

DEFAMATION

A Lawyer's Workshop

What is Defamation?

Generally any statements that harm a person's reputation or make an ordinary listener think worse of any person, group or company.

Before we look at some examples of the types of statements to be held to be defamatory, I wish to refer to some essential basic points.

1. Intention to defame is not necessary – You can defame someone even though you did not intend to.
2. What matters is what do the words convey to a listener, or reader. It is an objective test taken on the language used.
3. An objective test is also used to construe the meaning of the words used. Generally the Court will take the objective, natural or ordinary meaning of the words i.e. the meaning that would be construed by ordinary reasonable listeners or readers.
4. The Courts will also accept that the ordinary reasonable listener will “read between the lines” and use their common sense in construing the particular meaning taken by the words.
5. Even if a person is not identified by name, if the statements allow a sector of the community with specific knowledge to identify who the comments are about, a claim may be successfully brought.
6. Producers and presenters are responsible for what other people say on their show during talkback or interviews.
7. The more a claim is repeated the greater the risk for the damages to be increased. In other words repetition of the statement increases the risk of liability.

Remedies

8. There is however limited circumstances when a defamatory statement might still be protected by the Law and successful defences can be upheld which would make a defamatory statement not give rise to any liability to that Law. Those defences we will refer to later in this seminar.

At this point it is now useful to refer to some examples of what can amount to a defamatory statement.

What Sort of Statements?

There is no exhaustive list of the types of statements that are capable of being defamatory. The following are but mere examples, illustrative of some of the different types of statements which have been considered defamatory.

Imputations of anti-social conduct

1. In 1996 Rock singer Elton John sued successfully for allegations that he was on a bizarre diet that involved spitting out food after chewing it, although his rock-star image was partly based on confessions of years of drug and dietary abuse under control at the time of publication of the article.

Imputations of fraud or dishonesty

1. It will normally be defamatory to describe a person as a cheater or a liar or as otherwise dishonest.
2. In 1997, Tim Shadbolt, a public figure and local politician, successfully sued Truth which had published an article accusing him of being a liar and a mayor who had no interest in the environment.

Imputations of criminal conduct

1. It is also capable of being defamatory to say that someone is suspected of a crime. It is defamatory to say of a man that he is suspected of dishonourable conduct – it may suggest to a reader that the person concerned has actually committed the offence. There is a strong need to take care that the imputation of suspicion is not so strong as to be indistinguishable for guilt.
2. In a New Zealand case references to a Serious Fraud Office inquiry in a newspaper were held not capable of meaning that the plaintiff was guilty of, or had a propensity for fraud, dishonesty or forgery, but could mean that the plaintiff was 'suspected' of such criminal behaviour. However, a reference to the suspected person being a 'wheeler-dealer' did not carry the meaning of fraud or dishonesty.

Ridicule

1. Satire and cartoons (political and otherwise) have been the subject of very few defamation actions. Ridicule is often the most potent weapon against a public man. If mere ridicule of a public man was defamatory, every public newspaper – especially every comic newspaper – would be perpetually subject to being sued. The fact is public people must put up with laughing, caricaturing, and sneering.
2. However, cartoons and satire may be defamatory if they suggest conduct or character traits that cannot be proved true as factually accurate.

3. In 1991 the chairman of the Council of the New Zealand National Art Gallery was able to successfully sue television New Zealand for references in a satirical programme that suggested he had obtained commission for the purchase of two Goldie paintings.
4. In 1994 a journalist sued successfully for defamatory statements in a satirical magazine that suggested she was a habitual drunk.

Insanity or Mental Illness

1. It is defamatory to say of a person that he or she is or was insane or mentally ill or diseased.

Incompetence or Unfitness for Job

1. If the allegations are of abusing one's position are defamatory. Thus, allegations that a Cabinet Minister was involved in the improper issuing of import licences, and in another case where the Minister concerned was alleged to be using his position as Minister of Mines to grant prospecting licences over land in which he had an interest, were held defamatory.
2. In 1996 an award of \$130,000 was made in the New Zealand High Court for allegations of business and financial incompetence, political corruption and misuse of the public position of the Mayor in Pakuranga in Auckland.
3. Usually disparaging remarks about a tradesperson's or professional person's product are not defamatory but if the language 'reflects on the owner or manufacturer.... in his character as a person or as a 'trader' it may constitute defamation as well.
4. Statements that a certain milkman watered his milk, that a building constructed by a certain builder was a 'fire trap' that could have cost people their lives, were all held capable of being defamatory of the 'tradesman' concerned.

Imputations of Financial Difficulty

1. A weekly newspaper published an article based on information contained in a High Court judgement and court documents relating to an application for annulment of a bankruptcy of an individual. The article was found to be defamatory of the plaintiff because it suggested he was living beyond his means.
2. Media that comment on the financial standing of companies operate in a risk area, for companies have business reputations and can sue for defamation – but to succeed a company must prove the defamatory statement has caused, or is likely to cause, pecuniary loss to it.

How Can We Express Our Point of View?

- Be fair and accurate. If there are two sides to a story – say so.
- You may make “fair comment” but it must be clear you are giving an opinion and not stating a fact.
- If your honest and genuine opinion is that someone is, for example dishonest, you must have the facts to prove it.
- You cannot defame if you had the person’s permission to say what you said.

These Excuses Are No Good

- I made a mistake.
- Someone else told me it was true and I believed them.
- I said it was just a rumour – I didn’t say it was true.

Contempt of Court

- You could be in contempt of Court if:
- You fail to obey a Court order such as name suppression, or
- You broadcast anything likely to prejudice a fair trial.

Some main defences to a claim of defamation and how they apply

The Defence of Truth

For the defence of truth to be available a statement (oral or written) must be either.

- Literally true; or
- Not materially different from the truth
- When measured against the whole context of the presentation or statements on the topic.

The Defence of Honest Opinion

For the defence of honest opinion to be available:

- The facts upon which the commentator relies for each statement claimed to be an honest opinion must be true facts and the commentator must state those facts at the same time as making the statement of opinion.
- Honest and genuinely held belief essential
- Belief need not be correct
- Statement must be obviously an opinion.
- Malice does not destroy and honest opinion defence.

The Defence of Qualified Privilege

For the defence of qualified privilege to be available, a statement (oral or written) must be on a matter of legitimate public interest which means you have to show:

- There was at the time a social, moral or legal duty to broadcast/say what was said to the public; and
- That at the same time there was a corresponding mutual interest/duty by the public in receiving the information.
- The statements need not be factually correct or true.
- If the statement is about a politician, then it will be privileged only if:
- The statement is about the actions and qualities of those elected to or seeing election to Parliament (it is not clear if it will apply to local body politicians); and
- The statement covers only matters of genuine public interest and is not about the private life of a politician (that is something that the public have no legitimate interest in).

Malice/Bad Motive will destroy the defence

- if the statement maker did not genuinely believe what was said or said it recklessly not caring if the statement was true.
- But, if the statement is made by a journalist out of sheer neglect or stupidity, it may be protected. Failing to properly check facts will probably be seen as recklessness destroying the defence.

Taking improper advantage of the situation destroys the defence

- if the statement maker was being personal, spiteful or malicious and that was the primary reason for making the statement, then there is no defence.

Counter-attack/defence against attack

1. A person who is attacked by another is entitled to respond to/answer that attack provided they do not go too far in doing so.
2. If in responding the person makes any defamatory statement about the attacker, then that statement is protected by qualified privilege if;
 - the defamatory statement is made genuinely; and
 - it is fairly relevant to the accusation/attack which was made.

Explore the following scenarios to see how the rules apply

Scenario 1 – Truth & Honest Opinion

During the broadcast of a magazine programme in relation to overseas events of interest and importance to immigrants to New Zealand there was a report of the release in India of 10 Kashmiri men who had been arrested, detained and tried for allegedly being involved in guerrilla warfare activities on the Indian/Kashmir border which resulted in the death of 35 people in one Indian village near the border.

At the trial all 10 men denied involvement and maintained their innocence but they were found guilty anyway.

4 years later 4 men were let out of prison.

The news report stated that the 4 specifically named and identified men had been “released” from prison in India and allowed to return to Kashmir.

The Indian reporter said in her commentary that in her opinion it was a case where pressure on the authorities had been brought to bear by the rich families of the guilty men and that they had been let go as a result of a “deal” involving a bribe that had been done and that it was an example of the sort of corruption that was prevalent in India.

In fact, the truth was that:

- The 4 men had been pardoned by the Indian Government after new evidence became available that made it clear that those 4 men were definitely not involved in any way in the deaths of the villagers.
- The families of the 4 men had been lobbying the Indian Government since the conviction of their family members;
- The families of the 2 men were not wealthy, but 2 families were wealthy;
- The families of the 4 men had pooled their resources and hired a private investigator who had found official documents which showed that the 4 men were innocent.
- There was no payment of a bribe to any member of the Indian Government.

A sister of one of the 4 men lives in New Zealand and is listening to the programme. She is very upset because she says that she and her father living in New Zealand have been defamed because;

- saying her brother had been ‘released’ was an incorrect statement because he had been pardoned;
- the stigma of imprisonment has not been lifted from her family; and
- her family is one of the wealthy families;
- her family did not pay any bribes to have her brother released;
- the Indian community in Auckland all think that she and her family are dishonest and terrorists.

Questions:

1. Can the sister and father really say they were defamed if they are only members of the family of the former prisoner?
2. What would the defamation actually be – i.e. what is the sting of the words which would be complained about as being defamatory?
3. Is the defence of truth available to cover that sting of the defamation which would be alleged?
4. Is the defence of honest opinion going to cover the sting of the defamation which would be alleged?

Answers:

Yes, the sister and father really can say they were defamed even though they are only members of the family of the former prisoner because:

The man was specifically identified by name;

His family is therefore identified by name and or connection to him to at least a specific group in the community who would have had knowledge of the family connection?

The stings of the defamation would be as follows:

- The sister and father are corrupt and bribe officials;
- The sister and father are dishonest;
- The sister and father engage in illegal activities;
- The sister and father are members of a family with terrorist connections.

The defence of truth is not available to cover the stings of the defamation which would be alleged because the true factual position is substantially and materially different from the stings which would be alleged.

The defence of honest opinion is not available to cover the stings of the defamation which would be alleged because the opinion is not based on the material/central true facts even though it may be the honest and genuinely held opinion of the commentator.

Scenario 2 – Qualified Privilege – political expression

The Society for Ethnic Groups is a Society of members whose interests and goals are to assist various groups of immigrants to New Zealand from different countries to maintain their cultural identity and background while also learning to live in New Zealand society.

The Society is about to hold elections for the appointment of members to the Board of the Society. There are several members of the Society who are standing for office.

Maria, the current elected Secretary of the Society, is giving an interview on the radio which is being broadcast live.

The Purpose of the interview is to:

- explain generally what the purposes and goals of the Society are;
- bring the elections to the attention of all interested members of the community;
- give an outline of the people who are seeing to be elected to office in the Society; and
- encourage members of the Society to vote in the elections.

During the interview Maria, when explaining who each of the people are who are standing for election, launches into a detailed comment about Roberto, one of those standing for election to office in the Society.

Roberto has previously held a position in the Society as Treasurer. He is not standing for re-election to that position. Roberto trained as a nurse in the Phillipines. He wants to be elected as a general member of the Board with a portfolio for health issues for immigrants, which is an area of special interest to him.

Maria and Roberto have previously had a disagreement.

Maria and Roberto's past disagreement relates to his time as Treasurer.

Maria says on air that Roberto is evasive, unreliable and a "con artist". She says that when he was Treasurer he was lazy, withheld the Society's cheque book from the Board and failed to pay the Society's accounts as they fell due for payment. She says that he is bad tempered and difficult to deal with and that his family life was very bad.

In fact Roberto:

- did not overlook paying the accounts of the Society on time;
- did make financial records and the society's cheque book available to the society's accountant upon request;
- did not provide it to the Board when requested because it was already in the possession of the Society's accountant who was preparing the Society's end of year financial accounts.
- Maria fell out with Roberto over a car that she brought from him which then broke down and which he would not fix.

Roberto says that Maria has defamed him and he wants to sue Maria because of what she said and the radio station for letting her say what she did on air. He says that his reputation has been ruined amongst the Filipino community specifically and the immigrant community generally.

Questions:

1. Can Roberto say he was defamed and what would the sting of the words which would be complained about as being defamatory?
2. Might the qualified privilege available to cover that sting of the defamation which would be alleged?
3. If the defence of qualified privilege may be available, would it be destroyed by malice or taking improper advantage by Maria?

Answer:

Yes, Roberto can say he was defamed.

The stings of defamation would be as follows:

- He is a lazy person;
 - He is dishonest;
 - He is unreliable and evasive in performance of his public duties;
 - He has a bad temper;
 - He has a bad family life and is a bad husband and father.
1. The defence of qualified privilege for statements of political expression may not apply to statements about members of a private society standing for election – this point has not been tested in New Zealand courts, since recent developments creating a similar defence for statements about parliamentarians.
 2. If the defence was recognised as apply to this situation, then in any event it may not be successful on these facts because:

- The stings that relate to the private life of Roberto are not covered by the defence because they are not matters of legitimate public interest.
- The stings which do relate to the performance of public office duties, even though untrue statements in fact, can be potentially covered – qualified privilege defence does not require protected statements to be factually true.
- However, in relation to those stings addressed in the paragraph above, Maria is arguably motivated by malice and ill will and has taken improper advantage of the situation of publication/broadcast because she had a falling out with Roberto about the car deal, thereby destroying her defence.