

12 OCTOBER 2020

LTN 30 | DEFAMATION

1. A defamatory statement is one “which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business” (Halsbury’s Laws of England).
2. A defamatory statement made in writing or in some other permanent form (such as in an image, or on the radio, television or a website) is called libel. A defamatory statement made orally or in some other transient form (such as a gesture) is called slander.
3. The law of defamation is governed by common law and statute such as the Defamation Act 1996 (“the 1996 Act”) and the Defamation Act 2013 (“the 2013 Act”). One of the objects of 2013 Act, which came into force on 1 January 2014, is to discourage trivial defamation claims.

Actionable defamation

4. A person can only sue for defamation if the statement is communicated (in legal terms “published”) to a third party. Thus, if a letter containing a defamatory statement about a councillor is sent only to that councillor, it is not actionable.
5. A statement is not defamatory unless it has caused or is likely to cause serious harm to the third party’s reputation. In relation to a trading organisation this must be a financial loss (s.1 of the 2013 Act).

Who can bring an action for defamation?

6. Any living person can bring an action for defamation. Individual councillors or council staff can sue for defamation. A company can also bring a defamation action.
7. Public and local authorities (including local councils) cannot be defamed and cannot therefore sue. The House of Lords held that it is in the highest interest of the public to allow a council to be subject to scrutiny and criticism, and it would be contrary to such interest for local authorities to have any common law right to bring an action for defamation (Derbyshire C.C. v The Times Newspapers Ltd [1993] 1 AER1011).
8. A person can be sued if he or she participates in the making of a defamatory statement. S.10 of the 2013 Act confines legal action to the author, editor or

- publisher (defined by s.1 of the 1996 Act) of the defamatory statement unless it is not reasonably practicable to bring an action against them.
9. Employees or agents of an author, editor or publisher may also be sued if they are responsible for the content of the statement or the decision to publish it (s1(4) of the 1996 Act).
 10. A public or local authority (including a local council) can be sued for defamation. It may also be liable for any act by an agent or employee if done within the scope of his or her authority or employment. A local council may be liable for a defamatory statement in the following cases:
 - a) it directly authorises the making of a defamatory statement (e.g. in the words of a resolution)
 - b) it authorises a councillor or instructs an employee to write a letter containing a defamatory statement
 - c) a councillor or an employee is given general authority to express the council's views on a matter (e.g. in a newspaper) and does so in defamatory terms.

Defences

11. The main defences to defamation are set out below:

Truth

12. S.2 of the 2013 Act creates the defence of "truth". A defendant must prove that the statement is substantially true.

Privilege

13. There are two defences of privilege, absolute privilege and qualified privilege. The defences are relevant when there is a public interest in ensuring the ability of parties to speak freely without fear of legal action. Privilege can provide a defence for statements that may be false or damaging.
14. In the following circumstances only, absolute privilege provides a complete defence to an action for defamation:
 - a) proceedings in Parliament (Article 9 of the Bill of Rights 1688)
 - b) contemporaneous fair and accurate reports in any publication of court proceedings (s.14 of the 1996 Act)
 - c) authorised reports of court or parliamentary proceedings e.g. official law reports, Hansard (s.2 of the Parliamentary Papers Act 1840)
 - d) investigations by the Local Government Ombudsman (s.32 of the Local Government Act 1974)

e) statements made in the course of judicial proceedings (common law).

Absolute privilege cannot be used as a defence for defamatory statements made in council meetings.

15. Qualified privilege is a defence for a person who has an interest or a legal, social or moral duty to make the statement to the person to whom it is made, and the latter has a corresponding interest or duty to receive it. Qualified privilege will normally attach to statements (both written and oral) made by local councillors or council staff in the course of their official duties, and for the purposes of council business, provided that the statements are made in good faith and without any improper motive such as malice. Malice cannot be inferred from the fact that a person's belief is unreasonable, prejudiced or unfair, provided he or she believes in its truth and is not reckless.
16. A leading case on the defence of qualified privilege (which arose out of remarks made by an alderman of Bolton Corporation at a council meeting) is *Horrocks v Lowe* [1974] 1 AER 662 (Court of Appeal) Lord Diplock's judgment contained the following helpful passage: "My Lords, what is said by members of a local council at meetings of the council or of any of its committees is spoken on a privileged occasion. The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter when they believe affects the interests or welfare of the inhabitants. They may be swayed by strong political prejudice, they may be obstinate and pig-headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and so long as they do so honestly they run no risk of liability for defamation of those who are the subjects of their criticism". The judgment can also be applied to written communications sent by a local council in the course of official business.
17. Paragraph 11 of schedule 1 of the 1996 Act, means that fair and accurate reports of proceedings at a public meeting of a local authority (which includes local councils) have qualified privilege. Accordingly, it is not possible to succeed in a defamation action unless it can be proved that the statement was made with improper motive such as malice.

Publication on matters of public interest

18. S.4 of the 2013 Act creates a defence if:
 - a) the defamatory statement was, or formed part of, a statement on a matter of public interest and

- b) the statement maker reasonably believed that publishing the statement was in the public interest.

The defence applies to a statement of both opinion and fact.

Honest opinion

- 19. S.3 of the 2013 Act creates the defence of “honest opinion” for a defamatory statement. As its name suggests, the defence cannot be used for statements of fact. The defendant must establish that the statement indicated the basis of his or her honest opinion and that an honest person could hold the opinion in the circumstances. The defence is available to anyone, whether or not he or she has a duty or interest to communicate the statement to another person (see “qualified privilege” above). The defence of honest opinion is primarily of use to journalists and others who report on the proceedings of public bodies (including local councils).

Offer of amends for unintentional defamation

- 20. S.2 of the 1996 Act provides an opportunity for a person to defend a defamatory statement. If a defamation action has been issued, the offer of amends must be made prior to service of the defence. The person who has published a defamatory statement must offer (i) a suitable correction to the statement complained of and a suitable apology to the aggrieved person (ii) to publish a corrected statement and apology and offer to pay the aggrieved person’s costs and damages. An offer to make amends may be in relation to the whole statement or a specific defamatory meaning (“a qualified offer”).
- 21. It is always possible that an offer of amends may be made and accepted without the statutory formalities.

Innocent dissemination/operators of websites and secondary publishers

- 22. S.1 of the 1996 Act provides a defence that is available to defendants who are not the author, editor or commercial publisher (e.g. printers, distributors, on-line service providers and live broadcasters). The defendant must have taken reasonable care in relation to the publication of a defamatory statement. and must not have known or had reason to believe that he or she caused or contributed to the publication of a defamatory statement. S.1 is a defence that is available to internet service providers.
- 23. Website operators also have a defence under s.5 of the 2013 Act if they did not post the defamatory statement on the website; and the aggrieved person gave the website operator formal notice of complaint; and the

website operator responded to the notice in accordance with the procedure set out in the Defamation (Operators of Website) Regulations 2013. The defence will not succeed if the aggrieved person cannot identify who posted the defamatory statement on the website. Guidance on the statutory procedure is available from the Ministry of Justice via the following link: www.gov.uk/government/uploads/system/uploads/attachment_data/file/269138/defamation-guidance.pdf

Implications for local councils

24. Councils must ensure that they do not participate in the publication of defamatory material. If in doubt, they should consult NALC before taking any action. The same care should be exercised before publishing statements made by others, e.g. reading out letters from parishioners at council meetings, reproducing complaints, etc, verbatim in the minutes of a meeting or permitting third parties to post material on their websites.

Implications for councillors and council staff

25. There is a difference between statements made by councillors or staff in a public or in a private capacity. A defamatory statement made in a private capacity does not attract all of the defences specified above, e.g. qualified privilege.

Insurance

26. Article 6(3) of the Local Authorities (Indemnities for Members and Officers) Order 2004 (SI.3082), enables a council to provide indemnities to its councillors and staff to allow them to defend a defamation action. An indemnity cannot be provided to bring a defamation action by a councillor or member of staff. If a council decides to provide such indemnities, it will need to arrange appropriate insurance cover before the event. More guidance is available in Legal Briefing L03-05 and L05-10 (Wales)

Court proceedings

27. If court action is threatened, the parties to the claim must comply with “Pre-action Protocol for Media and Communications Claims” published by the Ministry of Justice. The protocol is intended to encourage the exchange of information between parties at an early stage of legal proceedings and to provide a clear framework for resolving the claim. The protocol forms part of the Civil Procedure Rules and can be accessed via the Ministry of Justice

using the following link: www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
5	Parish and community council meetings	Sets out the law and procedure of local council meetings.
9E	Handling Complaints	Sets out the procedures for complaints against local councils in England.
9W	Handling Complaints	Sets out the procedures for complaints against local councils in Wales.

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