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Exam Notes – Tortious Defamation (approx. 1500).

Defamation simply defined: generally, a statement injurious to one's reputation. E.g. by facilitating 'hatred, ridicule or contempt' (Berkoff v Burchill (1996)) or lowers their standing in society's view (Sim v Stretch (1936)).

Why is protecting reputation important?

Starkie (1813) – Reputation is a civil right of the same standing as any other, e.g. right to enjoyment of life.

Fleming (1998) – Defamation protects dignity.

THE TWO TORTS

Can take the form of two torts:

Libel: If the statement is in a published and permanent form, e.g:

newspapers (Flood v Times Newspapers (2012))

wax images (Monson v Tussaud's (1894))

radio (1952 Defamation Act, s.16)

TV (1990 Broadcasting Act s.s166 & s.201)

films (Youssoupoff v MGM (1934))

public plays (1968 Theatres Act, s.4)

Slander: If it is not published and transient, e.g. in conversation, impressions.

Both are protected by the 2013 Defamation Act, s.1. Slander is typically harder to prove as it requires proof of damage (nb: four exceptions), and general damage is usually insufficient (Roberts v Roberts). Slander is only tortious, whereas defamation can be tortious and criminal.

Four conventional exceptions that make slander actionable per se:

Imputation the claimant is unfit for their profession

1952 Defamation Act s.2,

McManus v Beckham

Imputation the claimant has committed a crime meriting jail time

Gray v Jones

Imputation the claimant has a transmittable disease

2013 Defamation Act s.14(2)

Bloodworth v Gray

Imputation the female claimant is adulterous – Repealed under the 2013 Defamation Act, s.14(1)

1891 Slander of Women Act s.1

Kerr v Kennedy

In Court

Judge: decides if the expression could have a defamatory meaning.

Jury: traditionally decided the actual meaning from the possibilities identified by the judge.

BUT – per 2013 Defamation Act, s.11 – jury trials for defamation hearings to be generally disused. Now, usually judge determines both the possible and actual meaning.

THE TEST

Similar tests for libel and slander; must prove in all likelihood three criteria:

The statement in question is potentially and actually defamatory

The statement regards the claimant

The statement was published

NB: both are strict liability tests.

First Criterion

Mere angry abuse does not qualify – *Thorley v Kerry* (1812).

Per *Lewis v Daily Telegraph*, three ways of approaching this determination:

The words' natural meaning

True innuendo

False innuendo

Context matters.

Second Criterion

Any person (legal or natural) can sue for defamation, so long as the statement identifies them.

Companies have an extra burden per 2013 Defamation Act s.1, the harm must include actual or potential 'serious financial loss'.

Usually, classes cannot be defamed (*Knuppfer v London Express Newspaper*), unless:

The class is so small that every member is defamed (*Foxcroft v Lacey*), or;

Where the defamation 'points' at the class, then members can sue individually (*Farrington v Leigh*).

NB: this is an objective matter, thus it is immaterial whether the defendant intended to publically identify the claimant.

Third Criterion

Defamation protects public reputation, not feelings, thus proof of publication, i.e. communication to another, is integral. Some exceptions exist, e.g. matrimonial privilege (*Wennhak v Morgan* (1888)). Repeating a statement without permission is generally not actionable (*Ward v Weeks*).

Defendant is liable in instances of accidental publication where they could have reasonably predicted the consequence (*Parke v Prescott*).

NB: Reasonably cautious distributors are not publishers, e.g. producers, broadcasters, internet service providers, inter alia.

Traditionally a multiple publication rule, whereby each repeated new publication of a defamatory statement was actionable. BUT – 2013 Defamation Act, s.8, now a single publication rule. Thus only the initial publication is typically actionable.

DEFENCES TO DEFAMATION

Truth

Ability to prove the defamatory statement is 'substantially true', and the only defence that actually examines the potential truth of a statement:

2013 Defamation Act, s.2.

If parts of the statement cannot be proven true but are not the elements causing serious harm to reputation, the defence may stand (2013 Defamation Act, s.2(3)).

Context is vital here (*Charleston v MGN*).

Note that whilst one has a legal right to their good reputation, only one already in possession of a good reputation can defend it (*Williams v MGN* (2009)).

Honest Opinion

Regarding the provision of an honest and fair opinion on a matter of public interest. Allowed for public policy reasons. The defamatory statement in question must be:

an opinion (cf. assertion of fact)

with indication of the basis for the opinion

a fair opinion given the facts known

NB: Pre-2013 Defamation Act was known as 'fair comment'.

Absolute Privilege

This defence is available even where statements are unquestionably defamatory, regardless of maliciousness or intent. Explicable as free speech being fundamental here more so than one's right to reputation.

Examples include:

Statements made in Parliament (1689 Bill of Rights, A.9)

Official Parliamentary papers and select committee meetings

Statements in judicial proceedings

Lawyer-client communications

Traditional Qualified Privilege

Excuses defamatory statements made in qualified privileged settings, where not malicious:

1996 Defamation Act, s.15

Can include statements made:

with a legal, moral or social duty to disclose the statement alongside a mutual duty that the information be known (*Adam v Ward*)

for protecting public and personal interests

fair and accurate reports of parliamentary or judicial proceedings

Publication in the Public Interest

A new defence recognized under the 2013 Defamation Act s.4, amalgamating several prior defences. Concerns journalistic statements and applied with regards to freedom of expression.

. Requires that:

The statement was in the public interest

The defendant reasonably believed the statement to be in the public interest

Significant judicial discretion in determining the validity of this defence; consideration of 'all the circumstances' with 'allowance for editorial judgment'. This defence is unavailable in circumstances of malicious intent.

Courts seem prepared to place significant weight on the 'reasonable belief' element here - *Economou v de Freitas* (2016).

Lock 2017 – notes the judicial emphasis on examining the specific circumstances of each case.

Focus on whether the information is in the public interest – not synonymous with being interesting to the public. Can turn on the question of whether journalistic and editorial judgment was prudent, responsible and appropriate (*Flood v Times Newspapers* (2012)).

This defence includes what was previously known as the 'Reynolds' defence; stemmed from the case of *Reynolds v Times Newspapers*. Reynolds factors in evaluating whether this defence is valid may still bear some guidance post-2013 reforms. E.g. severity of the statement, the trustworthiness of the source, was balanced comment attempted, was the tone neutral, inter alia.

Also covers the conventional 'neutral reporting' defence - protects publications where there is totally neutral reporting of another's allegations, compatible with the values of journalistic integrity. Previously distinct from Reynolds; as yet, not entirely clear whether 2013 Defamation Act s.4 is intended to operate more similarly to Reynolds or 'neutral reporting'.

Innocent Distribution

Here, the law distinguishes between producers and distributors of defamatory statements. This defence is available to the latter, but can be defeated by proof of actual knowledge.

Per *Viztelly v Mudie's Select Library*, mechanical distributors have a defence where:

They were unaware a publication may contain a defamatory statement

They ought not reasonably have known

They were not negligent

Regarding internet service providers, the defence may or may not apply. If they seek content, they will be deemed publishers (and this defence will be unavailable), but if they are only an outlet for a statement, they will not be deemed publishers. Can be tricky to distinguish.

Offering Amends

Where a defendant offers to make amends in writing, including a 'suitable correction' and 'sufficient apology' that is published, alongside an appropriate offer of compensation.

1996 Defamation Act, s.2.

Should the claimant accept this offer, proceedings must desist but the actions described in the defendant's offer of amends are legally enforceable.

1996 Defamation Act, s.3.

NB: even if the offer is not accepted, it can be used by a defendant to try and mitigate a damages award (*Cleese v Clark*).

REMEDIES

Can take the form of permanent injunctions, temporary injunctions or damages.

Injunctions

NB: Injunctive relief is rarely granted given it runs contrary to the values of free speech and expression.

Damages

Judicial approach, as seen in *KC v MGN* (2012):

Establish the appropriate figure without consideration of aggravating or mitigating factors

Establish whether there ought be discount for mitigating factors.

Rarely will exceed £200,000 in England (except in instances of particular damage).

ECHR CONSIDERATIONS

In EU law, reputation is protected under Article 8, the right to respect for private life (*Chauvy v France* (2005)). However, cf. freedom of expression per Article 10.

Note impact of 1998 Human Rights Act here.

s.2(1), obliges judicial consideration of European case law in domestic law circumstances;

s.3, obliges judicial interpretation of English legislation in a manner compatible with Convention rights.

It is thus implicit in any defamation case that the judiciary balance Art.8 and Art.10 rights, as is already more openly necessary in breach of confidence cases in English law.

Flood v Times Newspapers (2012)

However, as yet no explicit rules or criteria for English Courts to incorporate in this regard.

Rudkin (2014) – The 2013 Act moves the balance of freedom of expression and protection of reputation towards the former.

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