
DEFAMATION LAW – FOR MATERIAL PUBLISHED BEFORE 1 JANUARY 2006

NOTE: This information sheet applies to publications published prior to 1 January 2006. Please refer to our Information Sheet entitled "The Law of Defamation – for material published after 1 January 2006" if the material in issue was published on or after 1 January 2006.

Introduction

Defamation is a communication from one person to at least one other that lowers or harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence. The law of defamation aims to balance free speech with the right of an individual to enjoy a reputation free from indefensible attack.

While the news media tends to be the main target for defamation actions, people have also sued over poems, novels, cartoons, paintings, photographs, artistic criticisms, songs and satire. Threats of defamation actions are often used to stifle criticism or to settle other grievances such as invasion of privacy (see also the Information Sheet "Privacy and the Private Sector").

The law of defamation is complex and often unpredictable. Defamation actions are very costly, difficult to defend and substantial monetary damages can be awarded. In some cases plaintiffs can obtain a court order called an "injunction" preventing any further communication of the offending publication or material. It is further complicated by the fact that for material published pre-2006 different laws apply in each State and Territory and a plaintiff can choose to sue in any State or Territory in which the communication was published.

This information sheet is designed to give a brief overview of the law of defamation, how the risks can be minimised, and what to do if you are threatened with an action for material published pre-2006. Because there are time limits within which a defamation action must be filed in court, suing in relation to material published before January 2006 may not be possible unless the material has been republished, such as by publication on the internet. See the discussion below on Limitation Periods.

What is defamation?

For a defamation action to succeed, the person complaining of the defamation (the plaintiff) has to prove three things:

1. that the communication has been published to a third person;
2. that the communication identifies (or is about) the plaintiff; and
3. that the communication is defamatory.

The communication has been published to a third person

To be defamatory, the material has to be **published** (communicated by any means – written, orally, pictorially) to at least one person other than the plaintiff. The intention of the communicator does not matter – liability for defamation can arise from errors.

Everyone involved in the communication is potentially liable: and each, all, or some can be sued. This means that writers, publishers, editors, artists and gallery owners must all be aware of the potential dangers. This also means that it is no defence to argue that you are only repeating rumours or a comment made by somebody else: you can be liable for a republication.

The communication identifies the plaintiff

The plaintiff has to prove that they were the person identified by the defamatory communication. This is obviously most straightforward when they are actually named, but other information may be sufficient. Even the use of a false name may not save you if the plaintiff can be identified by other means.

There have been cases where identification has been accidental, for instance when the fictional name "Artemus Jones" happened to have a real-life equivalent.

A class of people cannot be defamed, but a statement denigrating a group may be defamatory of a member of that group. The plaintiff must show that the words would be understood to refer to the plaintiff in particular. If the group is reasonably large, it is less likely that this can be proven.

A dead person cannot be defamed, although a living relative may be if the communication defames them by association.

In all States and Territories, except NSW, companies and other organisations with a "legal personality" (eg. incorporated associations, trade unions, local councils) can sue for defamation. In NSW, however, if a company has 10 or more employees (and no subsidiary companies), it cannot sue for defamation. If a communication defames an employee of a company, however, that employee can sue.

The communication defames them

The key issue in a defamation action is damage to a person's reputation. The test of whether a communication is defamatory is: "Does the communication lower/harm the plaintiff's personal or professional reputation, hold the plaintiff up to ridicule, or lead others to shun and avoid the plaintiff?" This is judged from the viewpoint of "ordinary reasonable people in the community in general" and in light of contemporary standards.

The meaning that is argued over (the "imputation"), might not be what you meant to say. The literal meaning of the communication is not the only meaning that is considered. The court looks at what it thinks the ordinary reader or viewer would have understood the communication to mean. This may differ from what both the plaintiff and the defendant think.

The courts will expect the ordinary reader or viewer to engage in a "certain amount of loose thinking", to "read between the lines" and to be guided by the idea that "where there is smoke there is fire". Be careful if you are reporting "allegations" – the audience may presume that there is a factual basis to them. It is important to remember that the law uses the "ordinary reasonable reader/listener/viewer" – a hypothetical person – to test whether a publication is defamatory.

The plaintiff does not have to prove that the imputation is false, that it actually caused them harm, or that you meant it to cause harm. On the other hand, just because a imputation hurts or upsets a plaintiff, does not mean that it is defamatory. It must affect their reputation in a damaging way.

The limits are unclear in relation to humour, cartoons or satire. Words obviously intended only as a joke may be reasonably safe, but there may be a problem if there are underlying defamatory facts understood by the audience. You can publish photos or film of people in funny situations unless it makes the subject look ridiculous or the target of derision rather than good humour.

Context is important. A picture can become defamatory according to placement. A comment might not be defamatory when told to a limited audience, but may become defamatory when removed from its context and circulated more widely. In one case a plaintiff who told a small group of friends a self-deprecating story about being mistaken for a hangman was able to sue when a local newspaper published the story. People might be expected to read a book more closely than a newspaper. TV and radio viewers only have a fleeting impression.

This can also work in favour of defendants. The plaintiff can't just take one imputation out of context. There may be an "antidote" to a defamatory imputation in other parts of the communication.

Defences

The first step when someone threatens you with defamation is to establish whether they actually have a case. The plaintiff must be able to prove all three elements discussed above – that the material has been communicated to a third person (other than the plaintiff), that the plaintiff is identified in the communication and that the communication defames them.

The next step is to consider whether you have a defence under the law of defamation. Defences include:

1. Fair comment
2. Truth/Justification
3. Qualified privilege
4. Other defences

Fair comment/comment/honest opinion

It is a defence to show that what you have said is "fair comment" on a matter of public interest. To take advantage of this defence you have to be able to prove three things:

1. the communication must, on the face of it, be **comment** – that is: an opinion, criticism, deduction, judgment, remark, observation, or conclusion;
2. the facts upon which the comment is based must be stated unless they are widely known. This is required so that the readers/viewers/listeners are able to form their own views on the facts. These facts have to be known to you when you make the communication. It is very important that the comment is clearly distinguishable from the facts upon which it is based; and
3. the communication has to be on a matter of public interest.

The opinion can be extreme, as long as it is honestly held by the communicator. This means that you have to be very careful in responding to an initial complaint. If you say that you "didn't mean it" this could subsequently make it very difficult to raise the defence of fair comment.

The defence of fair comment is obviously very relevant for reviewers and critics, but it can also be useful for satirists, comedians and other artists whose work incorporates an element of social commentary.

Truth/Justification

If an imputation is found to be defamatory, this defence requires the publisher to prove it to be true in substance or not materially different from the truth. This can be difficult as you can only use evidence that is admissible in court – this means that you will need original documents and/or witnesses who are credible and willing to testify in court.

Your sources have to have first hand knowledge of the relevant circumstances. The rules against "hearsay" evidence will prevent you putting forward witnesses who "heard something from somebody else".

In Queensland, Tasmania, the ACT and NSW as well as proving that the information is true, you also have to prove that your publication was for the public benefit.

You should also remember that the court may find that the meaning of your communication is different to that which you intended. This means that you may face a situation where you have to prove the truth of an imputation that you didn't intend to say, but which the plaintiff says arises.

You also have to prove the truth of all the defamatory imputations that are found to exist in the communication. However in NSW & Tasmania you may get away with proving most of them, if the unproven ones don't further damage the plaintiff's reputation.

Qualified privilege

The defence of "qualified privilege" applies when you have an interest or a legal, social or moral duty to communicate something to a person and that person has a corresponding interest or duty to receive the information. This link between you and the person you are communicating to is crucial to the defence.

The defence of qualified privilege can be complex and is narrowly interpreted by the courts. The legislation applying to material published pre-2006 was also altered by legislation in some States.

Qualified privilege traditionally protects communications such as references given by employers or complaints to the police or other relevant authorities. The defence will fail if the plaintiff can show that you were actually motivated by malice to make the communication. This means that it can be

dangerous to attempt to "get even" with someone by bad-mouthing them. If they choose to sue, you may find yourself without a defence.

This defence was originally designed for one-to-one communications. It is less likely to be successful when your communication is published to a wider audience because you have to demonstrate the corresponding interest or duty with each member of the audience. There are two important exceptions. Firstly, if you have been attacked publicly you are entitled to make a public response. Secondly, the High Court has recognised (in the case *Lange v ABC*) a corresponding duty and interest between members of the Australian community in publishing and receiving information about government and political matters.

Other defences

There are other defences, however they are less relevant to artists and a discussion of them is outside the scope of this information sheet. They include: the defence of triviality; protected reports of court and parliamentary proceedings; and the defence of innocent publication in relation to those such as newsagents (and possibly Internet service providers) who cannot reasonably be expected to be aware of the defamatory content of material they distribute.

Place of Publication

A plaintiff may sue in any Australian State or Territory in which the communication was published to a third party. In the case of an article or comment on a website, this is any State or Territory in which a person browsing the web reads that article or comment. It doesn't matter for the purposes of defamation law where the website itself is hosted.

Limitation Periods and republication

In general, if you wish to sue someone in defamation for material published pre-2006, you must commence the action within six years. In the Northern Territory, however, you must commence within three years, and in NSW you only have one year from the date of publication.

If there are unusual circumstances a court may have the discretion to extend the time period for filing the defamation action. However it is difficult to convince a court that there are unusual circumstances. The circumstances in which a court will extend a limitation period in relation to material published pre-2006 is outside the scope of this information sheet – legal advice from a defamation lawyer should be sought urgently if a limitation period applies to any claim you may have in relation to material published pre-2006.

However, the right to bring an action in defamation is not measured only from date of the first publication. Actions may be brought in respect of each defamatory publication so that subsequent publications, such as on the internet, may be a 'republication'. That is, material that is claimed to be defamatory may have multiple dates of publication. An English court determined that the sale of a single copy of a newspaper 17 years after the date of original publication was sufficient to found a defamation claim. The High Court of Australia has also rejected arguments in favour of a 'single publication' rule in relation to publications on the internet (*Dow Jones v Gutnick* ([2002] HCA 56 [26])).

Where material is re-published on or after 1 January 2006, the relevant defamation law for the republications is described in the Arts Law Information Sheet: [Defamation law \(for material published after January 2006\)](#). However in those cases, you must commence the action within one year of the publication of the material although the court does have a discretion to extend this period.

Before you publish

1. Consider the communication as a whole including any headlines or illustrations. Consider the context. Ask yourself – Which groups or individuals have been identified? What imputations arise? Are they defamatory? Try to put yourself in the position of potential plaintiffs;
2. See if editing or clarification can remove any unintended defamatory imputations;
3. Check who is identified in the communication. Narrowing the scope of the material, or removing details that can lead to identification;
4. Consider the benefits of publishing against the risk of being sued for defamation;
5. What defences might be relevant? If it is meant to be comment, ensure that it is clearly identified as such (for example by adding "In my opinion..." and that the facts on which it is based are stated or obvious);
6. If you want to argue that the defamatory imputations are true, how can they be proved? What has been done to verify their accuracy? Remember proof has to be to the stringent standards demanded by a court. Sources need to be first hand (what if they wish to remain confidential?).

If you're threatened with an action for defamation

1. Check whether they have a case by determining whether all the elements for defamation are there: defamatory meaning, identification, publication. Remember that just because a communication is insulting, annoying, false or damaging to someone's business doesn't mean that it is necessarily defamatory.
2. Consider what, if any, defences are applicable to you?
3. Decide if you wish to apologise, correct, clarify, retract or defend? Seek legal advice before responding. It is important to get legal advice promptly.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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