NEW THREAT – ESTABLISHED REMEDIES: THE ENDURING EFFICACY OF MEDIA LAW

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Despite the fast changing media environment, with disinformation being distributed across multiple platforms by thousands of people every day, the legislative and common law equipment we need to protect individual and corporate reputations is already largely in place and in some respects has been since antiquity.

As in codes of laws from the Romans and the Hebrews through to the Teutons and the Anglo-Saxons, today in the UK it is potentially actionable if one party (the publisher) makes a statement to one or more publishees that causes or is likely to cause serious harm to the reputation of another. This is the tort of defamation, of which the term "libel" refers to statements in permanent forms, with "slander" being the cause of action where the publication is more transient, such as verbal statements. The Defamation Act 2013 sets out the main defences which may be available to a publisher in a libel claim and which in some respects have raised the bar for claimants. However, it remains a striking facet of English law (and a cause of considerable resentment among the media) that, once a claimant has established a prima facie case, much of the burden then shifts on to the defendant publisher.

A successful libel claimant can secure significant damages as well as an injunction preventing further publication – not to mention a prominent apology where the case is settled or is subject to the "offer of amends" regime. So libel remains a popular route for protecting, or repairing damage to, reputation.

Claims before the UK courts can range from mass online and print publication of defamatory statements to millions worldwide, to a defamatory tweet or other social media post to a handful of readers.

Libel and its defences

Perhaps the most obvious potential defence is Truth. For this to succeed, the defendant publisher (and the burden rests squarely on the defendant) must show that the allegation complained of is substantially true. So if you're making a complaint you should tell the publisher as clearly as you can what they got wrong.

Another defence is "honest opinion" which is where the publication is not an allegation of fact, but a comment or value judgement. Obvious examples are things like restaurant or theatre reviews – basically, as long as you actually ate the meal or saw the play, you'll be able to express whatever opinion you like as long as it's honest. But it can get more complicated when dealing with more nuanced allegations – thus, is it an imputation of fact or opinion to accuse someone of being a "racist" or an "extremist"? (Predictably, the answer is that it all depends!)

Perhaps the most elusive of the defences is "public interest". This is designed to encourage responsible journalism on important matters by offering a defence even if the publisher can't prove that what it published was true.

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Section 4 of the Defamation Act 2013 holds that it is a defence to show that the statement sued over was on a matter of public interest, and that the publisher (most obviously through the journalist/editor) *reasonably believed* that publication was in the public interest. In deciding this, a court will look at all aspects of the case – the evolution of the article, how well-researched it was, whether the claimant was contacted prior to publication, whether the article sufficiently reflected any responses received etc. – and make appropriate allowance for "editorial judgement". Predictably, much depends on that word "reasonable".

Section 4 is a fairly new defence (albeit drawing from years of case law), which at the moment makes it rather unpredictable as a new body of case law builds up around it. We can expect more court guidance in the months and years to come.

The UK has over the years been seen as a favourable jurisdiction for libel claimants, and indeed London has been, and to a considerable extent is still, known as the "libel capital of the world". The UK media have frequently complained (and indeed campaigned) about what they describe as "libel tourism", namely the use of the English Courts by overseas claimants suing over publications with little or no readership in or connection to this jurisdiction.

While the extent of that problem has been hugely exaggerated, the 2013 Act put in place certain safeguards to address it.

But overseas claimants are still entitled as of right to sue in England over worldwide publication if the publisher is domiciled here, and indeed can sue in England over publication here even if the publisher is based elsewhere in the EU or other Lugano Convention countries (such as Switzerland, Denmark and Norway).

There is a lesser-known route which is to claim under the separate tort of "malicious falsehood": an alternative to libel. This can be used when a statement is not necessarily defamatory but nevertheless causes financial harm. Unlike libel, here the burden is on the claimant to prove falsity and malice. So it may sound more dramatic but is generally harder to pursue.

Privacy

If you want to prevent publication of private or confidential information, one can make a claim for Misuse of Private Information and/or Breach of Confidence. The key question a court will consider is whether there is or was a reasonable expectation of privacy on the part of the claimant. If so, the court will then balance Articles 8 (privacy) and 10 (freedom of expression) of the European Convention on Human Rights and will ask if disclosure was in the public interest, and to what extent the information was or is in the public domain.

If the court finds in the applicant's favour, the remedies include an interim injunction and damages, which can make this a very attractive route – indeed, the injunction is likely to be crucial where the aim is to prevent private matters becoming public and where compensation clearly won't be an adequate remedy.

In cases of racial, religious or gender-related hate crimes, or of harassment or blackmail, the court will take these aggravating factors into account. Criminal proceedings should also be considered alongside internet takedown requests and injunctions.

Data protection

Another weapon in the armoury of possible claims is using data protection law. Remedies are available for the unlawful processing of personal data, which can include publication of inaccurate or private data. Under the UK regime, there is an exemption for journalists, but it is not a blanket exemption to the requirements of the Data Protection Act.

In some respects of course the law is evolving to keep up with changes to publishing in the modern age. There is for example the "right to be forgotten" regime which derives from EU Data Protection legislation, under which one can require a search engine to delist or block certain search results that come up when a search is made against your name. A recent case in England established that Google was required to delist certain results that breached the UK's regime for the rehabilitation of offenders, and further rulings are expected.

In that case, the judge remarked that the matter involved "novel questions, which have never yet been considered in this Court". We can anticipate more such questions arising as communications platforms evolve – just as we can reasonably expect that certain longstanding principles will continue to be applied.

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Fake News in the ancient world

> **"The making of false and derogatory statements has been recognised as a wrongful act from the very earliest times and as an actionable wrong in nearly every modern system of law."**

Peter Carter-Ruck, 1972

Law Reforms of King Uru-inimgina of Lagash (24th century BC)

"If a man falsely claims that the virgin daughter of another man was not a virgin, and his claim is proven to be untrue, the false accuser shall be fined 10 sheqels of silver"

The Mosaic Code (discovered 7th century BC?)

"Thou shalt not raise a false report… put not thine hand with the wicked to be an unrighteous witness… Thou shalt not go up and down as a tale-bearer among thy people".

Hammurabi's Code (1754 BC)

"If anyone "point the finger" at a sister of a god or the wife of any one, and cannot prove it, this man shall be taken before the judges and his brow shall be marked (by cutting the skin, or perhaps hair)."

Roman Law (450 B.C.)

The offence of famosus libellus (written defamation) was punishable by death.

Teuton Law (6th century)

The Lex Salica decreed that if a man called another a wolf or a hare he must pay him three shillings; to reflect on the chastity of a woman secured a fine of 45 shillings, though proof of truth was a complete defence.

Anglo-Saxon Law (9th Century)

In his Doom Book, Alfred the Great introduced the Lex Talionis under which slanderers' tongues were removed.

The Statute of Gloucester (14th Century)

"Every deviser of false news, of horrible and false lyes [against] great men of the realm" to be hanged, drawn, quartered, mutilated or fined, imprisoned or pilloried.