

Libel II: Defending the Libel Action

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Likely Defendants

- Author / Editor / Publisher
 - Interviewee, Journalists, novelists, newspaper editors, et cetera

- Mere Distributors / Secondary Publishers
 - Newsagents, wholesalers, online service providers

- Applicable defences vary

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The Decline of the Jury

- Prior to Defamation Act 2013
 - Defamation last area of civil law in E&W to use juries
- Defamation Act 2013 S11
 - Trial to be without a jury unless the court orders otherwise
 - When might this happen?
 - Advantages for media?
- *Yeo v Times Newspapers* [2015] EWHC 3375
- *Blake, Seymour & Thorpe v Fox* [2021] EWHC 3463

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Defences to Libel

- Common Law & Statutory
- Changes to defences in 2013 Act
 - Common law => Statute
 - Creation of new defences

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Defences

- Truth
- Honest Opinion
- Consent
- Privilege
 - Absolute
 - Qualified
 - “Duty & Interest”
- Offer of Amends
- Innocent Dissemination

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Truth

- Defamation Act 2013 Section 2 “Truth”
 - (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
 - (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
 - (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant’s reputation.
 - (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

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Truth



□ Importance of proving truth

– *Liberace v Daily Mirror Newspapers, The Times* June 18, 1959



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Truth

□ Malice & Truth

- The general rule
- Rehabilitation of Offenders Act 1974
 - Amended per Defamation Act 2013 S16

□ Evidence arising after publication

- *Chase v NGN* [2002] EWCA Civ 1772
- *Moss v Channel 5 Broadcasting* (Feb 3 2006)
- *Depp v Newsgroup* [2020] EWHC 2911 (QB)
- *Vardy v Rooney* [2022] EWHC 2017 (QB)

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Honest Opinion

□ Defamation Act 2013

– Section 3 Honest Opinion

□ Three-part test:

- “...a statement of opinion.”
- “the statement complained of indicated, whether in general or specific terms, the basis of the opinion.”
- “an honest person could have held the opinion on the basis of—
 - “(a)any fact which existed at the time the statement complained of was published;
 - “(b)anything asserted to be a fact in a privileged statement published before the statement complained of.”

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Honest Opinion

(5)The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6)Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

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Honest Opinion

- Media issues
 - How is the report phrased? *Is it opinion?*
 - *See, on previous equivalent, e.g. Boyle v MGN (2012)*
 - Absence of malice
 - Sources? Interviewees?
 - Application of S3(5) to:
 - Newspaper publisher as defendant
 - Opinion column / other article by journalist
 - Reproducing comments of third party interviewee

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Consent

- *Cook v Ward (1830) 6 Bing. 409*
- Consent forms
- Fully informed consent
- Implied consent
 - *Carrie v Tolkien [2009] EWHC 29 (QB)*

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Privilege

□ Absolute Privilege

- Contemporaneous reports of court proceedings
 - What is contemporaneous?

□ Parliamentary Privilege

- Relates to statements made in parliament
 - (Also applies re contempt)
- Individuals could for a time waive privilege in order to sue re statements about their professional conduct in the house
 - Defamation Act 1996, S13
 - *Hamilton v Fayed* (1999)
- BUT: Deregulation Act 2015: Sch23 Para44
- *Sang & Patel v “disgusted and outraged” SoS DCMS Michelle Donelan*

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Qualified Privilege

□ A question of malice

- *Horrocks v Lowe* [1975] AC 135
 - Importance of an ‘honest belief’ in truth of statement
 - Improper motive
- Character assassination
 - *Galloway v Telegraph Group Ltd* [2004] EWHC 2786
- unintended meanings & malice
 - *Loveless v Earl* [1999] EMLR 530

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Qualified Privilege II

- Importance of ‘fair and accurate’
 - Defamation Act 1996 Schedule 1 [As Amended by Section 7 Defamation Act 2013]
 - Not necessarily a verbatim report
 - *Cook v Alexander* [1974] 1 QB 280
 - “...a fair presentation of what took place so far as to convey to the reader the impression which the debate itself would have made on the hearer of it.” (Lord Denning)

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Qualified Privilege III

- Right to Reply
 - *Turner v MGM* [1950] 1 All ER 449
 - *Adam v Ward* [1917] AC 309
 - *Regan v Taylor* [2000] 1 All ER 307

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Qualified Privilege IV

□ Defamation Act 2013 Section 4

– Publication on a matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that:
 - (a) the statement complained of is, or forms part of, a statement on a matter of public interest; and
 - (b) the defendant acted responsibly in publishing the statement complained of.

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Qualified Privilege V

□ Section 4 Replaces “*Reynolds* Privilege”

– *Reynolds v Times* [1999] 4 All ER 609, HL

- Lord Nicholls’ factors:
 - Seriousness of the allegation
 - Nature of the information – matter of public concern?
 - Source of the information
 - Steps taken to verify information
 - Status of the information
 - Urgency of the matter (see also
 - Was comment sought from defendant?
 - Did article include gist of Plaintiff’s case?
 - Tone of the article
 - Circumstance of publication – including timing
 - Not an exhaustive list

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Qualified Privilege VI

- *Serafin v Malkiewicz* [2020] UKSC 23
 - The breadth of the public interest defence in section 4 Defamation Act 2013 and in particular, whether the defence is available where the allegations complained of relate to an individual's private conduct towards a body in relation to which there is a public interest, rather than to the running of that body;
 - Whether the CA was entitled to interfere with the judge's factual findings;
 - Whether rudeness, and/or "descending into the arena" on the part of the judge can be sufficient to render a trial unfair.
- *Vardy v Rooney* [2022] EWHC 2017 (QB)

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Offer of Amends

- Defamation Act 1996
 - Section 2(4)
 - “a suitable correction of the statement...and a sufficient apology” and...
 - ... “...pay...such compensation (if any) and such costs, as may be agreed or determined to be payable.”
 - Section 4 issues

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Offer of Amends

- *Tesco Stores v Guardian News* [2008]
EWHC B14 (QB)
- *Club La Costa (UK) v Gebhard* [2008]
EWHC 2552 (QB)

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Innocent Dissemination

- Defamation Act 1996, Section 1(1)
 - not the “author, editor or publisher” of the defamatory statement
 - did not know and had no reason to believe that the statement in question was defamatory
 - took reasonable care in relation to the publication of the statement in question
- Section 1(2)
 - “editor” and “publisher” defined

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Innocent Dissemination

- *Godfrey v Demon Internet* [1999] EMLR 542
- *Totalise v Motley Fool* [2002] EMLR 20
- *Sheffield Wednesday v Neil Hargrieves* [2007] EWHC 2375
- Ecommerce Regulations 2002, Regn 19
- Section 1(3): a *Catch 22*?
- Regulation 22: “actual notice”
- *Bunt v Tilley* [2006] EWHC 407

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Innocent Dissemination

- Ecommerce Regulations 2002, Regn 19
- Section 1(3): a *Catch 22*?
- Regulation 22: “actual notice”
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Actions Against Distributors

Section 10, Defamation Act 2013

- Action against a person who was not the author, editor etc.
 - (1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.
 - (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

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Operators of Websites

- Defamation Act 2013, Section 5
 - Defence to show statement posted to a website uploaded by a third party
 - Defence lost if:
 - Not possible for claimant to identify sender, AND
 - Claimant sent notice to operator re complaint, AND
 - Website operator failed to respond “in accordance with any provision contained in regulations”
 - Ability to identify = “Sufficient information to bring proceedings against the person”

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Operators of Websites

- Defamation (Operators of Websites) Regulations 2013
 - Notice of complaint
 - Specify email
 - Give all relevant details
 - Confirm lack of sufficient information to bring proceedings
 - Confirm whether operator may provide poster with complainant's contact details
 - Defective notice
 - Operator must still respond, though no obligation to explain exactly what is defective

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Operators of Websites

- Time limits
 - Operator has 48 hours to notify poster of details of complaint
 - Missing / fake contact details – 48 hours to delete
 - Five day window for response
 - No response, deletion within 48 hours
 - Poster may refuse consent to delete
 - Must supply contact details to Operator to be sent to Complainant
 - Deletion within 48 hours where “reasonable website operator” believes details provided “obviously false”
 - Automatic removal within 48 hours where same or substantially similar comments removed twice before
 - Time limits exclude non-working days

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Peer-reviewed statements in scientific or academic journal etc.

- Defamation Act 2013, Section 6
 - Relates to a scientific or academic matter
 - Independent review of scientific or academic merit
 - Before publication
 - Editor plus one or more “persons with expertise”
 - Defeated by Malice

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Concluding Remarks

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