

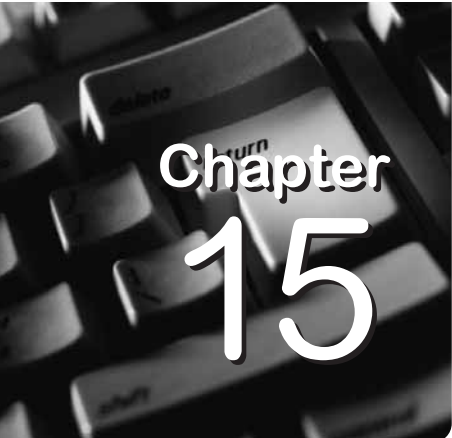
Section 3

DEFAMATION AND MALICIOUS FALSEHOOD

As far back as the 11th century, English law has provided a legal claim for people whose reputations have been damaged by lies told about them. Over the centuries, this action developed into the modern law of defamation, and its main (though not only) use is now in cases where damaging statements are published by the media. Most legal systems have a form of defamation law, but the rules vary widely throughout the world, and England's are considered to make life more difficult for the media than the laws in many other countries.

Defamation is one of the most important areas of law for a journalist to know about and, for that reason, it is considered in more depth than most other subjects in this book. To keep chapters at a readable length, the coverage of defamation has been split into two. Chapter 15 explains how defamation is committed and thus how to avoid committing it. Chapter 16 explains the defences which can be used in defamation, and also details the remedies which may be ordered against publishers and broadcasters if found liable for defamation.

The final chapter in this section covers a related, but different action, called malicious falsehood. Like defamation, it is concerned with protecting people from lies published about them, but it applies to statements which cause financial damage, rather than damage to reputation.



Chapter 15

Defamation

The law of defamation protects people against untrue statements that could damage their reputation, and is probably the single most important area of law for any journalist to know about. One of the reasons for this is that defamation can affect journalists in any field of work. If you work, for example, for a trade magazine or in the women's press, it's quite possible that you will never need to think about court reporting or official secrets after you've passed your law exams. But almost every kind of journalist, on almost every kind of publication, has the potential to defame someone, and some of the most high-profile defamation cases have involved quite small publications.

The second reason why defamation is such an important part of the law for journalists is that being successfully sued for it can be very expensive. Damages in defamation cases are usually decided by juries; as a result, they are very unpredictable, and can be extremely high. One careless piece of research or unchecked statement could end up costing a publisher tens of thousands of pounds in damages – sometimes even hundreds of thousands – and as much again, sometimes more, in legal fees. Big national papers can absorb such losses (though decreasing circulations mean even they find it difficult), but for smaller magazines, losing a libel case can be disastrous. The magazine *Living Marxism* was actually forced into liquidation after being ordered to pay damages of £375,000 in a libel case in 2000.

Because of this, most publishers are very nervous of libel actions. One result of this is that, faced with a threat of libel, even where the journalist believes that the story is legally sound, many publishers will choose not to run it, or to water it down. In this way the threat of a libel action can be used to prevent publication of stories that really ought to be brought to the public's attention. Similarly, many publishers, faced with a complaint about a story that has already been published, will back down, print an apology and if necessary, agree to pay some compensation, rather than allow the case to go to court and risk huge legal costs and possibly damages. In fact, most libel claims are settled out of court, and court hearings are rare.

None of this means that journalists should be so scared of being sued that we never write anything that upsets anyone, but it does mean that every journalist needs to understand thoroughly the basic rules of this area of the law – not just so that you know what not to write or say, but because defamation law does give some protection to press freedom, and by knowing the rules, you can often safely say more than you might imagine. Many newspapers and magazines publish potentially defamatory material every day, but by making sure that what they print is covered by one of several defences to defamation, they can do so safely.

THE ELEMENTS OF DEFAMATION

As explained in the introduction, the law of defamation protects people against damage to their reputations. To succeed in an action for defamation, the claimant must prove three things:

- the statement complained of was defamatory;
- the statement referred to the claimant;
- the statement was published.

Even if all these things are proved, a case may fail if the defendant can establish one of a number of possible defences.

As explained at the start of this section, defences for defamation are covered in the next chapter, but one thing worth knowing at this stage (because it will help explain some of the cases in this chapter), is that if you can prove that what you say is true, you will have a complete defence in defamation. This is known as justification.

Forms of defamation

There are two forms of defamation: libel and slander. Libel is committed by publishing a defamatory statement in permanent form, while slander covers defamatory statements in transient forms, such as unrecorded speech. Defamation actions against the media almost always concern libel, which covers defamatory statements which are made in any of the following ways:

- printed;
- broadcast on TV or radio (Broadcasting Act 1990);
- in films and videos;
- on the internet;
- made during public performances of a play (Theatres Act 1968).

For this reason, the terms 'libel' and 'defamation' can be viewed as interchangeable for the purposes of this chapter. There are rare circumstances in which members of the media can face a slander claim through their work; these are covered on p. 234.

THE MEANING OF 'DEFAMATORY'

Most of the original law on defamation comes from case law (see p. 6), rather than statute, so there is no single definition of what defamatory means. Old cases have suggested that a statement will be defamatory if it 'tends to lower the person in the estimation of right-thinking members of society', or exposes the person to 'hatred, contempt or ridicule'. Both of these are still accurate, but a more comprehensive definition, in line with modern legal thinking, is given by the legal academics McBride and Bagshaw in their textbook *Tort Law*, 3rd edn. (Longman, 2008). They say that a statement is defamatory if reading or hearing it would make an ordinary, reasonable person tend to:

- think less well as a person of the individual referred to;
- think that the person referred to lacked the ability to do their job effectively;
- shun or avoid the person referred to; or
- treat the person referred to as a figure of fun or an object of ridicule.

Their definition makes it clear that the important issue is not how the defamatory statement makes the person referred to feel, but the impression it is likely to make on those reading it. The person defamed does not have to prove that the words actually had any of these effects on any particular people or the public in general, only that the statement could *tend* to have that effect on an ordinary, reasonable listener or reader. Nor does the claimant need to prove that they have lost money, or suffered any other kind of loss or damage. As the following cases indicate, a wide range of allegations have been found to be defamatory by the courts.



In *Byrne v Deane* (1937), the claimant was a member of a golf club, whose owners illegally kept gambling machines on the premises. Someone reported them to the police and afterwards a poem was posted up in the club, implying that the claimant had been the informant. He sued, and won the original case, but on appeal the courts held that the suggestion was not defamatory, because a right-thinking member of society (or as it might be expressed today, an ordinary, reasonable person) would not think less well of someone for telling the police about a crime.



In *Jason Donovan v The Face* (1992), the singer Jason Donovan successfully sued *The Face* magazine for saying he was gay. He based his argument on the fact that he had always presented himself as being heterosexual, and that *The Face* was therefore defaming him by suggesting he had deceived the public about his sexuality. The case did not, therefore, test whether it is defamatory merely to say someone is gay. It is unlikely that a jury today would find that it was defamatory to say someone was gay, but if someone is suing over such allegations, they are likely to have presented themselves as heterosexual, and therefore will be able to sue on the basis that saying they are gay implies they are lying and hypocritical.



In *Berkoff v Burchill* (1996), the journalist Julie Burchill described actor Steven Berkoff as 'hideous-looking' and compared him with Frankenstein's monster. The court argued that although the kind of remarks made would not usually be defamatory, they become so because the claimant earned his living as an actor, and therefore the words made him an object of ridicule. The result of this case surprised many people, because, as stated above, a statement usually has to go further than being simply unpleasant and rude before it will be considered defamatory. It suggests that if rude personal remarks are judged to be excessively offensive, they may be considered to have crossed the line into defamation.



In 1997, a columnist on the *Express on Sunday's* magazine mentioned a newspaper story which had stated that the film star Nicole Kidman had insisted that builders working on her house should face the wall whenever she walked past. A judge initially found that the story, though unpleasant, was not capable of being defamatory, but Ms Kidman appealed. The Court of Appeal agreed with her that the statement was capable of being defamatory. In the event the case was settled out of court.



In *Ivereigh v Associated Newspapers* (2009) a former spokesman for the Roman Catholic Church won £30,000 in damages over a story claiming he had encouraged two women who he had been romantically involved with, at different times in his life, to have abortions when they became pregnant. Abortion is seen as a sin by the Catholic Church, and Mr Ivereigh had publicly spoken out against it, so the story made him look like a hypocrite and a bad Catholic. Although it was true that one of the women had had an abortion and the other had booked one but then

miscarried before it could take place, Mr Ivereigh said that he had not encouraged either woman to have a termination, and the jury found in his favour.



In *Taj Hargey v Muslim Weekly* (2009), the claimant was a Muslim leader who is known for his liberal views about issues such as the role of women in Islam. *Muslim Weekly*, which tends to take a more conservative line, claimed his views meant he was not a proper Muslim. Mr Hargey won his case and was awarded damages described as a substantial five-figure sum.



In *Bowman v MGN Ltd* (2010) a West End actor called Simon Bowman won damages of £4,250, after the *Daily Mirror's* website described him as former EastEnders actress Hannah Waterman's 'new man'. While the words in themselves would not be considered defamatory, Mr Bowman had been in a serious relationship with someone else for 20 years, and so the words could be taken to imply that he was being unfaithful to that person.



In *Dr Sarah Thornton v Telegraph Media Group* (2010), Mr Justice Tugendhat said that for a claim to be defamatory, it had to reach a certain level of seriousness, in terms of the effect that reading it would have on other people's attitude to the claimant. The claimant was suing the *Telegraph* over an interview it had published with her that said, among other things, that she gave copy approval to people she had interviewed for her book. She alleged that as giving copy approval was generally frowned on by professional journalists, this implied that she lacked credibility and trustworthiness as a writer. The judge said that the statement had to be judged by the standards of ordinary members of society, and in ordinary language, to say that she gave copy approval was not capable of meaning that she had done anything reprehensible, that would affect people's attitude to her.

■ Settlements in defamation cases

Most defamation cases do not go to court, but are settled between the parties, often including payment of damages. In these cases we cannot be sure that a court would find the statements complained of defamatory, but as the settlements will have been made on expert legal advice, we can assume that they are at least potentially defamatory.



In *Parker v News Group Newspapers Ltd* (2005), the former EastEnders actor Chris Parker was paid £50,000 damages by the *Sun*, after a story falsely claimed that he had been sacked from the soap after refusing to see a psychiatrist.



In 2005, actress Lisa Maxwell accepted an out-of-court settlement with the *Daily Star Sunday*, over a story which falsely claimed that, many years earlier, she had had a one-night stand with a man she had only just met.



In 2006, TV presenter Noel Edmonds accepted 'substantial' damages from the *Mail on Sunday*, after it falsely claimed that he had seduced a woman in order to make her leave her husband.



In 2007, singer Victoria Beckham accepted substantial damages from *Star* magazine, after it published a story claiming that the crew of a TV show disliked her, describing her as 'picky, demanding and rude'.



In *Knightley v Associated Newspapers* (2007), the actress Keira Knightley accepted a public apology and undisclosed damages from the *Daily Mail* after it published a picture of her in a bikini with the headline carrying a quote from the mother of a girl who died of an eating disorder: 'If pictures like this one of Keira carried a health warning, my darling daughter might have lived.' Ms Knightley alleged that the article falsely suggested she had wanted to be

unnaturally thin, and set out to lose an excessive amount of weight by eating poorly and exercising inappropriately.



In 2008, Mia Amor Mottley, the former deputy prime minister of Barbados, accepted damages from *Country Life* magazine over a feature which referred to a calypso song whose lyrics included a suggestion that Ms Mottley has assaulted another woman.



In 2008, football agent Anthony McGill accepted an out-of-court settlement from the publisher of a football website which alleged that he had been 'tapping up' a professional footballer ('tapping up' means encouraging a player to break his contract and join another team, and is heavily criticised in the football world).



Former England footballer Andrew Cole accepted libel damages from the *Daily Star* in 2008 over a story concerning his arrest on suspicion of assault. He was released the following day and charges were withdrawn two days later, but the *Star* published a front page story alleging there were strong grounds to suspect that he had been beating his wife. Mr Cole sued after the paper refused to apologise.



Former pop star Yusuf Islam (formerly known as Cat Stevens) accepted an out-of-court settlement from news agency WENN in 2008, over a story claiming that he was sexist and bigoted. Mr Islam is a Muslim and the story claimed that he refused to speak to any woman who was not wearing a veil. The story was said to have caused distress in painting him as sexist, and presenting a distorted picture of his religious views.



Italian footballer Marco Materazzi accepted substantial damages from the *Daily Mail* in 2008 after it claimed he had used racist abuse against another player.



Actor Will Smith sued the news agency WENN over claims that he had described Hitler as 'a good person'. The case was settled and the agency paid an undisclosed sum in damages.



Model Katie Price and her then husband Peter Andre accepted damages from the *News of the World* in 2008 over a story in which their former nanny alleged that they were uncaring parents.



Singer Ozzy Osbourne sued the *Daily Star* in 2008 after it claimed that he had suffered a health scare while co-hosting a music awards show. The story alleged that he had fallen over twice, had to sit down frequently and was driven around in an electric buggy. The paper accepted that the allegations were entirely untrue, and paid undisclosed damages.



TV presenter Kate Garraway sued the *Sunday Mirror* in 2008 after it suggested that she was having an affair with the dancer Anton du Beke, whom she was appearing with on the BBC show 'Strictly Come Dancing'. While the stories did not specifically state that an affair was taking place, the paper used photographs, taken covertly, of Ms Garraway going about her daily life, which were presented in such a way as to imply that something was going on between her and her dance partner. The series of stories also included headlines such as 'Kate denies marriage is in trouble over dance partner pics' and 'Strictly no crisis . . . GMTV's Kate's show of unity after kiss with dancer star'. Ms Garraway sued, asking for aggravated damages (see p. 269) on the grounds that the newspaper had been told there was no truth in the claims but had gone ahead anyway. The case was settled out of court, with the paper paying damages said to be in six figures.



In March 2008, Kate and Gerry McCann, parents of Madeleine, who disappeared during a family holiday in Portugal in 2007, accepted a settlement of £550,000, and a public apology, from Express Newspapers after suing for defamation over stories suggesting they were responsible for their daughter's death. In the same year, Robert Murat, a property consultant based in the resort where Madeleine disappeared, accepted damages said to amount to at least

£800,000 from four national newspaper publishers and British Sky Broadcasting, over a number of stories which alleged or implied that he was involved in the little girl's disappearance.



In 2010, Barry George, who was accused and later cleared of murdering the TV presenter Jill Dando, accepted damages from Mirror Group Newspapers over claims that he was obsessed with TV journalist Kay Burley and singer Cheryl Cole.



In 2010, a property developer accepted £30,000 in damages from the Belfast-based *Sunday World*, over a story about alleged corruption linked to government contracts, which mentioned him and also referred to an arson attack that damaged a Belfast shopping arcade.



In 2010, the ex-wife of former England footballer Paul Gascoigne accepted five-figure damages from the *News of the World*, over an article that accused her of lying about the repeated violence she had suffered from her ex-husband. The article quoted Paul Gascoigne's reaction to claims made about him in his ex-wife's book, and was headlined 'You lying bitch.'



In 2010, *Take a Break* magazine paid damages to a former couple after publishing a story that claimed, among other things, that the woman had framed her former lover by supplying false information to the police.



In 2010, the trustees of a charity accepted damages over a story claiming that an al-Qaida commander was one of its 'favourite speakers' at its events. In fact the trustees had never met the man named nor invited him to speak at any event.



In 2010, the owner of Chelsea Football Club accepted damages over claims that he had a serious gambling problem.



In 2010, TV interviewer Michael Parkinson was paid damages by Associated Newspapers, over a story claiming that he had lied about his family background. The story, in the *Daily Mail*, carried claims by a cousin that Mr Parkinson had painted a false picture of his father, who he had described as honest, upstanding and well-liked. The cousin alleged that this was untrue and that his uncle was 'hateful' and disliked by most people. As Mr Parkinson's father was dead by this time, it was not possible to sue for defamation of him, but the action was brought on the basis that it was defamatory to say that Mr Parkinson had lied.



In 2010, *Take a Break* magazine paid damages to a man over a 'true life' feature about his wife. The feature was a triumph over tragedy-type piece, detailing Mrs Dionne Heneghen's battle to beat cocaine addiction, and how she had used her experience to help others. Within it, she claimed that it was her husband's treatment of her that led to her becoming addicted to cocaine, and that he abducted their child and kept him hidden from social services and the police. In fact she had been addicted before they met, and he had made efforts to try to help her overcome it. He had not abducted their son, but had taken the boy to live with him at Mrs Heneghen's request, and social services and the police knew the child's whereabouts.



In 2010, the creator of the *Dragon's Den* TV programme, Martyn Smith, accepted £70,000 damages from the Press Association and three newspapers, over a story that claimed he had 'narrowly escaped jail' for downloading child porn. In fact the man convicted was another Martyn Smith.



In 2010, footballer Cristiano Ronaldo was paid substantial damages by the *Daily Mirror*, over a story which claimed he went 'on a bender' at a Hollywood nightclub. The story alleged that, while he was recovering from a serious foot injury, he went to the club, drank wine, champagne and vodka, and tried to dance on his injured foot. Cristiano Ronaldo does not drink alcohol, and although he had been at the club on the night alleged, the newspaper accepted that he neither drank nor put his recovery at risk by trying to dance.

Defamation and truth

As explained above, if you make a statement that is defamatory, but you can prove it to be true, you will be covered by the defence of justification (see p. 240). Equally, if you publish a statement that is not true, but is not defamatory either, you cannot be sued for defamation. For example, if you were to write that two single film stars were dating, when in fact they were not, the celebrities would not be able to sue for libel unless there was something in the story which would have a bad effect on their reputation. If one of them were married, or known to be in a serious relationship, they might have a case in defamation, because the story would be implying that they had been unfaithful, but if they were both single and the story was merely untrue but not libellous, they would not.

Obviously, the fact that there is no legal obligation to be truthful does not mean there is no moral obligation. The Codes of Practice used by the Press Complaints Commission (PCC), the National Union of Journalists (NUJ) and Ofcom all recognise that journalists have a duty to ensure that the information they publish is accurate.

Myths and misconceptions **Untrue statements**



X *The claimant has to prove your statement is untrue.*

A defamation claimant has to prove that the relevant statement is defamatory, but he or she does not have to prove that it was a lie. If a statement is defamatory, the court will simply assume that it was untrue. If a statement can be proved to be true, you will have the defence of justification, but it is up to you to prove that; the claimant does not have to prove it was false.

Changes over time

In deciding whether a statement could lower its subject in the eyes of others, the jury is asked to consider how an ordinary, reasonable person (referred to in some cases as a 'right-thinking person') would read and understand it. This person is often referred to by judges as 'the reasonable man', and one of the things that makes defamation claims so unpredictable is that clearly, the views of the 'reasonable man' will change over time. At one time, for example, it would certainly have been defamatory to say of an unmarried woman that she spent the night with her boyfriend; this would not be the case today, unless, for example, that particular woman had presented herself as being against extra-marital sex, in which case she might be able to argue that the claim made her appear to be a liar and a hypocrite. In fact things have changed so much that it could now be defamatory to say a woman did not have sex with a man, as the following case shows.



In 2004, the celebrity magazine *Heat* agreed to publish an apology to a woman called Amy Barker, for saying that she had not had sex with pop star Bryan McFadden on his stag night. Ms Barker had originally sold the story of the incident to the *Sunday People*, but in an interview with *Heat*, Mr McFadden suggested that she had made the story up. Ms Barker's legal advisor sought an apology on the grounds that the *Heat* article called Ms Barker's integrity into question; neither side would say whether any damages were paid.



In *Mitchell v Faber & Faber* (1998), the claimant was a musician who had worked with the rock star Jimi Hendrix during the 1960s. The defendant was the publisher of a book about

Hendrix, in which the author said that the claimant had a 'strange contempt' for Hendrix and routinely used words like 'nigger' and 'coon' in everyday conversation. However, he said that the claimant had no idea that what he said might offend anyone, and did not intend any harm. The claimant sued on the basis that the book made him appear to be racist. The defendant argued that the book was not defamatory, in that it made clear that the claimant had not intended to offend Hendrix, and that his attitude was simply typical of many people in the UK 30 years ago. The Court of Appeal said that although it was true that those attitudes were widely held at that time, it was necessary to consider what impression the book would have on people reading it now, and therefore the words could be defamatory.

■ Effect of the claimant's existing reputation

What if the person you write about already has a bad reputation? Journalists often assume that if someone already has a low standing in the eyes of the public, then nothing they write about that person could be said to lower them further in the estimation of right-thinking people. This is not the case. For example, if someone was a convicted bank robber, and you wrote, wrongly, that he had been involved in the kidnap of a child, or of a sexual offence, he might well be able to sue successfully for libel. Despite his already bad reputation, it could be argued that your words have lowered his reputation even further.

However, if a person has an extremely bad reputation in one particular respect, and your false allegation is in the same vein and does not make that reputation worse, that person might well have difficulty proving that you have lowered them in the estimation of right-thinking people. For example, if an actor had serious drug problems, and this was well known to the public, he would have difficulties successfully suing for libel if you falsely claimed that he had taken drugs on a particular occasion, even if this was not true (see the Kate Moss case, p. 242).

The law, however, restricts the use which libel defendants can make of background information on a claimant. Evidence can be given to establish the fact that the claimant already has a bad reputation, but the old case of *Scott v Sampson* (1882) establishes that a defendant cannot put forward in evidence examples of the claimant's previous misconduct, unless the jury has already been told about these as part of a defence of justification. For example, take the case where a newspaper is sued over a story that claimed an actor had had an affair with his co-star, and cannot prove that particular story, but does have evidence of previous affairs. You might assume that if someone can be proved to have had serial affairs, their reputation cannot be lowered by suggesting that they had one with a particular person, but the effect of *Scott v Sampson* is that the evidence of the previous affairs could not be put before the jury. However, the situation is different where it is established that a libel has been committed, and the court has only to decide what damages should be awarded. In that situation, the case of *Burstein v Times Newspapers* (2000) establishes that background evidence which is relevant to the publication of the defamatory statement can be used to argue that the damages should be reduced.

■ Innuendoes

A statement does not need to make a direct criticism in order to be defamatory – a defamatory implication or innuendo can be just as dangerous. This is fairly obvious when it comes to deliberate hints: if you want to say that John Jones MP has taken bribes, you cannot escape the risk of being defamatory by saying something like 'John Jones MP said he had not taken bribes, and we all know that politicians never lie, don't we?' In these types of case, the courts will look at what the ordinary, reasonable reader would think that the words implied.



In 1986 the *Star* published a gossip column story about Lord Gowrie, an ex-Cabinet Minister, who had stepped down from his post the year before. Questioning why he had resigned, the story referred to 'expensive habits', and said that Lord Gowrie would 'snort' at the idea that he had been 'born with a silver spoon round his neck'. Lord Gowrie sued, arguing that references to expensive habits, snorting and a silver spoon implied that he habitually took cocaine. He won his case.



In *Liberace v Daily Mirror Newspapers Ltd* (1959), the American pianist Liberace, who at the time was very famous for his glittering costumes and effeminate manner, sued the *Mirror* over an article which described him as a 'deadly, winking, sniggering, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother-love'. Liberace claimed that the article implied he was homosexual, which he denied. At the time, to be said to be gay was seen as a slur, though it probably would not be today, and his libel claim was successful. (Many years later, he came out as a homosexual.)



In 2008, Lisa Jeynes, a contestant on 'Big Brother', sued the magazine *Love it!* and the *News of the World* over a coverline on the magazine and a headline in the paper, which said: 'BB's Lisa "the geezer". My fake boobs fell out on date with James Hewitt!' Ms Jeynes said that these words, along with the fact that there were rumours at the time that 'Big Brother' was to feature a transsexual contestant, suggested she was a transsexual, a transvestite, or a man posing as a woman. Mr Justice Eady dismissed the claim, saying that no reasonable reader would assume that the words carried the implication that she alleged they did.

A second type of innuendo is where words seem innocent on the surface (and may actually have been meant quite innocently) but can be read as defamatory in the particular circumstances, or because of special knowledge possessed by some readers. For example, take a situation where you interview a celebrity over lunch. To add colour to the feature, you want to describe the meal, but you are unable to remember precisely what the celebrity ate. Assuming that it is unlikely to matter, you write that she 'tucked into a juicy steak'. In most cases, though untrue, this would not be defamatory, but if the celebrity in question was actually an ardent vegetarian, the situation would be different. Your words could then, arguably, be defamatory, since they would suggest to those who know she is a vegetarian that she has betrayed her principles, or that she was a hypocrite in only pretending to be a vegetarian. If that seems extreme, consider the following real-life cases.



In *Tolley v JS Fry & Sons Ltd* (1931), the claimant was an amateur golfer, whose picture was used, without his consent, to advertise Fry's chocolate. He argued that anyone seeing the advert would assume he had both consented to and been paid for it, and that this would suggest that he had compromised his amateur status. He won his case.



In *Cassidy v Daily Mirror Newspapers* (1929), the *Mirror* published a picture of a man described as Mr Corrigan, with a lady who it said was his fiancée. The man had given these details to the paper, but in fact his name was Mr Cassidy, and he was married to someone else, though they lived apart. Mrs Cassidy sued on the basis that anyone reading the article, who knew her, would assume that if Mr Cassidy had a fiancée, he must be free to marry, and therefore could not have been married to her when they were living together (remember that this case took place at a time when both living together and divorce were uncommon). She won her case, and her victory was upheld on appeal.

A claimant who argues that they have been defamed by innuendo must not only show that the facts or circumstances giving rise to the innuendo exist, but that the statement was published to people who knew of those facts. So, in the example of the vegetarian celebrity

above, the claimant would not only have to be a vegetarian, but would have to show that at least one of the readers of your publication would know this. Clearly this is easier in some cases than others.

Myths and misconceptions Innuendo and implication



✗ 'I didn't mean it that way' is a defence.

In general, in defamation the important issue is not what you meant to say, but what a jury believes a reader would think you meant. So it is no defence to say that you did not mean to defame the claimant, or did not realise what your words implied.

■ Pictures

Defamation is not necessarily committed by words alone. It is possible to use quite harmless words, but still defame someone in print, thanks to the pictures used with those words.



In *Dwek v Macmillan Publishers Ltd* (2000), a book published by Macmillan included a picture, taken 20 years earlier, which showed the claimant sitting next to a woman who was (correctly) described as a prostitute. The claimant himself was not the subject of the book, and was not mentioned anywhere in it. He sued, arguing that readers would assume from the picture and caption that he was a client of the prostitute. The Court of Appeal stated that this could be defamatory.



The now-defunct magazine *Titbits* illustrated a feature on stealing at Christmas with a photograph of a meat porter winning a meat-carrying race at London's Smithfield market. The porter sued, on the basis that the use of the picture suggested he was a thief, and won his case.



In 2005, footballer Andy Johnson forced an apology and damages from Express Newspapers, after they used a picture of him alongside a feature on footballers with drink and drug problems. Although not named in the article, he claimed it implied he took drugs, which was untrue.



In *Capehorn v Independent News and Media* (2006), the *Independent on Sunday* paid undisclosed damages to actor Harry Capehorn, after it used his photo to illustrate a feature on ASBOs – anti-social behaviour orders. The photo was taken six years earlier for a publicity campaign by a charity, and Mr Capehorn, who was then 16, was the model for it. It was originally supplied on the condition that it would be captioned 'posed by models', but the *Independent* failed to do this. Mr Capehorn, who has since appeared in several TV series, said readers could recognise him from the photo and might assume he had been the subject of an ASBO.



In 2007, the BBC was sued by Waseem Yaquib, formerly manager of an Islamic charity, after it showed a picture of him in a programme about a different charity's alleged links to the extremist group Hamas. The picture showed Mr Yaquib standing next to Dr Essam Yusuf, whose charity Interpal was the subject of the programme. Mr Yaquib was not mentioned in the programme, but he said that the photograph would mean that viewers who knew him would assume there were grounds to suspect that he was an associate of Dr Yusuf, in connection with the funding of terrorist activity. The BBC settled the case and paid damages.



A former martial arts champion accepted substantial damages from the *Daily Mail* after it published a photo of him by mistake and captioned it with the name of another man who was accused of taking part in a £53 million robbery. The mistake arose because the two men had both represented England in martial arts, and had similar names; the picture had come from a local paper and been misrecorded by the *Daily Mail* photo library.

■ Juxtaposition

A statement that by itself might be quite innocent can become defamatory as a result of the material it is placed next to.



In 1988 the business magazine *Stationery Trade News* carried an article about counterfeit stationery products which were being imported into the UK. Towards the end of the story, it mentioned a different problem, involving envelopes which were not made in the UK being marketed under a brand name which sounded British. The makers of these envelopes sued the magazine, claiming that the story implied that they were selling counterfeit envelopes. They won their case.

■ Juxtaposition and broadcasting

Juxtaposition can be a particular problem for broadcasters, and it is vital to think carefully about the combined impression of words and pictures. If, for example, you illustrate a story about drug smuggling with film of holidaymakers coming through customs, an individual who is identifiable on screen could very well sue on the basis that you have implied they are a drug smuggler, as could a shopper who is shown in a film about credit card fraud.

Make sure you check what is in the background as well as the foreground: if, for example, your commentary is about a company accused of health and safety offences, and your presenter happens to stroll past a sign for a different company in the same field, you could find yourself sued on the grounds that viewers would assume that was the company mentioned.



In 2007, Sky and Channel 5 were sued by a family after they broadcast film of the family's house which, by juxtaposition, implied that the family were involved in terrorism offences. The film showed police officers in forensics overalls going in and out of the family's house, and had been taken on a much earlier occasion which had nothing to do with any terrorism investigations. It was shown as part of a story about five men being charged with terrorist offences, and accompanied by a voiceover explaining that thousands of items had been seized as part of the investigation. The family claimed that the combination of the film and the voiceover suggested that they were suspected of involvement in the terrorist plot. The broadcasters settled out of court and paid damages.



In 2008, a quiz show participant sued the BBC over a news report which he claimed implied that he was involved in a scam. Leigh Petters was a contestant on the Channel 5 show 'Brainteaser', and footage of him taking part was broadcast as part of a BBC report about irregularities in the way the quiz show was run. The story stated that on several occasions when viewers had not rung in to enter, the programme had given fictitious names of winners, and a member of the production team had pretended to be a winner. Mr Petters claimed that the juxtaposition of this commentary with the film of him suggested that he was involved in the scam, and was posing as a winner, when in fact he had taken part and won fairly. The BBC settled and paid damages.

Law in practice Subbing errors



It's important to be aware that libel can creep in at almost any stage of a story, not just in the initial writing. Rod Dadak, Head of Defamation at solicitors Lewis Silkin, advises that all journalists should keep a copy of the unsubbed version of their story:

Mistakes can be introduced during the subbing process, and a headline or caption can make a piece defamatory even if the original text was not. In practice it is unusual for a journalist to be sued personally, as most claimants sue publishers because they are more likely to have the money to pay damages, but if you were sued personally, you would be able to mitigate your liability by showing that you did not write the offending caption or headline, or that your original words were altered during subbing.

■ The importance of context

Words alleged to be defamatory must be read in their full context, rather than taken in isolation, and context can potentially include everything else on the page. As a result, an article taken as a whole may be judged to carry a defamatory implication which is not specifically stated anywhere in it. On the other hand, the context may rescue particular words from being defamatory.



***Norman v Future Publishing Ltd* (1999)** concerned an article on the opera singer Jessie Norman, in which the interviewer referred to her 'statuesque' size, and quoted an anecdote in which Ms Norman got trapped in a revolving door and, on being advised to get out sideways, responded, 'Honey, I ain't got no sideways.' She sued, claiming that the quote suggested she had spoken in a vulgar, undignified way, which conformed to a degrading racist stereotype. The Court of Appeal, however, looked at the whole of the article, which it found portrayed Ms Norman as a respected professional and a person of high standing. In that context, it held, the words could not be read as defamatory.



In ***Robert Dee v Telegraph Media Group Ltd* (2010)**, the claimant was a professional tennis player who had finally won a match after losing 54 in a row, during which time he had not won a single set. The *Telegraph* reported the victory, starting the story on their front page, with the headline 'World's worst tennis pro wins at last'. Three paragraphs on the front page described Mr Dee's losing run, with a line directing readers to the 'full story' in the sports section. Mr Dee claimed that the front page story implied that the 54 matches were the only professional ones he had ever played, and therefore that he had only ever won one game. However, the story in the sports section made it clear that this was not the case. The judge said that the front page story should not be treated in isolation: the reference to the 'full story' made it clear that the two pieces were meant to be read together, and a reader who did this would see that the paper was not claiming Mr Dee had lost every match he had ever played except one.



In ***Charleston v News Group Newspapers* (1995)**, the *News of the World* carried a story about a computer game which superimposed the faces of well-known actors onto other people's bodies, so that they appeared to be engaged in sexual acts. The piece was illustrated with a picture showing a man and woman having sex, with the faces of the actors Ian Smith and Ann Charleston, who played Harold and Madge in the TV soap 'Neighbours', superimposed on their bodies. The headline was 'Strewth! What's Harold up to with our Madge?' Although the article made it clear that the people in the picture were not Smith and Charleston, they sued on the basis that anyone who just read the headline and looked at the pictures might think that they had been

involved in pornography. The House of Lords said that using defamatory headlines could be 'playing with fire', but the defamatory effect had to be judged against the article as a whole. In this case, although the headline looked defamatory, a reader only had to glance through the first paragraph to see that in fact the paper was not making any defamatory allegation. The situation might, they said, be different if, for example, the headline was potentially defamatory and the words which explained it and removed the defamatory meaning were not found until well into the article, so that casual readers might not see them.

Cases like *Charleston* are often referred to in terms of 'bane and antidote', the bane being the potentially defamatory allegation, and the antidote those words which show the reader that it is untrue, or take away the defamatory meaning. A jury will be told to take the two together and decide whether the antidote does actually take away the bane.

Context and broadcasting

Part of the context of a defamatory remark is of course the medium it is presented in; someone reading a newspaper may well give more attention to that than they would to a TV or radio programme on in the background. Unlike a TV viewer, a reader can also easily go back over parts of the newspaper if a meaning seems unclear. The courts have therefore suggested that words which might not be defamatory in print, where a reader could be expected to see them in the context of a whole article, may be defamatory if they are part of a TV programme, where viewers might not be giving their whole attention and therefore might be more likely to pick up on the defamatory meaning without taking in other material that could have removed the 'sting'.



In *Gillick v BBC* (1996), a live TV programme was broadcast to mark the 25th anniversary of the Brook Advisory Centres, set up to give young people advice about contraception. A guest on the programme was Victoria Gillick, well-known at the time for her campaigns against under-age sex. She had won a court case in which she sought to restrict access to contraceptives for teenage girls, and the programme's presenter said to her, 'But after you won that battle . . . there were at least two reported cases of suicide by girls who were pregnant.' Mrs Gillick sued the BBC for libel, claiming that the words meant she was morally responsible for the deaths of at least two girls. The Court of Appeal held that the words should be judged on the meaning that they would imply to an ordinary person who had watched the programme once, and was neither unusually suspicious or unusually naïve. On this basis the words could carry the meaning Mrs Gillick alleged.

Defamatory remarks made during a broadcast may also be the subject of complaints to Ofcom (see Chapter 29). There is however nothing to stop a person who goes to Ofcom from suing for defamation as well.

Context and the internet

Context is also important with regard to internet articles, and the way in which they are accessed. If an online story would be read in conjunction with others, and as a whole, they remove a defamatory meaning, that can defeat a libel claim.



In *Budu v BBC* (2010), Mr Budu attempted to sue the BBC over three reports it published on its website. The first article said that Cambridgeshire Police had withdrawn a job offer from someone after discovering that he was an illegal immigrant. This was Mr Budu, but the article did not name him or identify him in any way. The second and third articles made it clear that he was not in fact an illegal immigrant at all. The articles were all archived shortly after initial

publication, and could then only be accessed by someone who searched for them on the BBC site. The only thing identifying Mr Budu as the subject of the first article was the fact that the story was linked to the two later ones. Therefore, the defamatory allegation in the first story could only be published to someone who had seen the other two articles. Reading the three articles together removed the defamatory meaning, so there was no possible claim.

■ Other people's words

If someone makes a defamatory statement, and you report it, you are publishing that statement and you may be liable, even though the words belong to someone else (the maker of the statement may or may not be sued as well but that does not affect your liability). Journalists often believe that if they write 'Joe Brown says that Joe Bloggs is corrupt', or quote him directly, they only have to prove that Joe Brown said what they say he said, but that is absolutely not the case. Unless you can prove that the words are true (or covered by another defence), you must not print the allegations whether as a direct quote or paraphrased. Repeating statements made by interviewees without being able to prove them is in fact one of the commonest causes of libel actions.

The same principle applies in broadcasting. If someone makes a defamatory statement on a TV or radio programme, the broadcaster may be liable, regardless of whether the speaker is sued. Where a programme is live, broadcasters can sometimes use the live broadcast defence (see p. 267), but even here, they will have to prove they have taken reasonable care to avoid the risk of libel.



In 1993 and 1994 the *Sunday Telegraph* and the *Sun* both paid damages to the Birmingham Six, who were falsely accused and later cleared of terrorism offences. Former police officers were accused of fabricating evidence but a prosecution against them was dropped. Afterwards, the *Telegraph* reported one of the officers as saying 'In our eyes, their guilt is beyond doubt'. The matter was settled out of court, with the claimants reported to have received £25,000 from the *Telegraph*, and £1 million from the *Sun*, which had published an article based on the *Telegraph's* interviews.

■ Reporting rumours

Can you report defamatory rumours if you make it clear that that is all they are, or even state that you do not believe them? Many journalists believe that if they report rumours in this way, they can argue that the story is true, because they are reporting that there are rumours, and they can prove that the rumours did exist. This is not the case. The law takes the view that readers will assume there is no smoke without fire, and if you cannot prove the rumour to be true (or cover yourself with another defence), you will be taking the risk of liability for defamation.



In 1999 Belfast's *Sunday Life* was successfully sued by the actors Natasha Richardson and her husband Liam Neeson over a story about rumours that their marriage was in trouble. The story focused on the fact that people who knew the couple well had said that the rumours were untrue, but the court held that this would not necessarily convince readers, and therefore the 'antidote' did not cure the 'bane'.



In *Major v New Statesman* (1993), the *New Statesman* was sued by the then Prime Minister John Major, for an article which repeated rumours that he was having an affair. The magazine said that it was merely reporting that the rumours were in circulation, and had not intended to imply that they were true, but this did not protect them. Ironically, years later it was revealed that Mr Major had been having an affair at the time, but not with the person the rumours alleged.

Myths and misconceptions 'Allegedly'



✗ *You are safe from a defamation claim if you use the word 'Allegedly'.*

If only defamation law was this simple! Comedians and satirical journalists, especially on TV and radio, often use the word 'Allegedly' when making remarks that could be defamatory, in a humorous context. It is possible that using the word within a comical context could mean that a judge or jury might find that no reasonable person would believe the statement was intended to be taken as true, though this has never been tested in court. However, in any kind of serious context, merely using the word 'Allegedly' has no special protective effect – if the words are defamatory it is only safe to use them if you are covered by a specific defence.

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Defamation

■ Implying habitual conduct

Even if you are sure you can prove that a specific allegation of bad behaviour is true, you must be careful that your description of that behaviour does not imply that the defendant behaved that way habitually (unless you can prove that as well). For example, if you were to describe someone convicted of shoplifting as 'a thief', that might be strictly true, since they would have a conviction for theft, and it would be unlikely to be a problem if the person concerned had a string of similar convictions. However, if you use the term 'thief' of someone who has just been convicted for shoplifting a packet of chewing gum, but otherwise has a completely clean record, they could argue that you were implying they were a habitual criminal who could not be trusted, and clearly you would not be able to prove that implication was true. It is not always clear where the line between these two extremes lie, so you should always be careful about using terms or making allegations that could imply habitual conduct, unless you can prove that implication.



In *David and Carol Johnson v Radio City* (1988), the radio station was sued by a couple who ran a company offering caravan holidays. The station had featured complaints about the company's holidays, and Mr Johnson was interviewed on air to give the couple's side of the story. However, during the interview, the presenter referred to Mr Johnson as a 'con man'. He sued, claiming that this implied that he was habitually dishonest. The radio station produced 20 former customers who were unhappy with the holidays they had bought, but the company produced an equal number who said they were satisfied. The judge instructed the jury that it had to decide whether the broadcast was only suggesting that some customers had been mistreated, or whether it was implying 'habitual' conduct. The jury found that the latter meaning was implied, and the Johnsons won damages of £350,000.

■ Reporting investigations

Obviously, saying that someone is guilty of an offence when they are not is defamatory, whether you say it yourself or report someone's else allegation (with the exception of reporting allegations made in court, which are covered by privilege – see p. 250). But what about saying that someone is being investigated in connection with a crime or other wrongdoing, or is under suspicion? Such allegations can easily lead to a claim for libel, if the story is written in such a way as to suggest that they have done something that gives grounds for the suspicion. In the 1964 case of *Lewis v Daily Telegraph* (see below), the Court of Appeal stated that,

depending on the way it was phrased, a claim that someone was being investigated for a crime could potentially mean any one of three different things:

- 1 that the person mentioned was guilty of the crime; or
- 2 that there were reasonable grounds for suspecting the person was guilty of the crime; or
- 3 that there were reasonable grounds for an investigation into whether the person had committed the crime.

Clearly, meaning (1) is more seriously defamatory (and more difficult to prove) than (2), and (2) is more serious and difficult to prove than (3). As a result, a publisher who means and can prove meaning (3), may still be in trouble if the court decides that the words as written are capable of carrying meaning (2) or even (1), and the publisher cannot prove that meaning to be true.



In *Chase v News Group Newspapers Ltd* (2002) the *Sun* was sued by a nurse, over a story which implied she was involved in the deaths of a number of terminally ill children. The nurse had worked with the children, and the newspaper based its story on the fact that allegations had been made against her to the hospital and the police. The headline ran 'Nurse is probed over 18 deaths' and the story made reference to the GP Harold Shipman, and a nurse called Beverly Allitt, both of whom had been convicted of murdering patients in high-profile cases. After the story was published, the police said that they had no grounds to suspect Ms Chase. When the nurse sued, the paper tried to justify its story by claiming that there were reasonable grounds for suspicion, but the Court of Appeal held that such grounds had to be based on evidence of the claimant's behaviour, not just allegations against her. The *Sun* paid Ms Chase £100,000 damages.



In *Lewis v Daily Telegraph* (1964), the *Telegraph* reported that a company was being investigated by the Fraud Squad, which was true. However, Mr Lewis, who ran the company, said the story implied that he and the company had committed fraud, or at least were suspected of it. The House of Lords said that the story could not be taken to mean that Mr Lewis and his company were guilty of fraud, but it could mean that they were under suspicion, and a jury should be allowed to consider the case on the basis of this meaning. In the event, the case was settled out of court.



The case of *Hayward v Thompson* (1981) took place against the background of the 'Scott affair', a very high-profile case in which a man called Norman Scott alleged he was the subject of a murder plot, because of an affair he had had with the former Liberal Party leader Jeremy Thorpe. Mr Thorpe and his alleged conspirators were eventually all acquitted, but while the allegations were still being investigated, the *Telegraph* published a story headed 'Two more in Scott affair'. It said: 'The names of two more people connected with the Norman Scott affair have been given to police. One is a wealthy benefactor of the Liberal Party . . . Both men, police have been told, arranged for a leading liberal supporter to be "reimbursed" £5,000, the same amount Mr Andrew Newton alleges he was paid to murder Scott.' Since the Liberal Party had few wealthy benefactors at the time, it was not difficult to spot that the man meant was a Mr Jack Hayward, and he sued. The *Telegraph* argued that its story meant only that Mr Hayward might be able to help with the investigation, but Mr Hayward claimed that it implied he was guilty of taking part in, or at least condoning, the alleged murder plot. The jury agreed, and the Court of Appeal upheld its verdict, saying that the headline placed Mr Hayward 'in' the Scott affair, and this was backed up by the words 'connected with' in the first sentence. Nothing else in the story counteracted the impression these words gave.



In *Jameel v Times Newspapers* (2004), a wealthy Saudi Arabian businessman sued the *Sunday Times* after it published a story headlined 'Car tycoon linked to Bin Laden'. The story stated that Mr Jameel had been named as a defendant in a case brought by the relatives of victims of

the September 11 bombings in the USA against over 200 defendants accused of helping to fund terrorist activity. The paper claimed that it was merely reporting the fact of Mr Jameel being named as one of the defendants, which amounted to the level (3) meaning in the list above. It pleaded justification for this meaning. Mr Jameel however said the story implied that there were reasonable grounds for suspecting him of being associated with Osama Bin Laden (the level (2) meaning), an allegation which the *Sunday Times* could not justify (and said it did not seek to make). He pointed particularly to the phrase 'linked with Bin Laden' in the headline, and the fact that a picture of the burning towers of the World Trade Centre was used to illustrate the story. The Court of Appeal agreed with Mr Jameel that the story could be read as meaning that there were grounds for suspicion, and said that the case could be tried on this basis. Mr Jameel then applied to have the *Sunday Times*' justification defence for the level (3) meaning struck out, on the grounds that there was not enough evidence for the paper to plead justification; he was successful. The case was then settled out of court, with the *Sunday Times* publishing a statement that it had not intended to suggest, and did not believe, that Mr Jameel had any connection with terrorism.

■ Previous convictions

Clearly, saying falsely that someone has been convicted of a criminal offence will be defamatory. But if it is true that they have been convicted, the journalist will be protected by the defence of justification. This protection also applies if a person has been convicted of an offence, and you say that they did it. Under the Civil Evidence Act 1968, the fact that someone has been convicted of a criminal offence can be taken as conclusive proof of the fact that they committed that offence, so a convicted burglar, for example, who maintains they are innocent cannot successfully sue a newspaper which says otherwise (though this would change if the burglar appealed and had the conviction quashed).

However, there is an exception to the above rules: the idea of the 'spent conviction'. This comes from the Rehabilitation of Offenders Act 1974, which was designed to help offenders reintegrate into society. Under the Act, convictions which have resulted in a sentence of no more than 30 months' imprisonment become 'spent' after a certain period of time (the time depends on the actual sentence given; see *Online resources* at the end of the chapter). The effect of this is that the offender can, to an extent, wipe the slate clean. Once an offence is spent they do not have to, for example, mention it in most job applications, it should not be mentioned in civil court proceedings, and in criminal proceedings only if absolutely necessary.

You might expect then that the media would be forbidden to mention spent convictions, but this is not the case. Most publishers do respect the provisions of the Act and avoid mentioning spent convictions, but in strict legal terms, if you publish details of someone's spent convictions, and they sue you for libel, in most cases you will be covered by the defences of qualified privilege, justification or fair comment (see Chapter 16). However, the Act provides that if the claimant can show that the publication of a spent conviction was motivated by malice (see p. 249), any of these defences should fail. In addition, if a journalist claims the defence of privilege (see Chapter 16) for reporting a reference to a spent conviction that was made in court, that defence will fail if the conviction is held to be inadmissible in evidence.

■ Product stories

Product tests are an important feature of many consumer magazines and newspapers, because readers like them and – in many cases – they are cheap and easy to put together. It is often assumed that these features are as safe as they are simple, but that is not necessarily the case. If you look back at the definition of defamatory on p. 208, you'll see that one of the factors

which can make a statement defamatory is an allegation that a person is no good at their job or business. If, in criticising a product, you imply that the person or firm producing the product is at fault, you may be at risk of a defamation action.

That does not, of course, mean that every criticism of a product is defamatory of the manufacturer. Simply saying that a particular lipstick did not last well in your tests, or you did not like the way a car handled, are unlikely in themselves to be defamatory. Where they can become so is if they imply that the manufacturer (or possibly the seller) has acted discredibly, or is in some way unfit or unqualified to carry on their business.



In 1985, the manufacturers of Bovril successfully sued the publishers of a book which claimed (wrongly) that the product contained sugar. They were able to base their case on the claim that the book had libelled them by suggesting they lied about the product's ingredients.



In *Walker Wingsail Systems v Sheahan Bray and IPC Magazines* (1994), a case which sent shivers around the magazine publishing world, a jury awarded £1.4 million to the maker of a yacht who claimed he had been libelled in a product test by *Yachting World*. The manufacturers, Walker Wingsail, had made dramatic claims about the performance of their yacht, but when tested by the magazine, it failed to live up to those promises. There was some dispute about whether the statements made in the magazine could be justified or not, because even the claimant's own expert witness found that the yacht did not perform as well as the manufacturers had claimed. However, the main thrust of the claim was that the article had implied that Walker Wingsail was deliberately misleading potential buyers. The firm was owned and run by a husband and wife team, and in court, the wife claimed that the magazine had effectively called her and her husband liars. The magazine denied this, arguing that they had not suggested dishonesty, only that the firm had made its promises carelessly and irresponsibly, which the magazine still claimed was true. The jury, however, found for Walker Wingsail.

Frightening as the *Yachting World* case may appear, it is not a reason to be scared of criticising products. Recent developments in the law on the defence of fair comment (see p. 250) mean that as long as you test fairly (e.g. treating all the products in the same way, and presenting a balanced picture of the results), make sure that any facts in the piece are accurate and state your views honestly, you should be covered by that defence, no matter how rude you are about the products.

Remember that you can be sued for defamation even if you are only repeating what someone else has said. This means that if a company criticises a rival's products or services, you should not publish those criticisms unless you are sure you are covered by a defence (usually justification or fair comment; see pp. 240 and 250).



In *Konfidence International Ltd v Splash About International* (2007), a nappy manufacturer sued another nappy manufacturer over a press release which suggested that the claimant company's nappies were poor quality and if used in swimming pools could damage babies' health. The case was settled and the defendant company paid damages (note that although this case was between the two companies, anyone who published the press release could potentially have been liable).

■ Spoofs and jokes

It is often thought that if a defamatory allegation is clearly presented as part of a joke, there will be no liability, but this is not the case. Remember that in defamation, what is important is not what the speaker or writer meant, but the effect the statement would have on a listener or reader. If an ordinary, reasonable person would assume there was some truth behind the

words, then there may be liability for defamation. The fact that satirical programmes and articles regularly take this risk does not mean that the risk does not exist.



In *Galloway v Jewish Communications Ltd* (2008), MP George Galloway won £15,000 in damages from the Jewish community radio station Jcom. He sued over a programme which featured a fictitious Middle Eastern reporter called 'Georgie Galloway', whose only phrase was 'Kill the Jews!' Mr Galloway said that it implied he held anti-semitic views. Mr Justice Eady said that although the character was clearly intended to be a joke, the defamatory implication it carried was a serious one. Damages would have been higher had it not been for the fact that the radio station had relatively few listeners, and had apologised on its website.

If, however, it would be clear to any reasonable person that the words were not meant to be taken seriously, and that the writer is not alleging there is any truth behind the joke, there will be no defamatory meaning.



In *Elton John v The Guardian* (2008), Elton John sued over a spoof piece in the *Guardian's* Weekend magazine, which mocked him. It was written in the style of a diary by Elton John, and began: 'What a few days it's been. First I sang Happy Birthday to my dear, dear friend Nelson Mandela . . . at a party specially organised to provide white celebrities with a chance to be photographed cuddling him, wearing that patronisingly awestruck smile they all have.' The 'diary' went on to talk about a ball which Elton John arranges every year to raise money for his AIDS charity: 'Naturally [the guests] could afford just to hand over the money if they gave that much of a toss about Aids research – as could the sponsors. But we like to give guests a preposterously lavish evening, because they're the kind of people who wouldn't turn up for anything less. They fork out small fortunes for new dresses and so on, the sponsors blow hundreds of thousands on creating what convention demands we call a "magical world", and everyone wears immensely smug "My diamonds are by Chopard" grins in the newspapers and *OK*. Once we've subtracted all these costs, the leftovers go to my foundation. I call this care-o-nomics.' It was headed 'A peek at the diary of Elton John', but at the end included the words 'As seen by Marina Hyde'. Elton John said it was defamatory because it implied that he was insincere in his support for the charity, and that after costs, the ball made little money for the charity and he knew that. The claim was struck out, after the judge held that no reasonable reader could believe that the words were really written by Elton John. It was clear that the diary was not written by him, and was 'an attempt at humour'. Nor would a reasonable reader believe that the piece was really suggesting as a fact that the costs of the ball meant it raised little money for charity, and Elton John knew that. If the paper had wanted to make such serious allegations, it would have made them in the news section, and the fact that this article appeared in Weekend, among articles on homes and food, made it clear that it was not intended to be taken seriously.

Law in practice Readers' letters



A newspaper or magazine that publishes a defamatory statement in a reader's letter can be liable in just the same way as if the same statement appeared in a news story. 'Letters which make potentially defamatory allegations should always be checked', advises Rod Dadak, Head of Defamation at solicitors Lewis Silkin. 'People often use letters pages to further their own grudges, so check who the writer is, and check whether any defamatory allegations are true, or covered by another defence, before publishing. It is also sensible to check whether the person or organisation criticised in the letter is known to be likely to sue for libel.' The defence of fair comment will often apply to letters (see p. 245).

REFERRING TO THE CLAIMANT

As well as proving that the statement in question is defamatory, the claimant has to show that an ordinary, reasonable reader or listener, including acquaintances of the claimant, would take the statement as referring to him or her (or it, in the case of organisations and companies). That means that if people who know the claimant would assume that the statement referred to him or her, the statement can be said to refer to the claimant; it does not matter that the public at large might not make the same assumption.

In many cases, identification is not in question, since the claimant will be named or pictured (and of course, leaving out the name but using a clearly identifiable title, such as 'the MP for Dover' or 'the head of the Timber Trades Association' is usually the equivalent of mentioning that person by name). However, there are numerous situations where a statement can be taken to refer to a claimant even where that person is not expressly identified, and the courts have in some cases been quite relaxed about what they will accept as identification.



In *Morgan v Odhams Press* (1971), the case arose from a story about a dog-doping gang. The journalist writing the story was being helped by a kennel girl, and during the investigation, she stayed with the claimant for a few days. The dog doping story was then published, with a photo of the kennel girl, and the following day, the *Sun* published another story, saying that she had been kidnapped by the dog-doping gang. The claimant argued that while she was staying with him, they had been seen out together, and anyone who had seen him with her would assume that he was a member of the gang. The article did not mention his name, and several of the details it mentioned about the gang members did not apply to him. The court said that ordinary readers often skim-read articles and would not necessarily notice the inconsistent details; if, on reading the article they came to the conclusion that the claimant was the person meant, then identification was proved. The jury found for the claimant.

■ Dropping hints

Journalists often assume that if they have a potentially libellous allegation to make, it is safest to avoid naming the person, but this is not necessarily the case. You are unlikely to describe the subject of your story merely as 'a man' or 'a woman'; instead, you will hope you can drop hints that will enable readers – or at least some of them – to spot who you mean, but which will still be sufficiently vague to prevent the story forming the basis of a libel action. This is potentially dangerous, because as soon as you provide enough detail to give any meaning to the story, you give the claimant grounds to say that some readers would know who you were referring to.



The *Burton Mail* was sued by the Police Federation (the equivalent of a trade union for police officers) for a story about a complaint against a woman police officer. She was not named, but gave evidence that people she knew had taken the story to refer to her. The paper paid £17,500 compensation. The case was one of 95 similar actions brought by the Police Federation on behalf of its members during the late 1980s and 1990s, all of which it won.



In *Hayward v Thompson* (1981), the case concerning the Norman Scott affair (see p. 222), the *Daily Telegraph* had not referred to Mr Hayward by name, but only as 'a wealthy benefactor of the Liberal Party'. They argued that this description was not sufficient to allow readers to identify him. However, the Liberal Party had very few wealthy benefactors, and there was clear evidence that both Mr Hayward's friends, and the rest of the national media, had realised immediately who was meant.



In *Lloyd v David Syme & Co Ltd* [1986], a newspaper falsely alleged that the Australian media tycoon Kerry Packer had fixed the result of a cricket match involving the West Indian team. The team captain, Clive Lloyd, was not mentioned in the story, and had not played in the match referred to, but he successfully sued for libel on the grounds that the allegation of match fixing necessarily implied that the team had been involved, and that as captain, he must have taken part.

A publication which carries a defamatory story without naming the individual concerned can also be caught out if another publication runs the same story, but does include the name; this clearly makes it possible for readers of the first paper to identify the person meant. The first paper will not be able to evade liability on the grounds that such identification was not its fault.

In fact, not naming your subject may not only fail to protect you from being sued by them, but could expose you to claims from other people. If, for example, you were to write that one of the directors of a particular firm was embezzling the company's money, not only could the person you meant drum up friends or relatives to say that they thought he was the person referred to, but the other directors might do so as well.

■ Pixellating and bleeping

As explained above, showing a picture or film of someone alongside a story means that the words of that story can be taken to refer to them. Pixellating the images will only protect against liability if it makes certain that the person could not be identified, even by someone who knows them. Similarly, bleeping out the name of a person or company in a broadcast can remove the risk, but only if they are not identifiable from the context or other details. It is sensible to take legal advice before relying on either of these devices.



In 2006, radio DJ Ian Thompson accepted what were said to be 'substantial' damages from the *News of the World*, after it published a story claiming that a 'well-known DJ' and two Premiership footballers took part in same-sex orgies. None of the subjects was named, but the story was accompanied by a picture of Mr Thompson, and footballer Ashley Cole, which had been pixellated to conceal their identities. However, thanks to the pictures and hints in the story, many readers recognised whom the piece referred to, and they were named on internet sites. The allegations were untrue, and the paper made an offer of amends to both of them. It was reported that Mr Cole had also been paid damages of £100,000.

■ Implied references

Be careful too of statements that imply blame on individuals even though you do not name them. For example, saying that a school is badly-run is effectively the same as saying the head-teacher is running it badly, and several newspapers have had to pay damages to headteachers as a result of similar stories. That is not to say that you should never publish stories about badly-run schools, but if you are aware of the risk of libel, you can take steps to make sure you are covered by a defence, usually justification or fair comment.

■ Unintended references

It is quite possible to be liable for defamation if you write a story that is true about the person you intended it to refer to, but untrue of someone else who could be identified as its subject, even if you did not know the latter existed. So, for example, if you write that 'Blonde

Susan Briggs, 42, of Tunbridge Wells robbed a bank', and this is true of the Susan Briggs you mean, you may still be sued by another blonde 42-year-old Susan Briggs from Tunbridge Wells, if she can make out a case that readers would have taken the article to have referred to her. The same could apply if, for example, you report that the Managing Director of Bloggs Ltd has been embezzling, and though this is true of the man you mean, he has since stepped down and the new MD is someone else.

Clearly, without an encyclopaedic knowledge of every person on the planet, this is quite difficult to guard against with certainty, and recent cases suggest that the courts will take into account the practicality of protecting against unintentional references. They are not likely to be so understanding if the mix-up is obviously the result of careless research, or failure to check facts which would be easy to confirm.



In *Newstead v London Express Newspapers* (1940), the *Daily Express* reported that a Harold Newstead, described as a 30-year-old Camberwell man, had been convicted of bigamy. This was true of the Harold Newstead that the paper had intended to refer to, but unknown to them, there was another Harold Newstead living in Camberwell, who was not a bigamist. He sued, claiming that the article could be taken to refer to him, and won his case. In fact the newspaper had known the occupation and exact address of the bigamous Mr Newstead, but had left these out, a fact that was made much of in court and may have influenced the decision. Had the paper published those extra details, it might well have avoided being sued, and it is worth remembering that the more details you include, the less likely it is that someone else out there will fit the same description.



In 1973, the BBC paid £15,000 in damages to the owner of a company called House of Floris, after a programme criticising another company with a similar name referred to it simply as 'Floris'. The owner of House of Floris successfully claimed that viewers might think that the programme was referring to his company.



In *O'Shea v MGN Ltd*, MGN published an advert for a pornographic website, containing a picture of a woman who looked very like the claimant. There were also certain details in the advert which the claimant said might lead those who knew her to think that she was the woman in the picture. She claimed the advert was defamatory because it suggested that she had allowed her picture to be used. The court agreed that the 'reasonable person' might take her to be the person in the picture, and they said that if a 'lookalike' had been used deliberately, the claimant could have a case in malicious falsehood (see Chapter 17). In this case, however, where the resemblance was totally innocent, it would be an unreasonable restriction on freedom of expression to expect a publisher to check whether every picture it published happened to resemble someone else. The claimant therefore lost her case.



The BBC was successfully sued by a London police officer, who happened to be walking out of a police station just as it was being filmed for a programme on police corruption. The programme featured general allegations and did not name anyone, but the officer was obviously identifiable from the film and could therefore make out a case that viewers might think he was one of the people to whom the corruption allegations referred.



In 2005, the *Sunday Mirror* paid £100,000 in an out-of-court settlement with a man they had mistakenly labelled as a rapist. The paper ran a story about the convicted rapist Iorworth Hoare, who won £7 million on the National Lottery while serving a prison sentence, but the man whose photograph they showed was someone completely different. The story quoted a woman who was said to have seen him coming out of a bail hostel, who said he looked 'evil' and had a 'distinctive swagger'; in fact the man shown had not come out of the hostel and walked the way he

did owing to hip surgery. The paper recalled its first edition and pulped 140,000 copies after it realised the mistake, but the man's lawyer was able to show that at least one copy was on sale near where he lived.

Because the courts have always recognised that it is very difficult to guard completely against the danger of unintentionally referring to someone, the offer of amends defence provides publishers with a way of minimising the harm done, both to the claimant and to their own pockets (see p. 263).

■ Defaming a group

Where a defamatory statement refers to a class or group of people (such as 'All footballers are greedy' or 'British politicians are corrupt'), it is not usually possible for that group of people to sue for defamation as a group, nor for one member of a group to sue on the grounds that the remark libels them personally. So, for example, if you were to say that plumber John Bloggs was useless at his job, he might be able to sue, but if you were to say that all plumbers are useless, neither John Bloggs alone nor the whole plumbing trade could sue.



In *Knupffer v London Express Newspapers Ltd* (1944), the defendants published an article describing the Young Russia party, a group of Russian émigrés, as a Fascist organisation. The group had approximately 2,000 members, 24 of whom were based in the UK. The claimant, a Russian emigrant living in London, sued on the basis that, as a member of the group, the statement defamed him personally. The House of Lords refused his claim, on the grounds that the statement was aimed at a large class of people and nothing in it singled him out.

However, where the group referred to is so small that the statement could be taken to refer to each and every one of them, one or all of them may be able to sue successfully. So while it is not dangerous to say 'All lawyers are useless', it may be a different story if you say 'All lawyers employed at Bodgit, Snatch and Run are useless'. Unfortunately there is no set number above which a class of people will be considered too big for one of the members to be able to sue for a remark aimed at all of them. Each case will depend on the facts and, in particular, how large the potential group is, and how closely the individuals in that group were associated with the defamatory statement.



In *Riches v News Group* (1986), the *News of the World* published a letter from a man who was holding his own children hostage at gunpoint, which made serious allegations against the 'Banbury CID', though without mentioning specific officers by name. Ten members of the Banbury CID successfully sued the paper for damages.



In *Aiken v Police Review Publishing Co Ltd* (1995), the *Police Review* magazine published a story headlined 'Nazi "humour" forces Jewish PC to quit', alleging that a police dog handler had been forced to leave his job because of the anti-semitic behaviour of some of his colleagues. There were 60 police officers working at the same station, 35 of them dog handlers. Ten of the dog handlers sued for libel, claiming that readers might think the allegations referred to them. The magazine applied to have the action struck out on the basis that readers would not be able to identify the claimants as the individuals whose behaviour was covered in the story. The judge refused the striking out action, saying that it was at least possible that readers might understand the story to be referring to each or any of the claimants.

Certain types of group, such as political parties, are also unable to sue for defamation whatever their size (see p. 232).

PUBLICATION

The final element of defamation is that the statement must be published, which simply means that it is communicated to a person other than the claimant or the defendant's spouse. In media cases, of course, publication is usually in print, broadcast or online. Every repetition of a libel – by the same publisher or someone else – is considered a fresh publication, and creates a separate claim.

■ Publication and the internet

It is often assumed that publication of internet material takes place when the material is first put online, but in law, publication occurs when a reader accesses the text. This means that a fresh publication takes place every time someone reads the material.



In *Loutchansky v Times Newspapers Ltd (No. 2)* (2001) *The Times* published articles claiming that Grigori Loutchansky, a businessman, was involved in crime. He sued for both the paper publication, and the use of the stories on the newspaper's website. The paper argued that, regarding online stories, publication should be deemed to take place just once, when the story was placed on the website. The Court of Appeal disagreed, and confirmed that each time the story was accessed it was a fresh publication.

A claimant will not necessarily have to prove that someone has read the story, but if the defendant can bring evidence that it has not been read, or read by very few people within the court's jurisdiction, they may be able to avoid liability.



In *Loutchansky* (see above), *The Times* argued that it could not be proved that anyone had actually read the defamatory material, but the judge concluded there was a 'reasonable inference' that the material had been read, given that *The Times* website had 12.5 million visits a month.



In *Jameel v Wall Street Journal* (2006), the *Wall Street Journal*, which is published in America and has a US-based website, was able to prove that an article had only been downloaded by five people in the UK, and one of those was the claimant's lawyer. The Court of Appeal held that there had not been 'substantial publication' in the UK and therefore rejected the case.

As well as content generated by journalists, most media websites also invite content from users, in the form of message boards, chatrooms, forums and bulletin boards. If any of this content is defamatory, the organisation which runs the website can be liable (just as a newspaper would be for a defamatory reader's letter).

However, in some circumstances, there will be a defence under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002. This states that where a website provider stores material provided by users of the site, they will not be liable for damages if they did not know that material posted was defamatory, were not aware of any circumstances or facts which would have told them it was defamatory, and acted quickly to remove access to the material once they did know.



In *Karim v Newsquest* (2009), the claimant was a solicitor who sued the Newsquest group over its report of a Law Society hearing in which he was struck off. The report itself was covered by absolute privilege under s14 of the Defamation Act 1996 (see p. 250), but the website

had a comments box under the story, and Mr Karim claimed that many of the readers' comments posted there were defamatory. He sought to sue Newsquest as the publisher of the comments. The court held that Newsquest were covered by the Regulation 19 defence: the comments were posted without any intervention by Newsquest, and they were not aware of any defamatory content at the time, but as soon as Mr Karim complained about them, they had removed them.

If you are successfully sued for a story that has appeared in print or been broadcast, it is important to make sure that it is removed from any online archives or amended so as to remove any libellous content.



In 2006, the father of comedian Jimmy Carr got two sets of damages from the *Sunday Telegraph* after settling a libel case regarding a story in the paper but it then mistakenly left the online version on its website. He got £12,000 in the first settlement and a further £5,000 in the second.

In 2009, Times Newspapers brought a case in the European Court of Human Rights (ECtHR), arguing that this rule was an unjustified restriction on the right to freedom of expression, because it meant that publishers could potentially be liable for ever. The ECHR disagreed, saying it was not a disproportionate restriction on freedom of expression to expect publishers to amend their own archives. However, the ECHR said that if a libel action based on internet publication was brought too long after the original story, that might be a disproportionate restriction on press freedom. Unfortunately the decision did not specify how long 'too long' might be.

■ Stories not originally challenged

The fact that a story was not the result of a libel claim when it was first published does not mean it is safe to use it later, even well outside the one-year time limit for libel claims. If, for example, you are researching a story using cuttings, and you repeat an allegation made in one of them, that is the equivalent of repeating someone else's words, as described on p. 247, and if the allegation is defamatory, you may be liable. Even though it may be too late to sue the person or publication who originally made the statement, your publication is a fresh libel and can be the subject of a claim.



In 1981, the *Evening Star* in Ipswich paid damages to a doctor over statements made in its 'Looking Back' column, featuring a news story published 25 years earlier. Although the doctor had not sued then, repeating the story was a fresh libel and gave him a new claim.

Who is the publisher?

In law, a statement published in print can be said to be published by the writer, the sub-editor, the editor, the publisher and the distributor; in online journalism, the internet service provider may also be sued, while in broadcasting, the publisher is usually the broadcasting company. Any or all of these people can be sued, though in practice claimants usually target those with the deepest pockets, namely the company, which is, in legal terms, said to have 'vicarious liability' for what their employees do.

If you are freelance, you may find that the terms and conditions you work under include an indemnity clause, under which you agree to repay the publishers any damages they have to pay as a result of libels in your work. In practice these are rarely enforced, but legally they could be.

■ Libels in more than one publication or broadcast

If a defamatory statement appears in more than one publication, the subject of the statement can sue all or any of them, and not necessarily at the same time (though there are restrictions on the overall amount of damages that can be awarded when this happens). This means that the fact that a claimant has not chosen to sue over defamatory allegations in another publication does not mean they are prevented from suing you if you repeat them. It is therefore not safe to assume that because an allegation or rumour has been widely reported, it becomes safe to repeat it.

Broadcasters whose programmes feature reviews of the newspapers should be aware that if they show a libellous story in a paper, they could be sued, regardless of whether the claimant also sues the paper.



An uncle of footballer Wayne Rooney sued the BBC in 2008 over a BBC Breakfast item which implied he had been involved in violent behaviour at a birthday party for his nephew's then fiancée, Coleen McLoughlin. The programme's review of the day's newspapers talked about a *Daily Mail* story which said that Ms McLoughlin had banned members of her fiancé's family from their wedding because of the way they had behaved at her birthday party. The story was (wrongly) illustrated with a picture of John Morrey, an uncle who had not been at the birthday party, and the presenter showed the relevant page on camera. The case was settled and the BBC paid damages.

WHO CAN SUE FOR DEFAMATION?

Individuals: Any living person can sue for defamation. However, there is no action for libelling the dead, so it is not possible to sue for damage to the reputation of a dead relative, for example, unless a claimant can establish that defamation of the dead relative affects the claimant's own reputation as well.



In 2010, TV interviewer Michael Parkinson was paid damages by Associated Newspapers, over a story claiming that he had lied about his family background. The story, in the *Daily Mail*, carried claims by a cousin that Mr Parkinson had painted a false picture of his father, who he had described as honest, upstanding and well-liked. The cousin alleged that this was untrue and that his uncle was 'hateful' and disliked by most people. As Mr Parkinson's father was dead by this time, it was not possible to sue for defamation of him, but the action was brought on the basis that it was defamatory to say that Mr Parkinson had lied.

Corporations: 'Corporation' is a legal term, which covers not only commercial companies, but also, for example, organisations such as schools and universities which have a legal existence separate from that of the individuals who manage them. Journalists often assume that a company can only sue if it can prove that the libel has caused it financial loss, but this is not the case. Corporations can sue for libels that damage their business reputations, but not for the kind of libels that might be described as causing hurt feelings in a person. In addition, individual members of a corporation may sue on the grounds that allegations about the company damage their personal reputations.



In 1993, the Body Shop as a corporation, and its two founders, Anita and Gordon Roddick, sued Channel 4 over claims that questioned the company's policies on animal testing.



In 1994, the BBC had to pay £60,000 damages and an estimated £1.5 million in costs when it was sued by a drugs company for claiming that the company knew one of its drugs had serious side-effects long before the drug was eventually withdrawn.



In *Hachette Filipacchi Ltd and Kevin Hand v Haymarket Media Group* (2008), magazine publisher Hachette and its chairman Kevin Hand sued *Media Week* over a story which suggested that Hachette was about to be closed by its parent company. The story implied that Hachette was in a difficult financial position, and that this was Mr Hand's fault. In fact the company had just had one of its most profitable years, and its main titles had increased their circulations. Haymarket settled and paid substantial damages.



In 2008, the *Daily Express* was sued by an estate agent, George Peter St Clare, and his company over allegations that his company had used 'mafia-style tactics' when selling property in Bulgaria. The *Express* story said that British buyers were being duped by unscrupulous agents and, as an example, quoted a disagreement which the claimant's company had had with a British couple. It went on to say that the couple had been threatened by thugs, and that their home had been set on fire. Mr St Clare said this implied that his company had been responsible for the threats and the fire, and that the allegations had damaged his company's reputation and his own. Express Newspapers settled and paid damages.

Associations: Some associations, such as clubs, are legally incorporated and can sue like any other corporation. If not, an association cannot itself bring a claim, but often defamatory allegations about a club will reflect sufficiently clearly on its officials to allow them to bring a claim on their own behalf.

Trade unions: Although trade unions have sued in the past, the Trade Union and Labour Relations (Consolidation) Act 1992 states that unions are not incorporated bodies. According to the leading academic lawyers McBride and Bagshaw, this means that unions can no longer sue for libel. However, suggestions that, for example, a union is badly run would clearly reflect on the leaders, and they could sue in their own right.

Local authorities and central government: Elected authorities cannot sue for defamation. This was established in the landmark case of *Derbyshire County Council v Times Newspapers* (1993), where the House of Lords held that it was important for freedom of speech that there should be free and open discussion of the work of elected authorities, and therefore they should not be able to sue for defamation regarding their 'governmental and administrative functions'. (They can still sue for defamatory statements regarding their property, and also, in some circumstances, for malicious falsehood – see Chapter 17.) However, once again, individual officers of, for example, a local council, could sue if criticism of the council reflects sufficiently on their personal reputations.

Political parties: In *Goldsmith v Bhoyrul* (1998), it was stated that political parties cannot sue for defamation, for similar reasons to those advanced in *Derbyshire County Council*, above. However, it is possible for individuals who are members of or work for a political party to sue for libel over defamatory statements about the party which reflect on their personal reputations.

Unincorporated organisations: In *North London Central Mosque Trust v Policy Exchange* (2010), it was held that organisations which do not have the legal status of a corporation (in this case the charitable trust that runs a mosque) cannot sue for defamation. However the claimants have been given leave to appeal.

Myths and misconceptions Stories about ordinary people



X *You can say what you like about ordinary people, because they can't afford to sue.*

Until recently, this was close to the truth; libel actions are extremely expensive, requiring specialist knowledge beyond most high street solicitors, and with no legal aid available for libel claims, very few ordinary people would have been able to sue, unless they were backed by a wealthy organisation such as a trade union. This has changed with the advent of conditional fee agreements (often known as 'no win, no fee' actions). These allow solicitors to take on cases on the basis that they receive nothing if the claimant loses, but up to a 100 per cent increase in their fees if they win. This means that someone who seems to have a good case can now sue, at no financial risk to themselves.

Claimants from abroad and 'libel tourism'

If your work goes online – whether in its original form or as an online edition of a print publication or broadcast programme – it is worth remembering that it can be accessed from almost anywhere in the world. If you say something defamatory about someone who is based in another country, they can sue in England, providing that they can show that they have a reputation here to defend (and the courts have generally not set this hurdle at a particularly high level). This can be an attractive prospect, as English defamation law generally makes it easier to win a case than the law in many other jurisdictions – if you libel an American politician, for example, they have very little chance of successfully suing you under American law, but may well be able to succeed in English law. In addition, the high legal costs for a defamation case in England means foreign defendants, or at least their lawyers, know that defendants may well settle a case to avoid racking up legal fees, even if they might have been able to win in court.

In recent years there has been growing concern about 'libel tourism', the practice of foreign claimants who are published abroad and suing for libel in the English courts, over publications which may have sold only a few copies here. Again, the reason for this is that English libel law provides fewer hurdles to a successful claim than the law in, for example, the US, which makes it easier to win a case, and because costs here tend to be very high, there is pressure on defendants to settle a case, even if they might have been able to win had they gone to court. In one case, for example, a Saudi Arabian businessman successfully sued an American author over a book that was published in America; he was allowed to sue in London because the book had sold 23 copies here, so had technically been published here.

SLANDER

As explained at the beginning of this chapter, there is a second type of defamation, in addition to libel, called slander. It covers defamatory words that are published in transient forms, such as speech. Obviously, in most cases, journalists are concerned with libel, and cases against the media for slander are rare. Even so, it is worth being conscious of the risk of making a slanderous statement, especially for those involved in investigative journalism. If, for example, you were to confront an alleged wrongdoer and put the allegations to them in the

hearing of a third party, or to repeat those allegations to someone else in the process of checking them, you could potentially be liable for slander.

People attempting to sue for slander are subject to a restriction that does not apply to libel cases. You can only be successfully sued for damages for slander if the claimant can prove that your making the slanderous statement caused them some loss (such as loss of business, for example), or if the statement you made contained or implied any of the following allegations:

- that the claimant had committed a crime that potentially carries a prison sentence;
- that the claimant has a contagious disease;
- that the claimant is no good at their job or business;
- if the claimant is a woman, that she is not chaste or has committed adultery.

Law in practice Handling complaints



If you are threatened with a libel action, or receive a complaint that could possibly lead to legal action, handling it correctly could save your publication from a nasty legal bill – while handling it badly can turn what would have been a simple complaint into an expensive court case, or, as the *Campbell-James* and *Turner* cases (see p. 264) show, increase the damages your publication has to pay. Rod Dadak, of solicitors Lewis Silkin, offers this advice:

- If you get a telephone call complaining about a story, it is always safer to say less than more; remember that you may be being taped. Be polite, make a detailed note of what the complaint is, and tell the caller that you need to refer the matter to your editor. Do not get involved in a debate about the story, and never offer an off-the-cuff apology. In most cases, journalists are indemnified by their employers if there is a claim for libel, which means you do not have to pay damages yourself, but if you go out on a limb and make an apology which exposes them to liability, you may lose this protection.
- Never ignore a letter of complaint; reply promptly, acknowledging the letter. Say that you will investigate the complaint, and give a date when you expect to be able to reply.
- Always tell your editor about a complaint, whether or not it seems serious, even if that means bringing to their attention a mistake they might not otherwise have noticed. Ignoring a request for a correction, or trying to hide one in a follow-up story, can very easily result in a complainant who would have accepted a proper apology suing instead. If your publication has insurance against defamation claims (as, for example, most local papers do), it is also essential that the insurers are informed at an early stage if a complaint appears to be serious.
- The Civil Procedure Rules 1999 contain a Pre-Action Protocol for dealing with complaints of defamation, which sets out a code of good practice and aims to promote early resolution of complaints, where possible without going to court. All journalists need to be aware of this procedure, and to follow it. (In 2006, the *Sun* was ordered to pay extra costs to the actor Chris Parker, because it ignored the Protocol – see p. 210). The complete Protocol can be read online (see *Online resources* at the end of the chapter), but in summary, the steps are:
 - The complainant should notify the defendant of the claim, in writing, as soon as possible. The Protocol details the information which should be provided, and if a letter of complaint does not contain the information required by the Protocol, you should mention the Protocol to the complainant and ask for them to follow it.



- The defendant should provide a full written response as soon as possible, and if this cannot be done within 14 days, should notify the claimant of the date they intend to respond.
- Throughout the Protocol process, both parties should act reasonably to keep costs proportionate to the nature and seriousness of the case.
- The parties should consider whether they can use an alternative to court action to settle the dispute, such as reference to the PCC, or discussion and negotiation between them.

KEY POINTS

The meaning of 'defamatory'

Defamation is the publication of an untrue statement which tends to lower the person it refers to in the eyes of reasonable people.

Defamation can occur in:

- direct criticism;
- hints and innuendoes;
- the effect of words and pictures together;
- the effect of context and juxtaposition;
- reporting of rumours;
- untrue implications drawn from true facts.

Referring to the claimant

It must be clear to an ordinary, reasonable reader that the statement refers to the claimant, but a hint or implication may be enough.

Publication

Every repetition of a libel creates a new cause of action.

Who can sue?

Individuals and corporations can sue for libel; elected authorities and political parties cannot.

Slander

Publication of defamatory words in transient form is slander.

TEST YOUR KNOWLEDGE



- 1 Which of these statements is potentially defamatory?
 - (a) Jake Black is a cowboy builder.
 - (b) Jake Black claims to be an honest builder, and we all know builders never do anything dodgy, don't we?
 - (c) Customer Mrs Smith said, 'I'm disgusted with the mess Jake Black left behind when he converted my loft. He is a complete cowboy.'

- 2 A well-known businessman has recently died. In his obituary, a newspaper states that he was a well-known womaniser, who was thought to have links with the mafia. Is the newspaper at risk of a libel action from his family?

- 3 You are a reporter on the business magazine *Construction and Building*. At an industry function, you hear a rumour that the finance director of a major building company, who recently took early retirement, was forced to do so after being discovered stealing company funds. You are sure that your source is reliable, but the company refuses to confirm the story. Which of these is safe to write?
 - (a) According to a reliable source, Bloggs Building's ex-Finance Director, John Smith, was forced to leave the company after being discovered stealing.
 - (b) Bloggs Building has denied that its ex-Finance Director, John Smith, was sacked for stealing company funds.
 - (c) Bloggs Building has denied that a senior member of staff has been sacked for stealing company funds.
 - (d) A well-known building company this week refused to confirm that a recently retired director was sacked for dishonest conduct.

- 4 Which of these could sue for libel if you published a defamatory statement about them?
 - (a) Thomson Holidays.
 - (b) The Conservative Party.
 - (c) The mayor of Tunbridge Wells.
 - (d) The managing director of Marks and Spencer.
 - (e) David Cameron.
 - (f) Bromley Borough Council.
 - (g) The National Union of Teachers.

- 5 You work for a woman's magazine, and write a feature about women who have set up their own companies. One of them mentions in passing that she had to start her own business because her husband left her penniless with three small children to bring up. You then get a letter from the husband, who is very angry, because, he says, he did not leave her penniless but in fact signed the family home over to her. His letter goes on to say that the marriage only broke up because she had an affair with his best friend. He says he doesn't want to sue, as long as you publish the letter and an apology. Should you publish it?

ONLINE RESOURCES

The Civil Procedure Rules Pre-Action Protocol for Defamation is available at:
www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_def.htm

The Defamation Act 1996 can be read in full at:
www.legislation.gov.uk/ukpga/1996/31/contents

Time periods for spent convictions are detailed at the National Association for the Care and Resettlement of Offenders' website:
www.nacro.org.uk/data/resources/nacro-2005020106.pdf

Visit www.mylawchamber.co.uk/quinn to access discussion questions on topical issues and debates to test yourself on this chapter.

