

Guide – Defamation & Malicious Falsehood

This guide sets out generally what to consider when faced with a dispute regarding claims based on untruthful statements, and where damage has been suffered financially and/or to your reputation.

High profile defamation claims are usually brought by celebrities and well-known public figures in order to protect their reputations. However, defamation does not just affect celebrities and they are not claims that are exclusively available to the rich and famous.

Anyone can be affected by defamation in different ways, especially with the use of the internet and social media where everyone is able to share their thoughts and opinions with the world in a matter of seconds, sometimes without appreciating the damage a mere statement could cause.

The law of malicious falsehood aims to protect economic interests and claims of malicious falsehood are sometimes made in tandem with, or as an alternative to, defamation claims.

Although the facts, the meaning of the defamatory comments and basis of claims are always unique and varied, this guide attempts to provide a useful starting point and overview of the process.

What is defamation – libel or slander?

The term “defamation” covers two types of defamatory actions: libel and slander. Both concern the publication of defamatory material that adversely affects a person / company’s reputation.

The defamatory statement has to diminish or undermine the victim’s reputation in the eyes of right thinking members of society. The distinction between the two types of defamation are:

Libel - where a publication is in writing or other permanent form such as print, online or broadcasting the action; and

Slander - where a publication is spoken or in some other temporary form such as gestures.

What is “defamatory”?

There is no statutory definition of what is “defamatory”. However, in the case of slander, words which are untrue or false may be considered as being defamatory if they cause a person to suffer serious reputational harm. The criteria is set out in more detail below.

Can a company or other organisation be defamed?

Yes, it is not just individuals who can bring a defamation claim. In order to protect its business reputation, a company or other legal entity can indeed bring libel and / or slander proceedings.

However, it is not enough to show that a statement has merely caused reputational damage; a company will need to show that the libellous or slanderous publication has caused serious financial loss.

In the absence of any evidence to show that serious financial loss has accrued as a result, it is unlikely that a company or any other organisation will succeed in pursuing any claim.

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Anonymous defendants

Anonymous perpetrators are frequently becoming more common with the incorrect presumption they can hide behind their keyboards.

Where the publisher of a defamatory statement is acting anonymously through third party selling platforms or social media pages, it may still be possible to pursue a claim against them by first applying for an application to the court for a “Norwich Pharmaceutical Order”.

A “Norwich Pharmaceutical Order” can compel third party, such as an internet publisher, to disclose any information they have about the identity of the perpetrator, so that a claim can be pursued against them.

The Civil Procedure Rules 1998 (CPR), which are the rules governing litigation in England and Wales, also contain a procedure for bringing claims against ‘persons unknown’.

This reflects the development of the common law in recent years, to enable claims to be brought against ‘persons unknown’ in defamation cases, in circumstances where the court can be satisfied that the claim can be served in such a way as to enable it to be brought to the attention of the anonymous perpetrator i.e. served over Twitter or Facebook.

Time limits

Unlike claims for breach of contract, whereby the limitation period for bringing a claim is usually 6 years, the time limits for bringing a claim for slander and / or libel are much shorter.

A victim has just twelve months from the date of publication of the libellous or slanderous statement by which to commence their claim.

Serious harm & meaning of statement

A recent Supreme Court decision clarified the meaning of “serious harm” in relation to defamation. Section 1 of the Defamation Act 2013 provides that a statement will not be defamatory unless the publication has caused or is likely to cause serious harm to the victim’s reputation. In the context of a company or other organisation, which trades for profit, this harm requires serious financial loss to have occurred.

However, the Supreme Court’s decision in *Lachaux (Respondent) v Independent Print Ltd and another (Appellants)* [2019] UKSC 27 has recently provided guidance on this and clarified that to ascertain whether serious harm has been caused by the publication, the court should not be confined to simply looking at the words used, but rather by reference to the actual facts. It follows that a more forensic examination of the context and facts of the publication needs to be considered, rather than simply considering the words used.

Just as important as showing serious harm, a core consideration of any claim is the meaning contained in the statement. The court will expect a single or correct meaning to be applied to the statement, or each part of the statement, if distinct allegations are raised. This is the natural and ordinary meaning a reasonable person would find in the words, rather than the meaning intended by the author or interpreted by the claimant.

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It is not always the overt meaning that is the problem, as innuendo meaning can be brought into the case when certain facts or circumstances are known to the recipient of the statement that distort the way they are received.

Publication

Irrespective of whether the action is for slander or libel, there must have been a “publication” of a defamatory statement to at least one other person, i.e. not the victim. This means that the words complained of must have been read and understood by the third party.

Alternatively, where there is an oral publication, i.e. in slanderous actions, the words complained of must have been apprehended or understood by another party who, again, must not be the victim.

The Pre-Action Protocol for defamation

A victim who wishes to bring a claim for either libel or slander is required to first comply with the Pre-Action Protocol for Media and Communications Claims (the Pre-Action Protocol) which is contained within the CPR.

The Pre-Action Protocol provides specific processes and procedures, which must be followed in order for the parties to prospective litigation to narrow the issues in dispute and to see if matters can be resolved through some form of Alternative Dispute Resolution before court proceedings are issued.

Under the Pre-Action Protocol, the victim, or prospective claimant, is required to send a

Letter of Claim that includes certain information such as, amongst other things, sufficient details to identify the specific publication containing the statement complained of and how the statement complained of has caused, or is likely to cause, serious harm and / or pecuniary loss.

Risks of not complying with the Pre-Action Protocol

There is no = rule that stops a claim being issued even where the Pre-Action Protocol has not been followed. However if a party fails to comply with the processes and procedures prescribed by the Pre-Action Protocol, they run the risk of being penalised by the Court and the possibility of facing adverse cost consequences.

Remedies available

There are a number of remedies available for defamation, including an injunction to restrain the publisher from further publication of the defamatory material and / or the court may order the perpetrator to remove the defamatory statement.

Statements that are of a very serious and inflammatory nature that continue to be published, or are likely to be repeated can require temporary and even permanent injunctions to remedy. In these cases, the matter can also be looked at from the perspective of harassment.

A claimant may also be able to claim general damages in compensation for any distress and hurt that the defamatory publication has caused.

A defendant may, once served with a claim form, but prior to serving a defence, make

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an offer of amends whereby they will make a suitable correction and sufficient apology to the claimant. In these circumstances, the case will not proceed to trial but instead will be heard at a hearing by a judge who will typically determine the quantum of any compensation which should be payable to the claimant.

Further, the Defamation Act 2013 requires that, if unsuccessful at trial, the defendant must publish the judgment of the court to the public, which is considered as a means of setting the record straight.

Defences

When presented with a defamation claim there are a number of potential defences available.

A claimant does not need to establish that the defendant intended to defame them. The defamation having taken place is enough to allow the case to proceed. This means the onus falls on the defendant to establish a legal defence and the two most commonly quoted defences include:

- Truth – can the defendant show that the statements that are complained of are substantially true?

Where the statement contains more than one imputation against the claimant, each must be proven to be truthful by the defendant.

- Honest opinion – could an honest and reasonable person have held the same opinion as expressed in the statement on the basis of facts or evidence which were available to them at the time?

A defence on this basis will only succeed if the statement was presented as opinion and the basis for the author holding that opinion is also apparent. Finally, it must have been an opinion that an honest person could have held at the time of publication from facts already known.

Malicious falsehood

Although typically more difficult to pursue than claims for defamation, malicious falsehood is an alternative claim which may be brought, which is not concerned with reputation but rather damage to economic interests. This is a separate action which may be brought for the publication of falsehoods which cause or are likely to cause financial damage, even if there has been no reputational damage.

When pursuing a claim for malicious falsehood, the claimant must show that the defendant has published statements which are false and that such publication was motivated by malice and was, therefore, dishonest. The claimant must also show that such statements have caused, or are likely to cause, the claimant to suffer financial loss.

Contact us

The law relating to defamation and malicious falsehood is complex, highly nuanced and is constantly changing, especially to keep up with the continuously developing world of social media.

It is, therefore, recommended that legal advice from a lawyer with expertise in this area of law is obtained.

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If you would like to discuss bringing or defending a claim for defamation and/or malicious falsehood, please contact our Dispute Resolution team by email at info@ts-p.co.uk, or by telephone on 01322 623700.

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