

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

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# Overview

- I. Law of Defamation
  - introduction
  - terminology
  - what is defamatory?
  - defences
  - outcomes
- II. Internet related issues
  - special defences
  - publication and hyperlinking
  - miscellany
- III. Practicalities

# Questions

- Interrupt at any time
- Please
  - questions relevant to place in the talk
  - don't anticipate the end of the story
  - **do not** ask about specific cases ("I've been sent this letter...")

# 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
  - tried in the High Court by default
  - ~~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 I

- “Defamation” = libel + slander
  - slander = spoken
  - libel = almost everything else
- Defamation is a **tort**
  - adjective: **tortious**)
  - committed by a **tortfeasor**
- Defamatory statements may be true
- Law = law of England and Wales
- Publish = communication to a third party

## Terminology II: a claim

- **Letter before action** (part of the pre-action protocol)
- **Issue** of a **claim form** (old: “writ”)
- **Claimant** (old: “plaintiff”) “C”
- **Serve** = “give”
- **Defendant** “D”



## 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?

- “Words [that] tend to lower the plaintiff in the estimation of right-thinking members of society generally”
- “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
- 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

# Serious Harm

- NEW section 1 Defamation Act 2013
- Claimant will have to prove the statement
  - has caused serious harm
  - is likely to cause serious harm
- *Cooke v MGN*
- Harm will often be inferred (eg alleging C is a terrorist)
- Body that “trades for profit”
  - serious financial loss



# Defences

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

# Truth

- Truth a complete defence to civil suit
- 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

## Honest Opinion: the defence

- The statement was a statement of opinion
- The basis of that opinion was indicated
- An honest person could have held the opinion, on the basis of
  - any fact which existed at the time of publication
  - anything asserted in a privileged statement
    - matter of public interest
    - peer-reviewed statement in scientific or academic journal
    - various privileged reports (eg court proceedings)
- Old law: “Fair Comment” or “Honest Comment” (abolished)

## Honest Opinion: defeating

- C can defeat defence if they prove
  - D published the statement and did not hold the opinion
  - D published someone else's statement who did not hold the opinion and D:
    - knew
    - ought to have known
- Old law: "malice"

# 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

# Outcomes

- Injunction
  - very unlikely to be made in the interim
  - may be made against innocent website owner
- Damages
  - historically very large
  - court of appeal reigned in jury awards
  - still very large
- Costs



## II. Particular issues for websites

- Preliminary
  - is there publication?
  - innocent dissemination
- General
  - Section 1, Defamation Act 1996
  - Section 10, Defamation Act 2013
- Technology specific
  - Section 5, Defamation Act 2013
  - E-commerce directive

# Publication

- Common law - knowledge not required
  - printer
  - printer's servant (who "clapped down the press")
  - newspaper vendor
- *Bunt v Tiley*
  - **passive** ISP not a publisher at all
  - probably correct

## Common law publication - without notice

- *Byrne v Deane*
  - notice left on club-room wall
- *Godfrey v Demon Internet*
  - USENET posting
  - publisher even though unaware of the post
- *Tamiz v Google*
  - blogger platform
  - not a publisher when unaware
- *Metropolitan International Schools v Designtecnica*
  - Google not a publisher of snippets
- Knowledge appears to make you a publisher

# Innocent dissemination

- Available to “secondary” publishers
- Elements of the defence:
  - D did not know the publication:
    - contained a libel
    - was of a kind likely to contain a libel
  - Lack of knowledge was not due to negligence
- May avoid pre-notice liability (but it depends)
- Mostly superseded by other defences

# 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 suing 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

- D is an Operator of a website who did not post the statement
- Claimant must prove:
  - it was not possible for them to identify the person who posted the statement
  - they gave a “notice of complaint” to the operator (or were deemed to have given one)
  - the operator failed to respond to the notice correctly

## Section 5: Notice of Complaint

- The complainant's electronic mail address
- The meaning which the complainant attributes to the statement referred to
- Which aspects of the statement the complainant believes are:
  - factually inaccurate; or
  - opinions not supported by fact
- A confirmation that the complainant does not have sufficient information about the poster to bring proceedings against them
- Whether the complainant consents to the operator providing the poster with the complainant's name and email address

## Section 5: operator action

- Time limit: 48 hours
- Defective notice, inform the complainant that:
  - the notice does not comply with the requirements set out in section 5(6)(a) to (c) of the Act and regulation 2; and
  - what those requirements are
- If able to contact the poster **electronically**
  - send information to poster
  - inform complainant
- If not able to contact the poster
  - remove statement
  - inform complainant

## Section 5: poster's response

- Time limit 48 hours from response
- Statement must be removed if:
  - no response by midnight on day 5
  - response is defective
    - includes “obviously false” name or postal address
  - poster asks for the statement to be removed
- Statement is retained if poster responds correctly and asks for it to stay
- Inform complainant
  - that the statement is staying or going
  - of the poster's name and address if the poster consented and asked for the statement to stay

## Section 5: repeat offenders

- Complainant informs the operator
  - at the same time as sending the notice
  - complainant has sent notice on 2+ occasion “in relation to the statement”
- Two or more previous notices of complaint about a statement that:
  - was posted on the same website
  - by the same person
  - conveys the same/substantially the same imputation as each previous notice
- Each time statement was removed from the website
  - in accordance with the regulations

## E-commerce directive

- Articles 12 - 15
  - mere conduit
  - caching
  - **hosting**
- Almost all forms of liability
  - key exception: data protection
- Applies only to “information society services”
- Does not prevent injunctions

# Information Society Services

- A service
  - normally provided for remuneration
  - at a distance
  - by means of electronic equipment for processing and storing data
  - at the individual request of a recipient of the service
- Remuneration
  - could be provided by advertisements
  - need not be provided by the users
  - must represent some form of economic activity
- Where does this leave civil society?

## E-commerce directive: hosting

- “Hosting”:
  - storage of information
  - provided by a recipient of the service (i.e. not the service provider)
  - recipient is not under hoster’s control
- Absolute defence for “hosting” provided the hoster
  - has no actual knowledge; or
  - acts expeditiously to remove or disable access
- No need to search out potential libels



# Hyperlinks

- Old cases
  - Hird v Wood
  - Lawrence v Newberry
  - Smith v Wood
- Newer cases
  - Crookes v Newton (Canada)
    - no liability
    - difference of views on context
  - *Budu v BBC* - linked material provides context
  - *Islam Expo v Spectator (1828)* - incorporated hyperlinked information into the text
  - *McGrath v Dawkins* - home button might create responsibility for linked site

# 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 (photographic likeness)
- class libel
  - “all lawyers are thieves”
  - Knupffer v London Express Newspaper

## Who can sue?

- Not Dead people
- Public bodies?
  - *Derbyshire v Times Newspapers* – arms of local and central government
  - *Goldsmith* – applies to political parties as well
  - *Duke v University of Salford* – but not universities
  - *McLaughlin v Lambeth* – or public servants
- Corporations
  - unless they have no trading reputation within the jurisdiction

# Single publication

- Limitation Act 1980
  - one year time limit
  - subject to possible extension
- Old: multiple publication rule
  - continuous availability = continuous publication
  - Loutchansky notices
- Reform: single publication rule
  - driven by Rupert Murdoch press
  - section 8 Defamation Act 2013

## Single publication

- First publication of statement
- Subsequent publication
  - includes “substantially the same” statement
- Cause of action “accrues” on first publication
- Not if manner of publication is “materially different”, taking into account
  - level of prominence
  - extent of subsequent publication
- Court can still extend time

## Practical action

- Decide on a strategy
- Decide whether to use section 5
- Design a response procedure
- Designate individuals to deal with responses
- Designate senior individuals to make “risky” decisions

## Example procedure

- Is the complaint clear?
  - if not - respond to complainant asking for more information
- Does the complaint hold any water?
  - if unclear - refer to more senior person
  - if still unclear - consult lawyer
  - if not, keep statement and respond to complainant with explanation
- Would it be practical for the complainant to sue the author?
  - if so, refer complainant to section 10, Defamation Act 2013
  - explain the situation to the complainant
- Do we keep the statement anyway?