

**DEFAMATION AND OTHER TORTS AFFECTING THE REPUTATION
ACCORDING UNITED KINGDOM LEGISLATION AND JURISPRUDENCE**

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ABSTRACT: *Everyone living in a society has a reputation and self-respect in the society and wants to exercise this without any interference from others. The tort of defamation is to protect individuals right of reputation in the society from being exploited and provides individuals with the actions which can be brought in the courts of law if they have been defamed by the publishment of an statement that is untrue about them and has an effect on the reputation of the individual in front of the society. There are some torts which have been developed to compensate for damaged reputations, just as others have emerged which compensate for bodily injury. In addition to compensation, equally important is the need for injunctions to prevent threatened damage to the reputation. The relevant torts are libel, slander, injurious falsehood, malicious prosecution. In this paper I will analyze the diverse types of torts in relation with UK legislation and jurisprudence in comparison with ECHR jurisprudence, in the light of recent developments of case-law.*

KEYWORDS: Defamation, Tort, Damage, ECHR, Reputation, Article 10 ECHR.

INTRODUCTION

Freedom of speech, the media and the law

Although not exclusively concerned with the activities of the media, the majority of defamation claims do concern statements made by the press. Freedom of communication is jealously guarded by the media, and as there is no written constitution in the UK, it is the judges who have undertaken the role of guardians of this freedom, although they have no overriding obligation to protect freedom of speech. Rather, the role of judges is to undertake an exercise which aims to achieve a fair balance between the right to free expression and the need to protect the reputation of the individual. Freedom of speech, in the absence of a written constitution, exists only so far as it has not been removed or eroded by common law or statute, including the Human Rights Act 1998, and the balance between the various countervailing interest's changes from one time to another according to the political climate. Art 10 of the European Convention on Human Rights protects freedom of expression. The role of the law of defamation is to ensure that freedom of speech does not outweigh the interests of the individual, although it is arguable that, certainly in the past, the damages awarded in defamation cases distorted the extent of the protection which the individual should reasonably expect. There are also some who would argue that the conflicting interests involved cannot be balanced and that the role of the courts should not be regarded as a balancing exercise, as the interests are not of equal weight. It was also argued that in some instances in the past the parties did not have equal financial standing, as in the 'Mc Libel' case.

Libel claims are no longer confined to what is published within each jurisdiction. It appears that a decision of the Australian High Court allows litigants to bring claims anywhere in the world for alleged libels published on the worldwide web, regardless of the website's country of origin.

How much the law on defamation actually protects all individuals is debatable, as in general it has only been the rich who could afford the luxury of suing for defamation. There is no public funding available for these claims, and the costs involved can be extremely high, partly because juries are required to hear them and partly because the lawyers who deal with such cases regard them as particularly complex and difficult and justifying high fees. Sometimes people bringing libel claims are able to obtain funding from friends and supporters or on a no-win, no-fee basis. If the claim is unsuccessful the funders may be liable for costs, though the judge may exercise discretion in such cases. In a case involving those who funded Neil Hamilton in a notorious and unsuccessful libel claim against Mohamed Al Fayed, the Court of Appeal held that the trial judge had been correct to refuse costs orders against them under s 51 of the Supreme Court Act 1981¹. In *Taylforth v Metropolitan Police Comr and The Sun Newspaper* (1994) unreported, Gillian Taylforth was left with a bill for costs of around £500,000 after an 11 day hearing. In 1993, a libel claim brought by Anita Roddick of the Body Shop cost £1 million for the claimant alone. In *Joyce v Sengupta*², the claimant circumvented the rule about legal aid by bringing her claim for malicious falsehood instead of defamation, with the approval of the Court of Appeal.

In *Spring v Guardian Assurance*³, an ex-employee of the defendant brought a claim for *negligence* because he had been unable to obtain employment after the defendants had written a damaging reference for him. Not only did this circumvent the legal aid problem, but it also prevented the defendant relying on the defense of qualified privilege which would have been available to a claim for libel.

The Third Royal Commission on the Press defined press freedom as:

“That degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments”.

Press freedom is protected by the defenses to the defamation claim, many of which influence editors and their legal advisors in arriving at the decision of whether or not to publish dubious material. Cynically, as far as the media and its legal advisors are concerned, the real question is how far they will be able to exploit the notion of press freedom in order to sell copy, without the fear of a libel claim. Newspapers are commercial concerns and depend for their existence on the number of copies they are able to sell. Publication of potentially defamatory material is a calculable risk, given that juries are unpredictable and defenses such as justification and fair comment may operate to the advantage of the press. Moreover, although libel damages generally are not tax deductible expenditure⁴, there are authorities which suggest that for newspapers libel damages are tax deductible⁵. Against the advantages of increased sales, editors must set the disadvantages of high awards of damages, including exemplary damages

¹ *Hamilton v Al Fayed (Costs)* EWCA Civ. 6651

² [1992] NLJ 1306

³ [1992] IRLR 173

⁴ *Fairie v Hall* (1947) 28 TC 200, as when a solicitor wrote a defamatory letter

⁵ See: the Australian case of *Herald Weekly Times Ltd v FTC* (1932) 48 CLR 113

in cases where it is obvious that a libel has been published for reasons of sensationalism with a view to making a handsome profit⁶.

It should not be forgotten that journalists, like members of the public, also have the opportunity to claim for libel. In 1995, an investigative journalist received £31,500 plus costs of £55,000 when he was libelled by Michael Heseltine. Taxpayers met this bill under Treasury guidance which allows public resources to be used to deal with matters arising in the course of official duties of ministers and civil servants.

The European Convention on Human Rights attaches special importance to freedom of expression. Article 10(1) states: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”*

The Article does recognize certain exceptions to this freedom which initially appear to curtail it greatly, and it identifies the protection of the reputation in particular⁷:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.”

In practice, despite these exceptions, the European Court of Human Rights has tended to lean in favor of the media in its interpretation of Art 10, and the Article does require much clearer statements of the legal limits to freedom of speech than are available in English law.

Article 10 has now been incorporated into English law by the Human Rights Act 1998, but it was referred to in the case of *Derbyshire CC v Times Newspapers*⁸ in the Court of Appeal, where it was accepted that it had affected the right of a governmental body to claim for libel. In the House of Lords, it did not appear to be necessary to invoke Art 10, and the decision was reached by reference to common law alone.

Article 8 also provides some degree of protection for the reputation of the individual, since it aims to protect private life. In the cases of *Rantzen v Mirror Group Newspapers*⁹ and *Elton John v MGN Ltd*¹⁰, the Court of Appeal referred to Art 10 in an effort to understand the correct approach to reviewing the jury’s award of damages. Their Lordships recognized that Art 10 must be regarded as underlying common law principles relating to freedom of expression.

In July 1995, the European Court of Human Rights was critical of the approach taken by the English courts when it reviewed the award of damages which a jury had made to Lord Aldington in 1989¹¹. The English jury had found that Lord Aldington had been libelled by Count Nikolai Tolstoy in a pamphlet written about his alleged wartime involvement in the

⁶ *Broome v Cassell & Co Ltd* [1971] 2 QB 354

⁷ Art 10(2)

⁸ [1993] AC 534

⁹ (1993) NLJ 507

¹⁰ [1996] 2 All ER 35

¹¹ See: *Tolstoy v United Kingdom* (1995) 20 EHRR 442

deaths of 70,000 Cossacks and Yugoslavs. Count Nikolai Tolstoy had been forced into bankruptcy by the huge award of damages fixed by the jury at £1.5 million and by the costs involved in the claim. The European Court ruled that the award of damages was excessive and that it amounted to a violation of the Count's right to freedom of expression, as 'taken in conjunction with the state of the national law at the time' it was 'not necessary in a democratic society'. The Court accepted that there is no upper or lower limit on the award of damages in English law which a jury can make and that the role of the judge in giving guidance is limited, perhaps because of the firm line taken in this case by the European Court of Human Rights. There has been a realistic opportunity for the courts to introduce more realistic levels of awards through the case of *Elton John v MGN Ltd* and the Defamation Act 1996.

A pre-action protocol now governs the conduct of the early stages of defamation claims. This important document is available on the Department for Constitutional Affairs website¹²

Libel and Slander.

Defamation consists of the torts of libel and slander. There are distinctions between libel and slander which are attributable to their origins and development, and have little real justification in modern law. The differences between libel and slander have been abolished in some commonwealth jurisdictions and in 1975 the Faulks Committee recommended that they should be abolished in English law, but the distinction remains, despite the Defamation Act 1996. Note also that there is a claim available for slander of goods where the words complained of relate on the face of them to a product¹³.

Distinction

The basic differences between the two torts are as follows:

Libel is a defamatory statement in some permanent form, for example, writing, recorded film or speech

Some examples of libel are: *Monson v Tussaud's Ltd*¹⁴ *Youssouf v MGM Pictures Ltd*¹⁵. By s 16 of the Defamation Act 1952, and ss 166 and 201 of the Broadcasting Act 1990, defamatory statements in radio and television broadcasts are libel. Under s 4 of the Theatres Act 1968, defamatory statements made in public performances of plays are libel. A purely transitory defamatory statement is slander. Examples are gestures and words which are spoken but not recorded. There is some doubt as to whether defamatory words recorded on disc, tape or CD are libel or slander.

Libel is actionable *per se* (without proof of special damage which is calculable as a specific sum of money), slander is not

To succeed in a claim for slander, damage must be proved except in four instances, which are as follows:

¹² www.lcd.gov.uk.

¹³ See: *Patterson v ICN Photonics Ltd* [2003] EWCA Civ 343

¹⁴ [1894] 1 QB 671 (the placing of a wax image of the claimant in the chamber of horrors at Madam Tussaud's waxwork exhibition amounted to libel)

¹⁵ (1934) 50 TLR 581 (the claimant was portrayed in a film as having been seduced by Rasputin; this was a permanent form of defamation and therefore amounted to libel).

(a) Where there is an allegation that the claimant has committed an imprisonable offence. The offence must be one which carries a sentence of imprisonment at first instance, rather than one which merely carries a possible prison sentence or a fine.

(b) Where there is an imputation that the claimant is suffering from a socially undesirable disease, such as smallpox, or perhaps more relevant today, venereal disease or AIDS. There has been a suggestion that the list of diseases in this category is now fixed.

(c) Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion¹⁶. It has been held that an allegation of lesbianism is included in the term 'unchastity'¹⁷. profession or calling. The statement must disparage the claimant in the way in which he or she exercises his or her profession or job. In *Hopwood v Muirson*¹⁸, it was held that an allegation that a headmaster had committed adultery was not actionable *per se* but it would have been had the adultery been alleged with a pupil or a teacher at his school. This common law position has been altered by s 2 of the Defamation Act 1952 which merely requires that the claimant could possibly have been injured in relation to his or her trade or calling by the statement.

Libel may be a crime as well as a tort, whereas slander is only a tort.

It was thought that criminal libel had become virtually obsolete, but the mere threat of proceedings by Sir James Goldsmith in 1977 succeeded in forcing *Private Eye* to withdraw copies of its magazine from bookshops¹⁹ Criminal libel is very similar to civil libel but it does not require the person defamed to be alive, nor is it necessary to publish the statement to a third party. Both of these elements are required for a successful action for civil libel. In criminal libel, it appears that the requirement that there should be a threatened breach of the peace no longer applies²⁰This has never been a requirement of civil libel. In other respects, the two types of libel are the same.

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¹⁶ Slander of Women Act 1891

¹⁷ *Kerr v Kennedy* [1942] 1 All ER 412

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