whom the defendant specially published the defamatory statement to.⁴¹ In *Alhaji K.A Giwa v. S. A. Ajayi & Ors*⁴² the Court of Appeal explained that a major ingredient of defamation; whether libel or slander, is publication. In order to succeed, the plaintiff needs to prove the fact of publication i.e. that the defamatory matter was published to third party.

Vulgar abuse

Normally, use of vulgar abuse or insult is not regarded as slander and thus not defamation. Vulgar abuse is an insult that is not considered to be defamatory because it is not intended to be taken literally or believed neither is it expected to cause real damage to a person's reputation. For example, statements made in the heat of anger such as calling someone 'a fool' during an argument, would likely be considered as mere vulgar abuse and nothing more as it is not likely to lower the estimation of the plaintiff in the estimation of right thinking members of society.⁴³ It is necessary to point out that it is the court's duty to determine whether the words of the defendant amount to mere vulgar abuse or slander. This it does by looking at the circumstances in which the statement was uttered.

However, when a vulgar abuse accuses the plaintiff of committing a specific crime, the statement will not be regarded as a mere abuse but instead slander that is actionable *per se*,

⁴⁰ *Okpanum v. Odinamba & Ors* (2017) LPELR-42678(CA); *BPPC v Gwagwada* (1989) 4 NWLR 439 CA.

⁴¹ *Awoniyi v. Regd. Trustees of AMORC* (1990) 6 NWLR 42 CA & *Fawehinmi v. Akilu* (1994) 6 NWLR 387.

⁴² (1993) 5 NWLR 433

⁴³ See *Bakare v. Ishola* (1959) WNLR 106.

as the imputation may lead to the plaintiff being shunned by the public or arrested by the police. The court will regard such abuse as defamatory whether or not it was said in an atmosphere of jokes / triviality or in the heat of anger.⁴⁴

Damages

The court through the award of damages seeks to protect the plaintiff who may otherwise be at the mercy of a defendant who strives to destroy reputations that has been built over the years. However as a general rule, the damages occasioned as a result of a defamatory statement must not be too remote neither must it be an improbable result of the defendant's statement. The plaintiff in an action for defamation can only claim damages for consequences of a defamatory statement that are foreseeable.

Defaming a class of people

Notwithstanding the requisite that a defamatory publication must refer to an identified person, in exceptional situations, the courts may recognise the defamation of a class or group of people. For example, where a defamatory publication is made against a small class of people who are clearly known and that what is said of the class is automatically said of each and every member of it.⁴⁵

It is necessary to point out that in an action for defamation; it is no defence for the defendant to claim that he did not intend to defame the plaintiff. The issue of the intention of the defendant may only be considered by the court in their assessment of the quantum of damages which a defendant would pay. To however, rely on this claim, the defendant must first admit he was wrong and offer to make amends.⁴⁶

Also, the innocent dissemination of a defamatory publication or material without knowledge of its defamatory content may not be defamation if the person who distributed it can show that he not only had no knowledge that the material contained libellous information but also that his lack of knowledge was not due to negligence on his part.⁴⁷

⁴⁴ *Ibeanu v. Uba* (1972) 2 ECSLR 195.

⁴⁵ *Dalumo v. The Sketch Publishing Co. Ltd* (1972) LL NLR 568.

⁴⁶ *Youssoupoff v. MGM Pictures* (1930) 50 TLR 581; *Newstead v. London Express Newspaper Ltd* (1940) 1 KB. 377.

⁴⁷ *Awolowo v. Kingsway Stores Ltd* (1968) ALL NLR 608; *Vizetelly v. Mudie's Select Library Ltd* (1900) 2 QB 1 70.

Subsidiary distributors are usually not liable for defamation provided the defendant distributor can show that:

Defences

Even when a statement is defamatory, there are circumstances when its publication will be permissible in law. The defences which a defendant may plead in an action for defamation include justification, fair comment and privilege.⁴⁸

a. Justification

A defence of justification simply involves the defendant proving the precise imputation complained of as true.⁴⁹ A defendant may plead in an action for defamation that the words complained about are true and a rendition of what really happened between the parties. The defendant pleads the defence of justification to prevent a plaintiff recover compensation for damage done to a reputation which he does not possess in the first place.⁵⁰ In *Anyah v. A.N.N. Ltd.*⁵¹ it was held that:

'Under a plea of justification, the onus is on the defendant to show that the alleged libel is true; in fair comment the onus is on him to show that the facts commented on are acknowledged to exist or are true. If the defendant brings evidence to prove the facts commented upon to be true or acknowledged to exist, the plaintiff should be entitled to produce evidence that they are neither acknowledged nor true. But he cannot divide his proof, bringing forward part of his evidence in the first instance and more in reply.'

Note that the existence of minor inaccuracies does not defeat a defence of justification. e.g. where a defendant makes several allegations and succeeds in proving three fourths of it as true, the defence will not fail.⁵² Section 7 Defamation Law of Lagos State provides;

"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, 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 plaintiff's reputation having regard to the truth of the remaining charges"

⁴⁸ *Bekee & Ors v. Bekee* (2012) LPELR-21270 CA; *Onwurah & Ors V. Nwumeh & Anor*(2016) LPELR 40304 CA.

⁴⁹ *Concord Press Nigeria Limited & 2 Ors v. Obijo* (1993) 3 NWLR 86 CA.

⁵⁰ *Nthenda v. Alade* (1974) 4 ECSLR 470.

⁵¹ (1992) NWLR 319.

⁵² *Dim v. African Newspapers Ltd* (1990) 3 NWLR 392 SC.

b. Fair comment

Fair comment is a defence in defamation for publication made by the defendant in honest belief of their truth. Fair comment which must be based on true facts is an impartial comment, observation, opinion or criticism on a matter of public interest as long as the statements are not made with ill will or with the intent to harm the plaintiff.⁵³

It should be noted that the determining consideration in a defence of fair comment is not whether a reasonable person would reach such conclusion but whether the defendant honestly expressed his genuine views.

c. Privilege

The defence of privilege is used to protect the defendant from legal action that may be instituted by the plaintiff for the tort of defamation. The defence is used to protect certain defamatory statements from legal action on the ground of public policy. There are two types of privilege: absolute privilege and qualified privilege. While absolute privilege totally protects the maker of a statement from legal action even when the statement is made with malice; qualified privilege is one where the maker of the statement enjoys the privilege of protection only when the statement is made without malice and with honest belief in its truth.⁵⁴

Examples of statements protected by absolute privilege include statements made in parliamentary proceedings, matters of state and communications between officers of the state, communications between a lawyer and his client, judicial proceedings and reports emanating from judicial proceedings etc.⁵⁵ Examples of statements protected by qualified privilege include statements made in performance of a legal, moral or social duty,⁵⁶ statement made in self-defence and fair and accurate reports of proceedings in the legislature etc.

Conclusion

⁵³ *Dim v. African Newspapers Ltd* (1990) 3 NWLR 392 at 408 SC; *Staphens v. Avery* (1988) 2 ALL ER 479; *Nthenda v. Alade* (1974) ECSLR 470; *London Artists Ltd v. Littler* (1969) 2 WLR 409 CA; *Saraki v. Soleye* (1972) 2 UILR 281; *Bakare v. Olumide* (1969) ALL NRL 762.

⁵⁴ *Michelin Tyre Services Limited & Anor v. Akinwunmi* (2009) 16 NWLR 633 CA.

⁵⁵ *Egbe v. Adefarasin* (1985) 1 NWLR 549 SC; *Ojeme v. Punch Nigeria Ltd* (1996) 1 NWLR 711 CA; *Saraki v. Soleye* (1972) UILR 271.

⁵⁶ *Ayoola v. Olajure* (1977) 3 CCHCJ 315.

The rationale for instituting defamation actions is to compensate the plaintiff for any damage done to his reputation and good will in the eyes of right thinking members of society. To thus succeed, the onus is usually on the plaintiff to show that the defendant's publications to third parties is not only defamatory but also lowers his reputation in society.