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## DEFAMATION GUIDE

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## Introduction

Defamation is a tort (a civil wrong) which arises when defamatory material relating to an individual is publicly disclosed. This guide addresses the law of defamation in England as at February 2013.

Defamation is of the utmost importance to the developing world. It is an essential element of the "Article 8 vs Article 10" (Privacy vs Freedom of Speech) debate since defamation has the potential to clash with a person's right to freedom of expression, which can result in censorship or publishers dreading possible lawsuits.

## What is defamation?

There is no statutory definition of defamation but according to Lord Aitkin in the case of *Slim v Stretch*<sup>1</sup>, an individual is considered defamed if he is '*lowered in the estimation of right thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem*'.

Defamation is divided into slander and libel. If the defamatory statement has been published in permanent form it is libel. Permanent forms of publication include newspaper articles and books, but are also deemed to include television and radio broadcasts, theatrical performances, photographs and posts made on the internet. If the defamatory statement is published in a temporary or transient form it is slander. Temporary forms of publication include oral statements from one person to another person.

## The burden of proof

The burden of proof rests with the claimant. The claimant must show that the alleged defamatory material:

- is defamatory of him;
- refers to him; and
- has been published to a third person.

To be 'defamatory', as mentioned above, the *Slim v Stretch* definition to '*lower a claimant in the estimation of right thinking members of society*' is often used. Another traditional approach is whether the words would cause someone to be '*shunned or avoided*'.<sup>2</sup> Words which simply cause hurt feelings or annoyance but do not have an impact on reputation are not considered defamatory.

Where the claimant has been named in the statement then there is not likely to be a disagreement as to whether it refers to the claimant. If the claimant has not been

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<sup>1</sup> *Slim v Stretch* [1936] All ER 1237

<sup>2</sup> *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581

named, however, then the claimant will have to demonstrate that they are identifiable from the words used.

The third element to be proven is that the material must have been published to a third person. This means it must be read, heard or seen by someone other than the person who made the initial allegation and the subject of the allegation.

## **Within what time period must defamation proceedings be commenced?**

This is typically within one year from the date of publication of the material containing the defamatory allegations. However, in exceptional situations the court can extend this time period.

## **Defences**

### ***1) Justification***

The plea of justification is an absolute defence. The presumption exists that any defamatory statement is false. Therefore the burden lies on the defendant to rebut this presumption and prove that the statement is/was true. Where a defendant alleges that the words complained of are true he must identify the defamatory meanings he seeks to validate and give details of the matters relied on in support of that allegation. The defendant does not have to prove that each detail is true.

### ***2) Fair comment***

The defence of justification defends statements of fact, whereas statements of opinion are covered by the defence of fair comment. If the words complained of contain a mixture of fact and opinion, justification should be pleaded to the facts and fair comment to the opinion.

Unlike justification, the defence of fair comment is not an absolute defence. The defendant must identify the defamatory meanings he seeks to defend as fair comment on a matter of public interest, and give details of the matters relied on in support of that allegation.

The defence of fair comment is defeated if the claimant can plead and prove that the defendant published the defamatory allegations maliciously.

### 3) *Absolute privilege*

Absolute privilege is a complete bar to an action for defamation on the basis of public interest. This means that once a defendant has established that a statement was published on an occasion which the law will shield, such as statements made in the course of parliamentary proceedings, the statement is completely protected from an action of defamation. This defence gives complete protection to fair, precise and contemporaneous reports of court proceedings.

### 4) *Qualified privilege*

Qualified privilege covers situations where it is felt that freedom of expression should overcome the protection of reputation, but not to the degree of granting absolute immunity. The defence is divided into three main groups of publications:

- i. Defamatory statements made under a social, moral or legal duty to a person who has a corresponding interest in receiving them e.g. Publications between an employer and employees are likely to be covered by this privilege.
- ii. Reports of proceedings listed in Schedule 1 Defamation Act 1996 e.g. documents made available by UK and other European courts, public proceedings of local authorities and proceedings at general meetings of public companies.
- iii. Reports of parliamentary and judicial proceedings e.g. this applies to journalists reporting on the proceedings of a court so long as the information recorded is fair and accurate.

The case of *Reynolds v Times Newspapers Ltd* provided the "Reynolds defence", which can be raised where it is obvious that the journalist had a duty to publish an allegation even if it turns out to be a mistake. A list of ten criteria was established against which attempts to use the Reynolds defence should be judged which include criteria such as the seriousness of the allegation, the tone of the article and the circumstances of the publication.

### 5) *Offer of amends*

An offer of amends gives someone who has made a defamatory statement a chance at an early stage to offer to pay damages and the costs of the claimant, alongside offering them an apology. This is a statutory defence under section two of the Defamation Act 1996. The purpose of this defence is to resolve defamation claims quickly and cheaply, and is often used by newspapers where they have made a statement which is unintentionally defamatory. If the offer is accepted by the claimant then he cannot bring or continue proceedings against the defendant. If the

claimant disputes the terms of the offer then they can apply to a judge to decide the level of damages.

## Remedies

### *1) Damages*

This is the main remedy for defamation and the purpose is to compensate the claimant for the harm done to his reputation by defamatory publication. The claimant may also claim "special damages" where he has undergone actual financial loss as a result of publication.

### *2) Injunctions*

An interim injunction can be a useful tool in avoiding the repetition of an allegedly defamatory statement before trial.

The overriding consideration in determining whether to grant an interim injunction is whether the publisher has an arguable defence to publication. If he does, the publication will not be restrained even if the allegations are incredibly damaging.

If the claimant is successful at trial, the Court may grant a final injunction which prevents any further or future publication of the defamatory material.

### *3) Statement in open court*

A statement in open court is a pre-prepared statement made with the permission of the court which is intended to vindicate the claimant. It is either an agreed statement made on behalf of both parties (a joint statement), or a statement by the claimant and/or the defendant (unilateral statements). A joint statement in open court is effectively an agreed formalised apology by the defendant.

## The Internet

The internet has created a focus on defamation. Individuals and organisations now have unrestricted opportunities to post information and opinions online and this content can be repeated on numerous occasions meaning a defamatory comment can spread incredibly swiftly.

The global reach of the internet raises the question as to the appropriate jurisdiction in which to bring a defamation claim if the allegedly defamatory material involves parties in multiple jurisdictions. The English Court applies various factors in

determining whether England is the appropriate jurisdiction, including where the statement was targeted and the extent to which the statement was seen in England.