

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

Francis Davey  
Room 5 Shoreditch Works  
32 - 38 Scrutton Street



## 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~~

## Alternative threats

- Malicious falsehood
  - claimant must prove falsity
  - requires “malice”
- Data Protection Act 1998
  - new regulation “soon”
  - EU-wide
- Privacy rights
- Intellectual property rights

## 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
  - messy patch

# Terminology

- “Defamation” = libel + slander
  - slander = spoken
  - libel = almost everything else
- Defamatory statements may be true
- Law = law of England and Wales

## Elements of defamation

- A statement S
- Identifiably about C
- S means M
- M is defamatory of C
- S was published by D to a third party
- NEW: S caused or is likely to cause “serious harm” to C

## 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

- Truth
- Privilege
- Qualified privilege
- Public Interest
- Honest Opinion
- Offer of amends

# Truth

- 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

- General
  - Section 1, Defamation Act 1996
  - Section 10, Defamation Act 2013
- Technology specific
  - Section 5, Defamation Act 2013
  - E-commerce directive

# Defamation Act 1996, section 1

- Not the “author”, “editor” or “publisher”
  - Author = originator
  - Editor, may include pre-moderation
  - Publisher = commercial publisher
    - *McGrath v Dawkins*
    - Amazon not a commercial publisher of its website
- 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

## Defamation Act 2013, section 10

- Not the “author”, “editor” or “publisher”
- Not reasonably practicable for to sue the author editor or publisher
  - does it matter that sueing would be useless?
  - what about suing anonymous posters?

*The person or persons who have offered the publishers of the Sun, the Daily Mail, and the Daily Mirror newspapers a copy of the book 'Harry Potter and the order of the Phoenix' by JKRowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants.*

## Defamation Act 2013, section 5

- An *optional* defence
- The idea:
  - complaint is made about a posted statement on a **website**
  - the website operator contacts the poster
  - if the poster wants the post to stay up, it stays
  - poster and complainant are put in touch
  - otherwise it is removed
- The reality: (!?!?)



## Section 5: the defence

- it was not possible for them to identify the person who posted the statement
- they gave a “notice of complaint” to the operator
- the operator failed to respond to the notice correctly

# E-commerce directive

- 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