The 'Tort' of Defamation

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"Slander, whose whisper over the world's diameter, as level as the cannon to its blank, transports its poisoned shot"- Williams Shakespeare

Most Sri Lankans are aware of the term 'Defamation'. We might have heard about it on the news when a politician saying that he or she would sue someone over a million rupees because the latter politician had said something about the former which is offensive or unpalatable. For example, one of the well-known defamation cases is the case by former Defense Secretary and our current Sri Lankan President Hon. His Excellency Gotabaya Rajapaksa who sued "The Sunday Leader" paper for Rupees 2 billion in 2010. The wrong of defamation consists in the publication of defamatory matters concerning another without lawful justification or excuse[1].Thereby, a person or organization whose reputation has been attacked could sue for defamation if the damaging material was published.

Nowadays, social media platforms have captured a premier position in the news limelight. Individuals and entities are criticized, even insulted, on a daily basis on social media, as if there were no repercussions for such acts because it instantly allows to 'publish' a statement that reaches millions of people. Even though Facebook or any other social media platforms have imposed its own regulations, these individuals could be sued, for millions, using centuries-old law; the law of defamation.

The Law relating to defamation in Sri Lanka consists of elements drawn from two legal systems namely Roman Dutch Law and English Law. In Roman Law and early Roman Dutch law, Defamation was considered as a species of injuria however with the influence of English Law, one could see that laws pertaining to defamation, ever since its enactment have taken a new dimension. Even though both the Roman Dutch Law and English Law seem to have theoretically different approaches they both seem to be practically identical.

for an example;

English Law distinguishes spoken defamation (slander) from written defamation (libel) whereas Roman Dutch Law makes no distinction between slander and libel.

Also intention is not material in English Law whereas in Roman Dutch Law wrong intent needs to be proven before the defendant is punished.

Earlier in Sri Lanka, defamation was considered as a criminal liability which was regulated by **Section 479** of **Chapter XIX of**

Penal Code and **Sections 14 and 15** of **Press Council Act No. 5 of 1973**.During this time these laws were used to threaten and intimidate journalists and media

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[1]R.G. McKerron The Law of Delict 7th Edition at 170

activists. We could witness in the past that a couple of Journalists like Former Ravaya Editor Victor Ivan and Editor of Sunday Leader Lasantha Wickremathunge were also convicted for criminal defamation for the content published in their newspapers. Later in 2002 due to the repealing of the Penal Code now defamation is filed under civil actions which outweighed the colonial baggage kept on the statute books for more than a century after independence. Hence, the claim of defamation is filed in District Court where the defendant resides or where the defamatory material was published. Sri Lanka is the first and only country in the South Asian region to have done away with the law of criminal defamation.

However, as a Democratic nation our country has granted citizens the freedom of speech and right to voice their opinion via embracing these natural entitlements in our constitution, **Article 14(a)** which grants permission to citizens of Sri Lanka for any form of speech that assures racial and religious harmony or in relation to parliamentary privileges (**Article 15(2)**). However, this right has triggered a controversial debate, in recent years. It has forced the laws pertaining to this area to strike a balance between right to expression and protection of an individual's privacy hence nowadays this right is subjected to restrictions and violating such restrictions by the ways of contempt of court, defamation and incitement of an offence would be penalized.

The case of ***Amaratunga V. Sirimal***[2] concerns several political parties protesting against the Government through Jana Gosha, a method of noisy protest including the ringing of bells and beating of drums. The police reacted with assault, tear gas and baton charge against the crowd. Fortunately, the court found this as unjust and as the people's fundamental right of freedom of speech has been infringed. One protestor who was assaulted was awarded with compensation by the state.

In the case of***Mohottige V. Gunathilake***[3]Justice Bandaranayake declared that "***Freedom of speech and expression includes the right to fairly and within reasonable limits criticize the government***". But who defines those limits? In order to answer this question, the courts have developed four essential requirements which need to be fulfilled, over these years through several judicial precedents for any legal person to file a defamation action against another;

1. **Statement must be defamatory**
2. **They must refer to the plaintiff**
3. **It must be published**
4. **There must be animus injuriandi on the part of the defendant.**

It is a necessity that in order to prove guilt in a defamation action all the above four requirements should be satisfied.

The first essential is where the **statement should be deemed to be defamatory**, which means that the statement causes to **diminish the esteem of the person** to whom the statement is referred to the eyes of the reasonable prudent citizens in the community cause the person to be taunted by the general public. This could reflect upon the moral character of the plaintiff such as dishonesty, attributing plaintiff has caused a crime or improper conduct. To establish what meanings are conveyed by

[2] 1993 1 SLR 264

[3] 1992 2 SLR 246

the entire published statement should be considered.

Courts when deciding on this requirement have always taken concern to analyze whether it actually creates **contempt or undue ridicule** to the concerned person or organization. For an example in the case of ***De Villiers V. Vels***[4] it was held that defamation imputes the person as insane, illegitimate, physically deform or affected by certain types of infectious or contagious infection.

In the case of ***Appuhamy V. Kirihami (1895)*** the first defendantadmits that at a private dinner party he excused himself from sitting down at the same table with the first plaintiff for the reason that the daughter of the latter had run away with a Wahumpura man of low caste. This statement was made in the presence of a large room of people and in the presence of the plaintiff. This was considered a statement which reduced his esteem in society.

But in the case of ***Thorley V. Kerry***[5]and***Fernando V. Fernando***[6]the courts have held that mere language or statement claimed to have caused such reputational damage or mere words of vulgar abuse could not be held actionable.

There are two types of defamatory statements;

1. **Prima Facie Defamatory** - where the statement in natural and obvious sense conveys a defamatory statement.
2. **Prima Facie Innocent or Innuendo** - where implied defamatory connotations could be derived by reading between lines or by extrinsic information.

According to McKerron, "Words on the face of them innocent may be used in some latent or secondary sense so as to convey to the person to whom they are published. An imputation defamatory of the plaintiff and conversely words on the face of them defamatory may be used in some latent or secondary innocent sense".

It should be noted that even though the statement is prima facie defamatory or not still innuendo could be pleaded through pleadings.

At the instances of innuendo, the plaintiff must prove the **significance of such statements** whereas he is **obliged to allege the special circumstances** which he relies upon as supporting his innuendo. In the case of ***New Age Press Ltd. V. O'Keefe***[7] The plaintiff was urged by the bench to justify the **particular sense** in which the words deemed to be identified as defamatory.

Meanwhile, there can be false statements which don't institute defamation but can be filed action and can claim compensation if any damages caused due to it. (Actio Iniuriarum)

The next requirement is that it **must refer to the plaintiff**, therefore plaintiff must identify himself as the person who is defamed. The **test** to ascertain this is where any prudent man while listening or reading such a defamatory statement should be able to understand that it denotes the plaintiff. A defendant may publish materials in the

[4]1921 OPD 55
[5](1812) 4 Taunt 355
[6]26 NLR 84

[7](1947) 1 S.A.L.R 311

form of a story or novel that are apparently fictitious characters where a reasonable person would understand that a particular character actually refers to the plaintiff. This is true even if the author states that he intends the work to be fictional.

In the case of ***Hulton V. Jones***[8], a barrister who was not a church warden filed a defamation case against a newspaper who published an article about a fictitious church warden with the same name. Court held that there were possibilities for people to assume that such an article was about the plaintiff. Here the court stated about the aforementioned test and also said that the intention of the defendant is irrelevant.

This was also discussed in a local case of***Felix Dias Bandaranaike V. The State Film Corporation and another***[9]In this case a permanent injunction was sought to restrain the defendant from releasing the film "Ape Rate Wada" for exhibition because the plaintiff had identified it as being defamatory to him. According to him the main character of the film, the minister of the highways was intended to refer and represent the plaintiff and was likely to be identified as him by the members of the public who see the film. The main role of the film was portrayed as a corrupt person who has abused his official benefits. Therefore, he alleged that the main character bears a strong resemblance to him and that he would be identified by the public as the Minister who is responsible for such corrupt acts.

In a situation like this the plaintiff claims that particular words could be understood as referring to him, the defendant is entitled to show that he did not intend the statement to be so understood but this by itself is not a good defense.

The other essential aspect is that the **statement should be published**. What is meant by 'published' is that the statement was intentionally or negligently communicated by the defendant to some other persons than the plaintiff. In other words, publication should be for at least one person other than the person who is defamed and if the defendant makes a direct statement to the plaintiff in private and if it is not revealed in general public by the defendant the statement is not considered as published. This publication will not be satisfactory unless the third party understands **defamatory significance** that they referred to the plaintiff.

Publication certainly includes traditional forms such as communications which includes books, newspapers, magazines and oral remarks. One of the very crucial cases of ***Vizetelly V. Mudie's Select Library (1900)***one could clearly understand this concept. The case facts - after knowing that there is an article which was with defamatory concern about the plaintiff, the library overlooked the letter which brought this to their attention. Consequently, the courts came up with three defenses for the defendant to prove the innocence;

- lack of knowledge about defamation.
- No intention to publish such a defamatory statement.
- No negligence on the part of the defendant.

As the defendant could not satisfy these conditions the court held the library liable. Meanwhile, the plaintiff alleged the

[8](1910) AC 20

[9](1981) 2 SLR 287

newsboy who distributed this to the customers of that publication also held liable but the courts held that 'carrying the newspaper is not the same as carrying the fire'-***Emmens V. Pottle***[10]and stated that there was **no strict liability** on the part of the newsboy.

This can also be seen in the case of ***African Life Assurance Society Ltd. V. Robinson and Co. Ltd.***[11]and ***Huth V. Huth.***[12]

In the case of "unintentional publication" the defendant is not liable if a third party by his own act sees or hears the defamation but if he foresees it, he will be liable.

However, there is a general rule where the words are published of a class of people and there is nothing to show which one was meant, none can sue, unless the statement purports to refer to a small ascertainable class where under particular circumstances one could identify that it refers to one or more individuals.

According to Lord Atkin "A libel published of a large number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact, included in the defamatory statement".[13]

In the case of***Knupffer V. London Express Newspaper Limited***[14] Lord Porter stated that the size of the class, the generality of the charge and the extravagance of the accusation may well all be elements to be taken into consideration but none of them is conclusive. Each case must be considered according to its own circumstances. For an example as stated in***Levy V. Moltke***[15] The courts decided that the phrase **'all members of jury'** can be sued because it refers to a definite class of people.

Any Domestic verbal assault is not considered as a publication and therefore no action could lie as mentioned in the case of ***Wennhak V. Morgan***[16]communication of defamatory matters among spouses is not considered as defamation but either spouse can file an action for defamation on behalf of the other.

Moving on to the final requirement **there should be an animus iniuriandi of defendant**, according to Roman Dutch Law, there should be an intention on the part of the defendant via publication of the defamatory statement to cause injury to self-esteem of the plaintiff. The onus of proof is on the plaintiff and he or she has to prove on the balance of probabilities that the defendant has published such defamatory material with the motive of injuring the plaintiff.

Since this is a presumption that it is always eligible for rebuttal. Even if the defendant says that he honestly believed the statement is true yet such a statement will be malicious if the belief is unreasonable.

In the case of ***Associated Newspapers of Ceylon Ltd. V. Dr. C. H. Gunasekara***[17], a newspaper filed defamatory matters concerning the plaintiff. Defendant tried to prove the absence of animus injuriandi and it was not successful. It was held that defamatory matters might increase the sales

[10] (1885) 16 QBD 354
[11]1938 NPD 277
[12](1915) 3 KB 42
[13]Alastair Mullis, Ken Oliphant, Torts 4th Edition at 290
[14](1994) 1. All. E.R. 495 (HL)
[15]1934 EDL 269, 315
[16](1888) 20 QBD 635,639
[17]53 NLR 481

of the print as the reason why it was included in the paper.

A defamatory claim could be mitigated by issuing a retraction and apology to the concerned individual. In the case of a newspaper article the retraction and apology should have equal prominence as the initial defamatory article.

In addition to general defenses, there are some special defenses exclusively available to defamation. If any or all of these following defenses were proved, they would absolve the defendant from liability.

1. Truth of Justification

Even though truth is considered as a defense in Sri Lanka, this **cannot be taken alone**. Defendant should be able to justify that the alleged defamatory statements were mentioned by him for the **public benefit**.

It was held in a local case of ***De Costa V. Times of Ceylon***[18] that the ingredients of truth and public benefit are essential to sustain pleas of justification and if the statement is true, no amount of malice or bad faith in its falsity will defeat the defence of justification and similarly if the facts are false no amount of good faith or belief in its truth will establish the defence.

One of the aspects of this defence is that it can succeed even when the statement was motivated by malice. This means that a newspaper could deliberately destroy a person's reputation if it could obtain enough materials to do so.

In the case of ***Chelliah V. Fernando***[19] The Defendant stated that the plaintiff was guilty of immoral conduct and that several men had kept her as a mistress. Soertsz J observed *"Roman Dutch Law requires not only that the words were true in substance and in fact it was for the public benefit that they should be published. Adultery is not an offence under our law and I fail to see how the private morals of a woman can be of public interest or how it can benefit the public to be informed of them".*

2. Fair Comment

This defence is based on the fact that every person has a right to express an **opinion honestly and fairly** of matters which are of public interest, which enlightens the right of free speech to all. This has been defined as "Criticism of matters of public interest, in the form of comment upon true or privileged statements of facts, such comment being made honestly by a person who did not believe the statement be untrue and was not otherwise actuated by malice".[20]

In***Kemsley V. Foot***[21]where the courts held that every person has a right to comment fairly, freely and honestly on matters of public. As long as this can serve three important ingredients such as;

I. a reasonable man can recognize it as a comment and not as a statement of fact.
II. the comment is fair and bonafide
III. the facts of the statement are true and accurately stated in order to fulfil the public interest.

For an example;***De Costa V. Times of Ceylon***

[18]65 NLR 217 (PC)
[19]39 NLR 139

[20]John Murphy, Street on Tort 12th edition (2007) at 422.
[21](1952) AC 345

3. Privilege

Law recognizes some occasions on which freedom of speech without fear as actions for defamation is more important than protection of a reputation of the person. Thus, the presumption of animus injuriandi can easily be rebutted if it can be proven that it was made on a privileged occasion.

Privilege can be either **absolute** such as judicial proceedings, anything said or done by members of parliament during the course of parliament sessions and also broadcast of parliamentary proceedings and the other official reports of the parliament or **qualified** such as publication of report of proceedings in courts of justice or parliament as long as it is fair and substantially accurate.

In absolute privilege no action for defamation can be brought even if the person making the defamatory statement made knowing it to be false and did it with intention to damage the reputation of another but the defense of qualified privilege can be rebutted by proof of malice and the owners ease on the plaintiff to do so.

For an example in the case of *Peter V. Neate (1883)* which includes a situation where a person has been dismissed from employment and the publication consists of a communication from his employer to his fellow servants of the grounds for such dismissal.

4. Miscellaneous Defences

Miscellaneous defences consist of defences such as jest, mistake , compensation and rixa (provocation).For an example ***Cantley V. Vanderspaar***[22]In this case the postscript to a letter written by the defendant addressed to the firm of Messers. Julius and Creasy were as follows; “is there any truth in the report that Mr. Creasy has turned Muhammadan and married Mrs. Cantley? We would like to send both a present”. The courts held that the mere statement of joke is not sufficient, the circumstances must prove that the hearer was not offended or reasonably felt that such statement was attached to defamatory meaning to the words.

In conclusion, a gentle reminder that according to official police records, traditional street crimes are decreasing but cyber-crimes such as defaming anonymously and verbal assault in online platforms are steadily increasing over the recent years and researches indicated that there are massive gaps in laws and provisions over the cyber-crimes. In some respect, it is understandable given their novelty to the country, but that is not a caveat to not pursue progressive new legislation. It is high time that our legal system takes necessary measures to cover up the burgeoning scope of cybercrime in order to draw level with this rapidly changing social communication system and also as responsible citizens we all must take a stand to only communicate matters relating to others which are assured and keeping the welfare of the society as the paramount concern. As the world's first moral philosopher Socrates once said **“when the debate is lost, slander becomes the tool of the loser”**.

[22]1914 NLR 353