

DEFAMATION LAW

WHAT IS DEFAMATION?

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

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

The communication has been published to a third person

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

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

The communication identifies the plaintiff

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

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

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

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

In all States and Territories, companies and other organisations with a 'legal personality' (eg. incorporated associations, trade unions, local councils) cannot sue for defamation. There are specific exceptions however, which allow some companies to sue, that depend on the nature of the company and the number of its employees.

A corporation can still sue for defamation if:

1. it is a non-profit corporation and not a public body (such as a local government or public authority); or
2. it employs less than 10 people, is not related to another corporation and is not a public body.

In assessing the number of employees of a company, part time employees are to be taken into account as an appropriate fraction of a full time equivalent.

The communication defames them

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

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

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

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

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

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

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

DEFENCES

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

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

1. Honest opinion (previously known as fair comment)
2. Justification/Truth
3. Qualified privilege
4. Other defences

Honest Opinion (Fair Comment)

Previously referred to as the defence of fair comment, the defence of honest opinion requires you to prove that the material communicated was an expression of honest opinion rather than a statement of fact, on a matter of public interest and was based on proper material. To take advantage of this defence you have to be able to prove three things:

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

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

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

Justification/Truth

The new uniform legislation in the states provides the defence of justification. This is a complete defence if you can provide the material published was substantially true. This means that if an imputation is found to be defamatory, this defence requires the publisher to prove it to be true in substance or not materially different from the truth. This can be difficult as you can only use evidence that is admissible in court – this means that you will need original documents and/or witnesses who are credible and willing to testify in court.

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

The publisher may try to prove the plaintiff's imputations (say [a] and [b]) to be true. Or the publisher may say the publications also means [c] and [d] and they are defamatory and true in which case the plaintiff can fail because the unproved imputations [a] and [b] do not further injure the plaintiff's reputation. In some states (including New South Wales, Queensland and Tasmania) before the introduction of the uniform laws the defendant was required to establish that the material was published for the public benefit in addition to proving the published material was true. In contrast, under the new uniform laws truth alone constitutes the defence. A possible consequence of these changes is that the publication of private details of person's life will be allowed, provided they are truthfully portrayed, even though there might be no wider public interest in the receipt of those details.

Qualified privilege

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

Qualified privilege traditionally protects communications such as references given by employers or complaints to the police or other relevant authorities. The defence will fail if the plaintiff can show that you were actually motivated by malice to make the communication. This means that it can be dangerous to attempt to 'get even' with someone by bad-mouthing them. If they choose to sue, you may find yourself without a defence.

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

In some instances the success of the defence will depend upon the 'reasonableness' of the publisher's conduct in the circumstances surrounding the publication. Under the new uniform laws, additional guidance as to relevant factors going to the reasonableness of the publication have been provided. These factors include: (i) the nature of the business environment in which the defendant operates; (ii) the extent to which the matter distinguishes between suspicions, allegations and proven facts; and (iii) whether it is in the public interest for the matter to be published promptly.

Other defences

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

Place of Publication

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

Limitation Period

For material published after 1 January 2006 if you wish to sue someone in defamation, you must commence the action within one year of the publication of the material. However the court retains the discretion to extend this period.

BEFORE YOU PUBLISH

Consider the communication as a whole including any headlines or illustrations. Consider the context. Ask yourself – which groups or individuals have been identified? What imputations arise? Are they defamatory? Try to put yourself in the position of potential plaintiffs;

See if editing or clarification can remove any unintended defamatory imputations;

Check who is identified in the communication. Narrowing the scope of the article, or removing details that can lead to identification can avoid potential problems;

Consider the benefits of publishing against the risk of being sued for defamation;

What defences might be relevant? If it is meant to be comment, ensure that it is clearly identified as such (for example by adding “In my opinion...” and that the facts on which it is based are stated or obvious); and

If you want to argue that the defamatory imputations are true, how can they be proved? What has been done to verify their accuracy? Remember proof has to be to the stringent standards demanded by a court. Sources need to be first hand (what if they wish to remain confidential?).

If you're threatened with an action for defamation

Check whether they have a case by determining whether all the elements for defamation are there: defamatory meaning, identification, and publication. Remember that just because a communication is insulting, annoying, false or damaging to someone's business doesn't mean that it is necessarily defamatory.

Consider what, if any, defences are applicable to you.

Decide if you wish to apologise, correct, clarify, or retract. The new uniform defamation laws provide mechanisms and timing requirements for making an offer to make amends. An offer will not constitute an admission of fault or liability but may be taken into account in mitigation of damages if the plaintiff is successful in court.

Seek legal advice before responding. It is important to get legal advice promptly.