Introduction

These notes are meant to accompany the slides to my talk. They are intended merely to supplement what I say with a few additional pieces of information. They are neither comprehensive nor complete and in some cases are simply in note form.

I have tried to ensure that the law is up to date for 5 March 2015

I - the law of defamation

Terminology

"defamation"

These notes will start with an explanation of what is and is not "defamatory", but first something needs to be got out of the way. Sometimes people use the term "defamatory" only for statements that are untrue. Indeed there can be quite heated arguments about it. As will, I hope, be clear, it is better to think of "defamatory" as referring to certain kinds of statements that hurt someone's reputation even if they might be quite true.

In other words the statement:

"Lord Archer is a convicted criminal"

is defamatory (but true).

"libel" and "slander"

Defamation is an umbrella term for two distinct kinds of claim (technically known as **causes of action**), which are:

- **libel** - written, broadcast or performed statements
- **slander** - spoken (or otherwise impermanent) statements

Since defamatory material published on websites will be libel, the practical differences between libel and slander are left to Appendix **??**.

Some anatomy of a defamation claim

Defamation is part of an area of law known as the "law of **tort**" from which we derive two eye-watering words: **tortious** and **tortfeasor**. The following is an outline of how a defamation (and indeed most tort claims) is carried out. I am simplifying by omitting applications and injunctions which can happen *at any time.*

If someone feels they have been defamed they will do the following:

1. They should (on pain of costs penalties) carry out the **pre-action protocol** requiring them to write a letter before action to the person/people they intend to sue.
2. They will fill in a **claim form** (old word "writ") and ask a court to **issue** it.
3. They are now know as the **claimant** (old word "**plaintiff**" in Scotland "**pursuer**") - we will call them "C" throughout.
4. Either with the claim form, or shortly afterwards, the claimant must also serve what is known as a **particulars of claim** - which sets out the details of the claim which they are bringing.
5. They will then **serve** it (i.e. give it to one way or another) on one or more people who will then be **defendants** (affectionately "D")
6. The defendants will then create a document known as a defence which will do two things:
   (a) deal with each point in the particulars of claim saying whether the defendant denies it, agrees that it is true, or does not know;
   (b) sets out the defendant's positive defences and any facts that the defendant relies on.
7. Many things can happen: the court will have one or more case management conferences or hearings to decide how the case should proceed and when evidence should be served; either party may make applications (and they usually will as we shall see), injunctions may be granted or discharged and so on….
8. Eventually the parties will have exchanged **witness statements** (the written evidence the witness is to give) and then there will be a
9. Trial
10. After the trial if the claimant has one they may seek to enforce any judgment; there may be an appeal etc.

Applications and injunctions

In the civil procedure rules anyone can make what is known as an "application" at any time.[1] Applications are very flexible. In rare circumstances:

- they can be made even before proceedings have started
- they can be made by non-parties.

In defamation proceedings the applications one is likely to see are:

- for an order to stop publication (called an **injunction**), perhaps before publication has happened and even without the knowledge (at first) of the defendant. Such an injunction would constitute what is known as "prior restraint" and would constitute a serious restriction on free speech. As a result the courts are very reluctant to make such orders except in special circumstances.
- to find out information, particularly the identity of a proposed defendant, from an innocent third party - a **Norwich Pharmacal** order.
- to ask the judge to decide a question of law
- for summary judgment (on the grounds that the other party has no *reasonable prospect of success*)
- for striking out (i.e. a deletion of part of one sides pleadings on the ground that they are irrelevant, wrong in law or disclose no cause of action)
- … a myriad of case management orders

Elements of defamation

To sue successfully for defamation C will need to prove:

1. A statement S
2. Identifiably about C
3. S has the meaning M
4. M is defamatory of C
5. S was published by D
6. The publication of S has caused or is likely to cause **serious harm** to the reputation of C

Serious harm

The requirement of serious harm was added by the Defamation Act 2013.[1] There has been very little consideration of what it means by the courts, but it is likely to make life more difficult for claimants.

A claimant will have to prove that their reputation either has suffered serious harm or that it is likely to do so. There will be some cases where serious harm is obvious (such as alleging that someone is a terrorist[2]) but in many cases the claimant will have to produce some evidence of harm to their reputation or risk having the claim dismissed at an early stage.

In the first case to consider what "serious harm" meant,[3] the defendant newspaper had published an apology for their defamatory article. The judge decided that meant that there was unlikely to be any risk of future harm – because anyone searching the internet for the article would almost certainly find the apology – and since there was no proof that any harm had been suffered, the claim was dismissed.

Cooke established that the time at which to test whether serious harm had taken place (or was likely to take place) was probably the date of issue (i.e. when the claim was started) rather than before. This seems to mean that a newspaper that is threatened with a libel claim can quickly apologies and avoid paying damages, although they may have to pay the claimant's costs of putting together their complaint.

It is far from clear exactly what you would need to do in order to prove serious harm.

For a "body that trades for profit", "serious harm" requires that the body has suffered "serious financial loss".[4] I hope that this will make it more difficult for a commercial organisations to sue individuals over trivial alleged libels, such as poor reviews, as, for example, Pimlico Plumbers threatened to do last year over reviews on Yelp.

What is defamatory?

The courts have made a number of efforts to define what it is for a statement to be "defamatory". In *Thornton v Telegraph Media Group*[5], the judge listed 9 well-known examples, including

[1] s1
[2] *Cooke v MGN* [2014] EWHC 2831 (QB) [43]
[3] *Cooke v MGN* [2014] EWHC 2831 (QB)
[4] s1(2)
[5] [2010] EWHC 1414 (QB)

> ... words [that] tend to lower the plaintiff in the estimation of right-thinking members of society generally?[6]

That expression would seem to apply only where the claimant has done something wrong. Surely "right-thinking members of society" ought not to treat someone less well because of something that was not their moral fault. However, the courts have held that defamation does include statements that carry no moral criticism, for example that they have a disease.

For example in *Youssoupoff v Metro-Goldwyn-Mayer Pictures* (1934) 50 TLR 581 the court held that an allegation that someone had been raped was defamatory. To some extent this may reflect prevailing social attitudes in the 1930's. The court held that a statement is also defamatory if it "tends to make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part", which would include an allegation that they were insane or had an infectious disease.

In some cases, a statement that held someone up to "contempt, scorn or ridicule" has been accepted as defamatory. In *Berkhoff v Birchill*, Stephen Berkhoff sued Julie Birchill for implying that he was "hideously ugly" in a ridicule alone might be defamatory

- likely effect of the words (not the actual effect)
- on "right thinking persons generally" – see Byrne v Deane for an example of something that was not defamatory because it claimed someone had acted lawfully.

Examples of imputations

A useful exercise is to think through the following imputations and consider whether they are (or are not) defamatory.

1. C is insane
2. C has HIV (does it make a difference whether C is "innocent" or contracted HIV through promiscuous *gay sex*)?
3. C has been raped
4. C has/had heart disease (what about 'flu?)
5. C is illegitimate
6. C has leprosy
7. X is a better journalist than C
8. C is a lawyer of only average ability

[6] *Sim v Stretch* [1936] 2 All ER 1237

Meaning

In deciding what something means (or what meanings it *could* have) the courts have developed a variety of approaches and rules.

- only one meaning - even though a statement may have multiple meanings, juries are directed to determine "the" meaning of a statement.
- intention is irrelevant (though it can be relevant to the Defamation Act 1996 and to some defences)

"natural and ordinary"

There are in fact two kinds of meaning that can be pleaded by a claimant. The first is what is known as the "natural and ordinary" meaning of the words.

- natural and ordinary meaning includes imputations and inferences
  - "Have you heard that Fox was reported twice as a spy" - defamatory implication that he was guilty.[3]
- hearer must be reasonably justified in understanding words to be defamatory
- not strained, forced or utterly unreasonable
  - not enough that it *might* be understood in a defamatory sense (see Capital and Counties Bank v Henty)
  - "suspicious people might get a defamatory meaning out of 'chop and tomato sauce"'[4]
- The ordinary reasonable fair-minded reader has been constructed by the courts as the person from whose point of view the meaning is to be assessed. Some of the qualities such a person is thought to have are:
  - reasonable intelligence
  - ordinary person's general knowledge
  - may include implications and inferences
  - fair minded and reasonable
  - 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

"Legal" Innuendo meanings

The word "innuendo" is used in two ways by defamation lawyers. The first in a non-technical sense to mean an inferred or implied meaning into words, the second is the label attached to a special kind of meaning that can be pleaded by a claimant. To distinguish it from the normal use of the word it is often called the "true" or "legal" innuendo meaning.

A legal innuendo is a meaning that a statement possesses because of the knowledge of additional facts that are not general knowledge. It may be that only some people to whom the statement is published are aware of those additional facts (and the claimant will have to prove it). That additional knowledge can make something that looked innocent into a defamation and vice versa.

A legal innuendo gives rise to a separate cause of action. I can sue once on publication to the general public and another time on publication to those with special knowledge.

Defences

Obviously a defendant can defend themselves by denying what the claimant claims (eg by denying that the statement was defamatory or was even published). But the publication of a defamatory statement can be defended in certain circumstances:

- Truth – the defendant proves the imputation conveyed by the statement is substantially true[7]
- Privilege – otherwise known as "absolute" privilege: the defendant proves that the statement was made on a privileged occasion. For example
  - reports of a statement made in Parliament
  - contemporaneous reporting of legal proceedings
  - statements made in legal proceedings
  - (possibly) statements made to one's lawyer in obtaining legal advice (there is some doubt over this - it may just be a qualified privilege.
- Qualified privilege
- Honest opinion
- Offer of amends

Qualified privilege and fair comment are defeated by the claimant proving **malice**. Like everything else in defamation "malice" has a peculiar technical meaning. Simply put it implies either that the statement was made for an improper motive or in the absence of honest belief in its truth.

[7] s2, Defamation Act 2013

Truth

It is a defence to prove that the "imputation" conveyed by the defamatory statement is true.

At common law there was a serious limitation on this defence comes in the form of the **repetition rule**. Where a defendant repeats a statement made by another it is not enough to prove that the statement was made, but that the statement was true.

For example even if the statement:

"There is a rumour that C murdered X"

were literally be true, the defendant would usually have to prove that C did murder X to defend a libel claim.

In *Lewis v Daily Telegraph Ltd*[1964] A.C. 234 Lord Devlin observed[8] that:

"… you cannot escape liability for defamation by putting the libel behind a prefix such as 'I have been told that …' or 'It is rumoured that …' and then asserting that it was true that you had been told or that it was in fact being rumoured. You have … to prove that the subject matter of the rumour was true."

this means that:

- adding "allegedly" after a possibly defamatory quote from someone else does no good at at all
- publishing a response by the defamed person, or noting that something is merely someone else's opinion is no protection.

Sometimes a statement that implies wrongdoing by C may means something a little weaker than that C is actually guilty of the wrong. Consider:

"Officers of the City of London Fraud Squad are inquiring into the affairs of Rubber Improvement Ltd. and its subsidiary companies. The investigation was requested after criticisms of the chairman's statement and the accounts by a shareholder at the recent company meeting."

What could that mean? Its direct meaning is easily justifiable (the Fraud Squad were investigating) but is that all? The Plaintiff in the case pleaded that it meant that they were guilty of fraud. The House of Lords decided that was going too far, but that it *could* mean that they had so conducted themselves as to attract suspicion.[5]

The courts have developed what are called the three *Chase* levels of meaning:[6]

1. guilty

[8] at p.283–4

2. reasonable grounds for suspicion of guilt - must be based on the conduct of the claimant (the **conduct rule**) and cannot be based merely on the fact that the police decided to investigate
3. reasonable grounds to investigate guilt

What is unclear is whether the "repetition rule" or the division of meanings into *Chase* levels of meaning has been abolished by the Defamation Act 2013.

Qualified Privilege

- Co-ordination of duty and interest
  - D had a duty or interest in publishing the statement
  - the recipient of the publication had a duty or interest in receiving it
- Defeated by malice
- Examples
  - confidential references
  - communications amongst the team

Honest Opinion

This defence seems to be intended to allow people to express honestly held opinions. It applies if three conditions hold:

- 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
    * report of court proceedings
    * various other statutory privileged reports

The Claimant can defeat defence if they prove that D did not hold the opinion, except where D published someone else's statement. In that case the Claimant can defeat the defence if they show that the defendant knew, or ought to have known, that the original author of the statement did not hold the opinion.

Outcomes

Why be afraid of a defamation claim?

- Injunction
  - May be made in the interim
  - Balance of convenience test for interim injunctions
- Damages
  - Potentially very large
  - Decided by juries, although the Court of Appeal does exercise some control over it. Juries sounds all very wonderful in theory but they have absolutely no sense of proportion when it comes to damages
- Costs - also potentially vast since defamation cases are usually heard in the High Court, are legally complex, dealt with by a very small group of specialised lawyers and involve long trials by jury. In general defamation claims are *very* attractive to lawyers who can laugh all the way to the bank.

An example of excessive awards is a case where an article claiming Elton John had a habit of chewing but not swallowing (in fact spitting out) food; had been observed doing it and medical evidence suggested this was a sign of Bulimia. The jury awarded compensatory damages of £75,000 (reduced by the Court of Appeal to £25,000).

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 - Issues relevant to websites

There are several, overlapping, defences available to a web host that may act as a defence against a claim for libel. They are:

- Innocent dissemination
- Section 1, Defamation Act 1996
- Section 10, Defamation Act 2013
- Section 5, Defamation Act 2013
- E-commerce directive

Defamation Act 1996

Under section 1 of the Defamation Act 1996, a defendant is not liable for a statement if they:

- were 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

"Author", straightforwardly means the person who originated the statement.

An "editor" is someone who has editorial or equivalent responsibility for the content of the statement or the decision to publish it. This is likely to include an activity such as moderating comments pre-publication, but I do not think it would include moderating comments in response to complaints (eg of abuse).

The word "publisher", in the context of the 1996 Act (and section 10 of the Defamation Act 2013, see below) does not mean simply someone who publishes (in the common law sense) a statement. It means a person whose business is issuing material to the public (or a section of the public) and who issues material containing the statement in the course of that business.

The key word here is "issue". For example, a bookseller is not a "publisher" for the purposes of this definition because they merely distribute books, rather than issuing them to the public.

In *McGrath v Dawkins* [2012] EWHC B3, the court rules that Amazon was not a "commercial publisher" of its website, because it the website was not its main source of revenue which comes from selling books etc. That seems to me to be rather generous to Amazon. The court also held that, despite the fact that Amazon did look at reviews and comments in response to complaints, it was not an "editor".

Section 10, Defamation Act 2013

Like section 1 of the 1996 Act, Section 10 of the 2013 Act is a generic defence to defamation that is not restricted to internet publication, but it will be generally useful for internet publishers.

Where a claim is for defamation is brought against someone who is not the author, editor or publisher (in the sense of the 1996 Act discussed above), the court has no jurisdiction to hear it unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

In practice this means that a claimant suing someone who was not an author, editor or publisher, would almost certainly have to produce evidence that it was "not reasonably practicable" to sue that actual author etc. There is, as yet, no case law on what this means, so there are several points that are not clear.

In the first place, it is possible to sue someone without knowing their identity. In *Bloomsbury Publishing Group v News Group Newspapers*[9] the court allowed a claim to proceed where instead of naming the defendants, they were described as:

> 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.

This approach has been used on a number of other occasions and has been endorsed by the Supreme Court.[10] Anonymity does not make *starting* a claim very much more difficult.

Serving the claim on the defendant might require a little more effort than usual. If it is clear that they will read something (eg twitter, facebook, a blog post) then a court might permit service via tweet or post. If their email address is available, then service by email could be used. A web host could be required to supply that email address by a Norwich Pharmacal Order.

It is quite possible that section 10 requires not that *starting* a claim be reasonably practicable, but the claim itself. Some lawyers have suggested that suing someone in the United States, where English defamation judgments are hard to enforce, might not be "reasonably practicable" because the claim itself would be pointless. This is not the literal meaning of section 10, but it is entirely possible that the courts will decide to interpret it that way.

[9] [2003] EWHC 1205 (Ch)

[10] Secretary of State for Environment, Food and Rural Affairs [2009] UKSC 11

What this means is that identity is not the end of the story. But if you are threatened over defamatory postings where you are not the "author, editor or publisher" and the real author etc is easily identifiable, you have a good argument that you cannot be sued.

Section 5, Defamation Act 2013

This is a defence available to "operators of websites" for statements posted on their website, provided they did not post the statement themselves – and presumably where it was posted on the their behalf either. A claimant may be able to defeat the defence, but only if they are able to prove three things:

- 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

Section 5 goes on to say that it is only possible to "identify" the poster if the claimant has sufficient information to bring proceedings against them. See my remarks on section 10 for difficulties with that condition.

The idea of section 5 is to try to put the claimant and the poster of the statement in direct contact and leave the website operator out of the dispute. Roughly speaking, having received a complaint, if the operator is unable to contact the poster, or the poster does not respond with a plausible name and address, or if they ask for the statement to be taken down, then the operator must take the statement down, otherwise the operator need only pass on the poster's contact details and may then leave the statement up without worrying about it.

In practice, section 5 is quite involved. Hopefully the following summary will help.

The process starts when someone (the "complainant") complains to the operator that a statement on their website is defamatory of the complainant. In order to constitute a proper "notice of complaint" the complainant must send a notice containing all the following information:

- their name and electronic mail address
- the statement
  - the meaning attributed to it
  - an explanation of why it is defamatory
  - where it may be found on the website

- 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
- whether the complainant consents to the operator providing the poster wit

Some of this is potentially useful. In my experience many complaints of defamation do not make clear what exactly is wrong with a statement, or in some cases fail to identity a specific statement at all. Forcing the complainant to set this out in a notice of complaint is useful.

An oddity about the notice is that the complainant has to confirm that they do not have sufficient information to bring proceedings, but the test in section 5 is that it is not possible for them to identify the poster. As discussed under the section 10 offence above, these are really quite different situations.

Even if the complainant fails to set out all the information they are supposed to, the operator must still respond within 48 hours of receiving the notice from the complainant, informing 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

Another oddity here is that the operator does not have to say what is wrong with the notice. As far as I can tell, a standard form response to any defective notice of complaint is fine. In practice it would almost certainly be better to tell the complainant where you think they have gone wrong.

If a valid notice of complaint is received, the next step seems to be designed to check whether the poster is a repeat offender. If

- that complainant has sent two or more previous notices of complaint about a statement that:
  - was posted on the same website
  - by the same person
  - and conveys the same or substantially the same imputation as each of the previous notices
- on each of those occasions the statement was removed from the website in accordance with the regulations (which would not be the case if the poster had formally resisted removal, or the statement was removed for some other reason)

- the complainant informs the operator, at the same time as sending the notice of complaint (you would expect, in the same letter or email) that the complainant has sent a notice of complaint to the operator on two or more previous occasions in relation to the statement

If all these conditions are met, the operator must remove the statement within 48 hours of receiving the notice of complaint and inform the complainant that they have done so.

Normally, a notice of complaint will not relate to earlier complaints. In that case, the operator must decide whether they are able to contact the poster personally. If they are not, then they must, within 48 hours of receiving the notice, remove the statement and send an acknowledgement to the complainant informing them that they have removed the statement.

"Able to contact" means able to contact **electronically**. If the poster is sitting in the same office as the operator, but the operator does not have an email address etc for them, then they are not "able to contact" them and must remove the statement.

If the operator is able to contact the poster, they must then, within 48 hours, send an acknowledgement to the complainant informing them that the operator is contacting the poster and also send the poster:

- a copy of the notice of complaint (with the complainant's name and address removed if they have not consented to the supply of that information to the poster)
- notification that the statement may be removed unless:
  - the operator receives a response from the poster by midnight on the 5th day after the day on which the notification was sent; and
  - the poster's response contains:
    * the poster's full name
    * the postal address of the poster's home or business
    * whether the poster consents to the operator providing the previous two items of information to the complainant
- notification that the poster's name and address will not be released to the complainant unless the poster consents or the operator is ordered to do so by a court

If, by midnight on the 5th day, the poster has not responded, or if they have responded but their response failed to contain the requirement information and indications as to whether the the poster consents to its release, of if they have responded correctly and asked for the statement to be removed, the operator

must, within 48 hours, remove the statement from the website and send a notice to the complainant indicating that they have done so.

If a reasonable operator would consider the name or postal address in the poster's response to be "obviously false", then the poster's response is to be treated as if it did not contain that information.

If the poster responds in time, with all the required information, and states that they wish the statement to remain, then the operator does not have to remove it. However they must, within 48 hours, inform the complainant that the poster does not wish the statement to be removed and that it has not been removed. If the poster consented to their name or address being provided to the complainant, that must be supplied at the same time. If the poster did not consent, the complainant must be notified in writing of that fact.

E-commerce directive

The e-commerce directive creates a general defence for those who are only "hosting" information, against almost all forms of liability for that information including defamation, but also other things such as copyright. The main exception is liability under the data protection directive (and hence the Data Protection Act 1998).

The defence applies to someone hosting information if:

- they are an Information Society Service
- they are innocent, in that:
  - they had no no actual knowledge of the unlawful information or
  - they acted expeditiously to remove or disable access once they had actual knowledge

Furthermore a hosting provider has no obligation to search out potential libels. For example in *Metropolitan International Schools Ltd*, Google could not be required to prevent future defamatory snippets appearing as a result of any search (although this decision would probably have been reached even without the benefit of the directive).

The defence does not prevent an injunction being made against a hosting provider.

Identity of claimant

The claimant needs to be identifiable, but it is enough if some readers are able to identify the claimant from the information given. They do not have to be named directly.

- "the man who lives in that house is a paedophile" [7]
- "X is illegitimate"[8]
- Hulton v Jones is a case of (probably) "accidental" defamation, which extends potential liability but it is unclear how far.
- O'Shea v MGN a case where someone looked like the person photographed - creates considerable difficulties if the idea were followed widely.
- class libel - although it is possible to libel a class of people a claimant has to prove that they individually were intended as the target because the courts accept that people make loose and wide generalisations
  - "all lawyers are thieves" would not permit any lawyer to sue[9]
  - Knupffer v London Express Newspaper was a case where the class of people (members of an organisation) was very small, but the claim still failed for lack of proof that a particular individual was intended.

Practical examples that might come up with a site like www.whatdotheyknow.com: officers of a public body are criticised either by title "the Freedom of Information Officer", or by implication "whoever was handling this case was incompetent".

public bodies

The House of Lords held in Derbyshire County Council v Times Newspapers that an organ of local or central government may not sue for defamation. This probably applies to other public bodies, but how far the line is drawn is unclear. Happily the principle applies to political parties as well[10] but we do not have the wonderful US rule which makes it very difficult for public figures to sue.

Something defamatory of a council may easily imply that someone in the council is defamed too. The fact that someone is a public servant may sue if they are defamed even if the defamation is linked to their carrying out public functions.[11]

Corporations in general do have reputations and can sue for libel. This applies even to very large and powerful corporations[11] although if they are unable to show any trading loss their damages will be kept in "tight bounds".[12]

publication

Must be to someone other than the claimant and/or defendant (so insulting someone in an email sent only to them is not defamatory). Two authorities are relevant to us:

[11] McLaughlin v London Borough of Lambeth [2010] EWHC 2726

- Byrne v Deane - allowing something to remain that you could remove may constitute publication
- Godfrey v Demon Internet - for example leaving defamatory posts you have been informed about on a USENET server would constitute publication.

Linking? Does linking to material constitute publication? There is (as yet) no direct authority on this point in English law. Some old cases could give us a clue:

- Hird v Wood - the defendant sat on a stool near a placard which had been put up on the roadway containing defamatory matter. He remained there for a long time smoking a pipe and he continually pointed at the placard with his finger and thereby attracted to it the attention of all who passed by. HELD: publication.
- Smith v Wood - the defendant has a copy of a libellous caricature print. A witness heard that the defendant had a copy, went to visit him and asked to see it. The defendant produced it to him and pointed out the figure of the plaintiff. HELD: no sufficient evidence of publication.
- Lawrence v Newberry - letter published in a newspaper referred its readers to a speech in the House of Lords which was alleged to contain defamatory matter. HELD: the letter published the defamatory matter in the speech.

It is hard to draw any firm conclusions. It seems to me that a link to something defamatory with text saying "here is a defamation" would certainly be publication.

Appendix A

Case Extracts

Byrne v Deane

The plaintiff was a member of a golf club of which the two defendants were the proprietors and the female defendant also the secretary. One of the rules of the club provided that "no notice or placard shall be posted in the club premises without the consent of the secretary." Certain automatic gambling machines had been kept by the defendants on the club premises for the use of the members of the club. Some one gave information to the police, with the result that the machines were removed from the club premises. On the following day some one

put up on the wall of the club a typewritten paper containing the following verse:-

"For many years upon this spot
You heard the sound of a merry bell
Those who were rash and those who were not
Lost and made a spot of cash
But he who gave the game away
May he byrnn in hell and rue the day."

The word "byrnn" was blacked out in the original and the word "burn" substituted for it. The plaintiff brought a libel action against the two defendants alleging that they had published the words in the notice of and concerning him to the members of the club. He alleged that the words meant that he had reported to the police the existence of the machines upon the club premises and that he had been guilty of underhand disloyalty to the members of the club.

Held: (1) not libellous because a law-abiding member of society would think Mr Byrne had acted properly; (2) there was sufficient evidence of publication because the defendants had not removed the note despite being aware of it.

Capital and Counties Bank v George Henty & Sons[13]

H. & Sons were in the habit of receiving, in payment from their customers, cheques on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch. Having had a squabble with the manager of that branch H. & Sons sent a printed circular to a large number of their customers (who knew nothing of the squabble)—"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the" bank. The circular became known to other persons; there was a run on the bank and loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency.

Held: the natural meaning of the words was not libellous.

Hulton v Jones[14]

Mr Artemus Jones, a barrister in practice, had been at one time on the staff of the Sunday Chronicle , a newspaper owned and published by the appellants, and contributed articles signed by himself to some of the appellants' publications. The appellants published in the Sunday Chronicle an article a part of which ran thus;

""Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. … 'Whist! there is Artemus Jones with a woman who is not his wife, who must

be, you know—the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham? No one, indeed, would assume that Jones in the atmosphere of London would take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

Artemus Jones complained and the newspaper printed the following apology:

"It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones referred to in our article was not Mr. Thomas Artemus Jones, barrister, but, as he has complained to us, we gladly publish this paragraph in order to remove any possible misunderstanding and to satisfy Mr. Thomas Artemus Jones we had no intention whatsoever of referring to him."

Note that: "apart from the name used, none of the details with regard to the imaginary personage described in the libel were applicable to the plaintiff, inasmuch as he is not a married man, nor a churchwarden, nor a resident of Peckham; nor was he either a frequenter of Dieppe or there at the time when the scene described in the alleged libel took place."

Held: for the plaintiff.

Chase v News Group Newspapers

On the front page of the newspaper for June 22 there was a large headline "Nurse is probed over 18 deaths: World Exclusive". The article said that she was suspected of overdosing terminally ill "youngsters" with painkillers. It identified the children concerned as nine boys and nine girls, aged between eight weeks and 17 years.

Held: The words were incapable of meaning merely "reasonable grounds to investigate". In order to justify a publication to the effect that there were reasonable grounds to suspect that the claimant was guilty of an offence, a defendant had to establish that there were objectively reasonable grounds for such suspicion. The defendant could not establish this and would therefore fail.

Appendix B

Libel v Slander

Recall that originally libel was for writing and slander for spoken forms of defamation. Over time libel has absorbed almost any form of non-spoken

defamation, including anything broadcast and anything recorded in permanent form.

Why does this matter? Libel has a historical origin as a part of the criminal process and a means by which the state could prevent scurrilous printed material. As a result libel is one of the very small number of causes of action where there was no need to prove damage of any kind.

Slander, on the other hand, has a different background. In most cases for there to be a valid claim for slander, actual damage would have to be proved. There were some exceptions to this for particularly serious slanders, such as a a statement that a woman was unchaste.[12]

Although it may feel like a slander, everything written on the web will be treated as a libel. Thus whether or not there was damage is immaterial.

Since the Defamation Act 2013 has imposed a requirement of "serious harm"[13] it seems to me that this distinction is likely to be very obscure. Claims for slander are fairly rare. The fact that a defamatory statement was slander rather than libel would matter only where there had as yet been no damage to the claimant's reputation but where serious harm was likely to be caused.

Appendix C

Judges and juries

All the following material is, to some extent, obsolete. Juries will be very unlikely to be used for defamation claimes, in line with almost all other civil claims. But the existence of juries until very recently has had its mark on the law of defamation, so I have included below my previous notes on judges and juries.

Fox's Libel Act[2] reformed the criminal procedure for libel so that trial was always before a jury. That rule has been adapted to civil proceedings so that a defamation claim is almost always heard in a trial by jury. This is now unusual because in England and Wales we have largely dropped the use of juries for civil claims except for a small number of rather special causes of action (such as claims against the Police for false imprisonment). Because trial is usually by jury it is important to understand the different roles judges and juries have.

- Judges - decide questions of law, which can set precedent
- Juries - decide questions of fact, which cannot set precedent

[12] s1, Slander of Women Act 1891, repealed by s14, Defamation Act 2013
[13] s1

Most lawyers understand the law/fact division but it is not at all plain to the lay person. For example whether a statement **is** defamatory is obviously a question of fact (which a jury would decide) but whether it is the kind of statement that **could be** defamatory is a legal question (which a judge would decide).

This has several consequences:

1. The judge can make decisions about what meanings a statement could have and whether they could be defamatory at any stage prior to the trial as well as at the trial. A common tactic to use at an early stage is to try to knock out meanings or indeed the whole case by an application for **summary judgment** or **striking out**.
2. The case law has to be read with care because the decisions are usually about what *could* be defamatory not what *was* defamatory. The decision of a jury is neither here nor there.

This means that in a defamation claim the following processes could occur.

1. C pleads that the S means M
2. The judge considers:
   (a) could S mean M? (is M a meaning S is capable of bearing)
   (b) is M capable of being defamatory?
3. The jury considers:
   (a) what does S mean?
   (b) is **that** meaning defamatory?

1Players familiar with pre-6th edition *Magic: the Gathering* will find applications reminiscent of interrupts.

2Libel Act 1792 (32 Geo. III c. 60)

3*Fox v Goodfellow* (1926) NZLR 58

4Lord Justice Scrutton in *Bennison v Julton*, The Times, April 13, 1926

5Rubber Improvement Ltd v Daily Telegraph [1964] A.C. 234

6*Chase v News Group Newspapers* [2003] EMLR 11

7Channel 7 Sydney v Parras [2002] NSWCA 202

8Cassidy v Daily Mirror

9Eastwood v Holmes

10Goldsmith v Bhoyrul [1998] Q.B. 459

11MacDonald's Corporation v Steel (No. 4), the Independent, May 10, 1999

12Jameel v Wall Street Journal Europe SPRL (No.3), [2006] UKHL 44; [2007] 1 A.C. 359

13(1881-82) L.R. 7 App. Cas. 741

14[1910] A.C. 20