

Staying protected how to avoid lawsuits in the age of user-generated content

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Defamation: the problem

- “defamation” - publishing a statement that harms someone’s reputation (literally “reduces their fame”)
- dangerous features:
 - claimant does not need to prove falsity
 - may be done “innocently”
 - applies to every repetition
 - ~~trial by jury~~

Defamation: unusual features

- **long** history of development by the courts
- trial by jury
- Human Rights Act 1998
- Defamation Act 2013
 - from: 1st January 2014
 - few cases so far

Terminology

- libel – writing (plus theatres and broadcasts)
 - –criminal origin
 - –no need to prove damage
- slander – oral
 - –civil origin, mostly must prove actual damage
- can a true statement be defamatory?
 - usage differs
 - yes

Elements of defamation

- A statement S
- Identifiably about C
- S means M
- M is defamatory of C
- S was published by D

Civil process

- [pre-action protocol]
- Claim form – issue and service
 - particulars of claim follow
- Defence
 - ...alarums... written evidence ...
- Trial
- ...

Applications and injunctions

- Flexibility:
 - can be made even before proceedings have started
 - they can be made by non-parties.
- Varieties
 - injunction
 - Norwich Pharmacal order.
 - ruling on the law
 - summary judgment, striking out....
 - ... a myriad of case management orders

Judges and juries

- Judges
 - questions of law
 - can set precedents
- Juries
 - questions of fact
 - cannot set precedents
 - decide on damages (££££)
- Fox's Libel Act
 - trial by jury normal but not invariable

Judges and Juries II

- C pleads that S means M
- Judge:
 - is S capable of meaning M?
 - is M capable of being defamatory?
- Jury
 - what does S mean?
 - is that meaning defamatory?

Defence tactics

- Interim applications
 - rulings on meaning
 - interim issues of law
 - –capability of being defamatory
 - striking out
 - summary judgment
- Summary disposal

What is a defamatory meaning?

- “one to the claimant’s discredit”
- “tends to lower him in the estimation of others”
- “causes him to be shunned or avoided”
- “exposes him to hatred, contempt or ridicule”
- United States (restatement):
“it tends to harm the reputation of another so as to lower him or her in the estimation of the community or deter third parties from associating or dealing with him or her”

Defamatory meaning II

- Likely not actual effect of meaning
 - proof of actual effect irrelevant
 - can still be defamatory even if no-one who heard it believed it
- Effect is on “right thinking persons generally”
 - *Byrne v Deane*

Are these defamatory?

- C is insane
- C has HIV
- C has been raped
- C has/had heart disease
- C is illegitimate
- C has leprosy
- X is a better journalist than C
- C is a lawyer of only average ability

Meaning I

- “natural and ordinary meaning”
- includes inferences
 - “have you heard that Fox was reported twice as a spy?”
 - covers many news reporting situations and WDTK
- not strained, forced or utterly unreasonable
 - not enough that someone might understand it that way
 - Capital and Counties Bank v Henty
 - “chop and tomato sauce”

Meaning II: the reader

- - ordinary reasonable fair-minded reader
 - –may be guilty of a certain amount of loose-thinking
 - –does not read a sensational article with cautious and critical care
 - –goes by broad impression
 - –does not construe words as would a lawyer
 - of reasonable intelligence
 - with an ordinary person's general knowledge

Meaning III: innuendos

- True or “legal” innuendo
 - in the light of additional facts which may not be general knowledge
 - a separate cause of action
 - can make a meaning defamatory or not defamatory

Defences

- Justification – statement is true
- Privilege
- Qualified privilege
- Fair comment
- Offer of amends

Justification

- Truth a complete defence to civil suit
- May plead an alternative (Lucas-Box) meaning
- Repetition rule
 - Lewis v Daily Telegraph
 - adding “allegedly” no good
 - giving right to reply or flagging something as possibly unreliable is also useless

Justification II

- Investigations of wrongdoing
 - “Police arrested C for child sexual abuse yesterday”
- Chase meanings:
 - was guilty
 - reasonable grounds to suspect
 - reasonable grounds to investigate

Qualified Privilege

- Co-ordination of duty and interest
 - Duty or interest in publication
 - Duty or interest in receipt
- Defeated by malice
- Examples
 - confidential references
 - communications amongst the team
 - newspaper reporting? Reynolds

Fair comment

- Comment not statement
 - may be an inference
- Honest – defeated by malice
- Matter of public interest
- Comment on existing facts
 - facts must be true

Outcomes

- Injunction
 - may be made in the interim
 - balance of convenience test for interim injunctions
- Damages
 - potentially very large
 - decided by juries, controlled by the court of appeal
- Costs

Offer of amends

- An offer to
 - make and publish
 - –a suitable correction; and
 - –a sufficient apology
 - pay compensation to be agreed or determined
- Plus
 - not an admission of liability
 - acceptance prevents future claim
- Minus
 - only useful for innocent defamations
 - may not use another defence

II. Particular issues for websites

Special defences I

- Defamation Act 1996
 - not the author, editor or publisher
 - took reasonable care in respect of publication
 - did not know and had no reason to know that D caused or contributed to the publication of a defamatory statement

Special Defences II

- E-commerce directive “hosting”
 - all information liability
 - applies only to Information Society Services
- Absolute defence provided
 - no actual knowledge; or
 - acts expeditiously to remove or disable
- No need to search out potential libels
 - Metropolitan International Schools Ltd
- Does not prevent injunctions

Identity of claimant

- Must be able to identify the claimant
 - “the man who lives in that house is a paedophile”
“X is illegitimate”
- Accidents
 - Hulton v Jones
 - O’Shea v MGN
- class libel
 - “all lawyers are thieves”
 - Knupffer v London Express Newspaper

Who can sue?

- Everybody, except
 - Dead people
 - Public bodies?
 - –Derbyshire – arms of local and central government
 - –Goldsmith – applies to political parties as well
 - –beware of defaming individuals via the public body
- Corporations can sue
 - unless they have no trading reputation within the jurisdiction

Publication

- Making available on a server is enough
 - Byrne v Deane
 - Godfrey v Demon Internet
- Indirect publication
 - Hird v Wood
 - Lawrence v Newberry
 - Smith v Wood
- Linking?

Consultation

- Limitation Act 1980
 - one year time limit
 - subject to possible extension
- Multiple publication rule
 - Loutchansky
- Consultation
 - driven by Rupert Murdoch press
 - response by 16 December 2009