Libel, slander, the internet and you

While the news headlines can often make it seem that matters of libel and slander are the preserve of celebrities and the super-rich, these are in fact issues which can affect anyone in their everyday business or personal life – today perhaps more than ever thanks to the rise and rise of internet communication.

The increasing use of electronic communications in all its forms has had a real impact on this complex area of the law, not least because it has made it easier than ever for people to make, publish and share comments and statements. From ‘traditional’ electronic format like email, forums and comment pages through to the growing phenomenon of social media (Twitter, Facebook, LinkedIn etc.), every week seems to bring new cases, new situations and new rulings.

No article of this kind can hope to cover all aspects of this complicated area, so it is essential to seek specialist legal advice in the event you believe you may have been defamed, or indeed are accused of defaming someone else. But it is certainly worth everyone’s time to make themselves aware of some of the basic concepts involved.

Background

No matter how complicated the internet may have made things, the fundamental principles of defamation (which includes both libel and slander) remain as they have for many years. In essence, what we are looking at is how judges over many centuries have tried to reconcile the right that an individual to his or her good name as against the public interest of freedom of speech.

Over the last 20 years of so, this balance has also been viewed in the context of the Human Rights Act 1988. The importance of freedom of speech under Article 10 of the European Convention has been stressed many times, as has Article 8, stating: "Everyone has the right to respect his private and family life, his home and his correspondence"

It is also worth noting, however, that there is no right of privacy in English Law, a fact which the House of Lords, now the Supreme Court, confirmed in a case of Wainwright v The Home Office [2003] UKHL 53.

What is defamation?

Defamation is the broad heading that lawyers give to a range of behaviours which call into question the reputation or standing of a person into question.

Defamation consists of two elements, libel and slander. A libel is a defamation in permanent form (such as on the printed page) whereas a slander is a defamation in a non permanent or transitory form (perhaps spoken).

Common to both elements is a notion that what is being put or alleged is defamatory, and in the end this is a question for a jury. And central to their deliberations would be this question: "what would
the words reasonably be understood to mean in light of the surrounding circumstances as known to the person to whom they were published". (Report of the committee on the Law of Defamation CMD 7535 paragraphs 55 and 56).

**What is defamatory?**

When seeking to establish whether comments are defamatory, the fundamental test we are looking at, per Neill L J in Gillick v BBC [1996] EMLR 267, is whether the words would be "likely to affect a person adversely in the estimation of reasonable people generally".

This focus on esteem and reputation is a pivotal first step. Perhaps the most common approaches we receive at AWB involve a complaint about statements made with reference to a client’s profession or employment – statements which are increasingly found to have been made via Facebook, Twitter, internet forums, review sites or any number of other internet channels.

In these instances, it is not sufficient simply to show that the words concerned injure the individual in his trade or business – one must show the words damage their reputation and the esteem within which they are held. If someone says, for example, that a tradesman has ceased trading, those words could clearly be harmful to the tradesman’s business; but, critically in the context of defamation laws, they do not reflect adversely upon the tradesman as he actually carries out his work.

The second factor that often comes into play is that of fair and honest comment. If, for example, if a customer makes a statement on a social media site expressing their dissatisfied with your service, that may well fall under the category of fair and honest comment – and so again the laws of defamation would be unlikely to apply.

If, however, they say they were deliberately misled, mis-sold to or otherwise deliberately mis-treated by you, those comments clearly have the potential to damage a reputation and may therefore be considered defamatory – depending on whether either of two defences can be offered.

**What are the defences?**

If defamatory language can be proven, then in simple terms it is for the Defendant to show a defence. In practical terms this means that the Claimant’s reputation is taken as spotless and worthy of protection unless and until the Defendant proves to the contrary or some other defence is shown.

The common defences are (1) justification i.e. that the words are true and (2) qualified privilege.

Qualified privilege is the less common of the two defences, and would be unlikely, for example, to apply to any openly published internet statements. Technically is can be defined as follows:

"A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential". Adam v Ward [1917] AC309 at 334.
In practice, this might mean the reporting of an alleged offence to a police officer. In normal circumstance such an allegation would not be considered defamatory because of the defence of qualified privilege.

It should be noted here that the defence of qualified privilege can be defeated if it can be shown that the Defendant acted out of express malice. This is an interesting formula. The right or privilege of publishing defamatory matter must (except in cases of absolute privilege - which I do not deal with here) be exercised for the purposes of obtaining the object for which the privilege is given. The absence of proper motive was sometimes referred to as 'express malice' or 'malice in fact'. What the Court is driving at is that the Defendant had, as a dominant motive, an improper motive for publishing the statement complained of. Most commonly, if a defendant knew that he was making false allegations, this can be evidence of malice. It is not, in short, an easy matter to plead.

But by far the most common defence is that of justification – whether the words are true or not – and it is on this simple test that a great many high profile, and controversial, defamation cases have rested.

The controversy arises because although offering a justification defence sound beguilingly simple in theory, it often proves very difficult in practice. With the burden of proof suddenly falling squarely on their shoulders, it is for the Defendant to prove the truth of their statement - and more often than not, that proves a great deal harder than they had ever imagined when they first dashed off that angry email, tweet or Facebook post.

Practical Considerations

While these are some of the fundamental principles and concepts surrounding the issue of defamation, but inevitably there are many more special considerations which may be relevant, such as those arising from the Defamation Act 1996, including:

- A statutory defence available to printers and distributors and others which is available on the proviso that the printer or distributor either did not know nor had any reason to believe that the act contributed to the publication of the defamatory material;

- A limitation period of one year after which the Claimant is statute barred from bringing a claim;

- A summary procedure for, if you will, the defamatory equivalent of a small claims matter.

Ultimately this remains a complex and specialised area of law in which expert legal advice should be sought at the earliest possible opportunity.

But as far as practical advice goes for your own day-to-day conduct on social media and even general conversation goes?

Well, freedom of speech remains an important principle in British law, and provided you keep to fair and honest comment and stick to the truth, you are probably as safe as you can ever be.
And if you’re in any doubt at all? Well, perhaps on those occasions it’s simply best left unsaid.

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