

TIPTOEING THROUGH THE LIBEL MINEFIELD NOTES

As presented by **Kevin Ritchie**
In conjunction with **Roth Communications**

What is libel?

The Merriam Webster dictionary defines it as:

- (a) a written or oral defamatory statement or representation that conveys an unjustly unfavourable impression
- (b) a statement or representation published without just cause and tending to expose another to public contempt
- (c) defamation of a person by written or representational means
- (d) the publication of blasphemous, treasonable, seditious, or obscene writings or pictures
- (e) the act, tort, or crime of publishing such a libel

<https://www.merriam-webster.com/dictionary/libel>

Cornell Law School in the US defines it as:

... a method of defamation expressed by print, writing, pictures, signs, effigies, or any communication embodied in physical form that is injurious to a person's reputation, exposes a person to public hatred, contempt or ridicule, or injures a person in his/her business or profession.

<https://www.law.cornell.edu/wex/libel>

What do we see immediately?

- (a) The identity of the person who is the subject of the defamation must be clear.
- (b) The person has to have a reputation to impugn or damage.
- (c) You can't defame the dead, but you can defame a company.
- (d) It has to be fair. There has to be a reason to say it.
- (e) The statement has to be published – it has to be disseminated to a third party, either verbally or by writing. It has to exist – or where someone has hastily deleted it, to be shown to have existed.

Why do we care about libel as journalists?

- (a) Because everyone involved in the process will be sued: you, the editor, the publisher and the owner.
- (b) If you lose the case, it will cost the media organisation money. It might even cost you money individually, or it might cost you your job – and any chance of future employment.
- (c) Because unscrupulous individuals and organisations will use lawfare as a legitimate way to muzzle media. They will use the cost of defending these actions and the potential ruinous effects of losing them to stop media investigating things they don't want to see in public. [Example Lothar Neethling v Vrye Weekblad in 1990]

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Question for attendees #1

Question: Are we allowed to hold negative views of people?

Answer: Yes. We have the right to freedom of expression in most countries – and freedom of belief. But we have also got the right to privacy and to dignity.

Question for attendees #2

Question: Are we allowed to express those views?

Answer: We can give an opinion to a third party about another person's suitability for a job, for example, if we are asked this. As long as we give this opinion honestly, fairly and based on our own experience – not the experience of others.

Commentary is generally free – if, according to the SA Press code, it is:

7. Protected Comment

7.1 The media shall be entitled to comment upon or criticise any actions or events of public interest; and

7.2 Comment or criticism is protected even if it is extreme, unjust, unbalanced, exaggerated and prejudiced, as long as it is without malice, is on a matter of public interest, has taken fair account of all material facts that are either true or reasonably true, and is presented in a manner that it appears clearly to be comment.

<https://presscouncil.org.za/ContentPage?code=PRESSCODE>

But all this is about opinion. What about facts?

Not all facts are fair. Even when they are, there has to be a reason to share them. This is where we enter the debate of public interest. There's a huge difference between what's in the public interest and what interests the public.

It's vital that we understand this, because as journalists, we use 'public interest' as a catch-all excuse for myriad sins that we commit, prying into people's businesses and lives – and often getting away with murder, figuratively.

The ethical journalism network defines public interest as follows:

Put simply, the public interest is about what matters to everyone in society. It is about the common good, the general welfare and the security and well-being of everyone in the community we serve.

<https://ethicaljournalismnetwork.org/the-public-interest>

Sometimes what interests the public happens to be in the public interest.

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Question for attendees #3

What examples are there of **what interests the public** overlapping with **the public's interest**?

- Drunkenness by temperance preachers
- Licentious behaviour by moralists
- Proof of bribery/corruption by politicians
- Revealing of past embarrassments, if these have not been disclosed and even denied

But if you can't show that the revelations you are publishing matter to everyone in society, serve the common good, speak to the general welfare and security and well-being of everyone in the community, you are going to struggle to mount a public-interest defence.

It's also key to understanding why public figures, especially celebrities and politicians (because they derive their power/wealth/status from courting public support), have less right to privacy than ordinary citizens. But they are also still entitled to fairness.

Question for attendees #4

Question: Can a picture be defamatory?

Answer: Yes.

Question for attendees #5

Question: So how do we publish a picture?

Answer: Using the same methodology as you would text or oral: truth, public interest, contemporaneity, fairness. But also context. A picture taken out of context or with the wrong caption can be incredibly defamatory.

It's vital that we understand this. It's why there is so much at stake when you publish pictures of suspects being brought into police stations or court. You have to err on the side of caution. It's why many newspapers still don't publish the names of suspects, even when they are in custody, until they have appeared in court and formally pleaded. It's just about being ultra cautious.

Defining libel, defamation and slander

Defamation is the general term for impugning someone's character or dignity.

Libel traditionally is when it is written. Slander, when it is spoken. These used to be important terms because there were different penalties for each and also different burdens of proof. Libel used to be recognised as more serious, but US case law has since evolved to recognise them as the same.

In the state of Illinois, defamation is divided into two kinds...

Statements (published or spoken) that are defamatory in and of themselves (defamatory per se) without the complainant having to prove that they are:

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Examples of obviously defamatory statements (in Illinois, USA)

- Saying/writing that someone is involved in criminal activity – or committed a crime
- Saying/writing that a person is infected with a loathsome communicable disease
- Saying/writing that a person is involved in behaviour incompatible with the proper conduct of their business/trade/profession
- Saying/writing that a person was an adulterer or unchaste or engaged in sexual misconduct
- Especially in South Africa, saying or writing that someone is a racist, rapist or wife beater (GBV)

And then there are statements that can be proven to be defamatory (defamatory per quod). A critical issue here is the onus of proof. If the statement is defamatory per se, the complainant doesn't have to prove it's defamatory. If it is defamatory per quod, the complainant must show why the statement was defamatory – and what damage they suffered.

Examples

In an Alaska Supreme Court case, a woman accused a man of assault, battery and false imprisonment. The court explained that because the statements imputed a serious crime, the man was not required to prove the damage to his reputation and emotional distress.

In a Texas Supreme Court case, one doctor sued another for a letter he circulated that stated that the doctor had a reputation for being untruthful. The court determined that this was not defamation per se since it didn't injure the doctor in his profession. Because of that, the doctor had to prove that he'd suffered mental anguish and loss of reputation.

<https://www.findlaw.com/injury/torts-and-personal-injuries/what-is-defamation-per-se-.html>

There's also a strict liability involved in most defamation law. It doesn't matter what you intended when you made the statement or published the piece – it's the fact that you did it that counts against you.

Your only defence in South Africa is that you reasonably believed it to be true at the time, especially when it comes to expressing an opinion.

Damages

If a court finds you have defamed someone, it will award damages against you – on top of the legal fees you will have had to pay (plus probably the other side's too). The damages are worked out as follows:

- General damages: The compensation for the past and future harm sustained to reputation in the community, as well as mental or emotional anguish and personal humiliation.

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- **Special damages:** The compensation for specific economic loss caused by the defamation. This can include things like loss of profits and loss of a job.
- **Nominal damages:** A nominal sum that can be awarded when defamation per se has occurred, but no serious harm to reputation was done.
- **Punitive or exemplary damages:** Additional sums meant to punish or set an example when the defendant's actions were wilful or malicious.

In 2017, in Australia, actress Rebel Wilson was awarded more than Aus \$4,5-million by a jury: \$3.9 million for economic loss and \$650,000 damages for non-economic loss. It was the biggest award in Australian legal history. The award of damages was also for eight different publications, not just one article.

You can Google other cases. Celebrities are perennially suing the media. Megan Markle, Duchess of Sussex; Johnny Depp; Elton John etc. Politicians do too, as do businesses. The list is endless. Therefore, so is the risk. Courts will look at how far the defamation spread: i.e. how many newspapers it was published in and their circulations (readerships) or time of broadcast (e.g. prime time) – as well as where it was published: front page/editorial column etc.

For media there are the following aggravating factors to consider:

- Repeated publication of the offending statement
- Repeated reliance on public interest when it is obvious that the statement is false
- Malice or other improper motive
- Delay, inadequate or no apology at all

(A practical guide to Media Law: Milo, Stein, Lexis Nexis South Africa 2013)

If you're going to apologise, make a virtue of it. Don't make excuses, don't qualify the apology – and publish it with the same prominence that you did with the original sin.

Follow that up by either putting the apology above the offending article on the website, or removing the offending article altogether but keeping the apology there.

Defamation as a crime

Up to this point, we have spoken of defamation as a civil matter or as a tort or a delict, depending on the country in which you live. There's also criminal libel, which is defined as:

The act of "unlawfully, intentionally and seriously impairing the dignity of another". Racial insults using racially offensive language, as well as emotional or psychological abuse are considered crimes under criminal libel.

<https://definitions.uslegal.com/c/crimen-injuria/>

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There are two major issues to consider right at the outset:

(a) Because it is a crime, the police have to investigate and send it to the prosecutors to prosecute – i.e. there is no cost involved to the complainant.

(b) If you are convicted of the offence, you will have a criminal record, be fined or perhaps even jailed.

Equally, because it is a crime, there has to be both the intention to defame and the act (the statement) has to be unlawful.

Two possible defences in this case would be that it unintentional because you reasonably thought the statement was true at the time, or that it was intentional because the statement is true.

Defences for defamation

There are three broad categories

1. Truth

In many countries, such as the US and the UK, that's all that has to be proved.

2. Public interest

In South Africa, you have to prove both: that it was true and there was a public interest.

Reasonableness is also a key factor to both of these.

- The fact that the source(s) were reliable
- The fact that the documents received were authentic and complete

– As a reporter, note-keeping is vital to prove that you did everything reasonable to check on sources and documents.

- Critically, the subject of the defamation was given the right to reply or to comment before publication – and whether this was used fairly and as fully as possible.
- Timing. The urgency to publish versus the time given to the respondent to reply to allegations.
- Tone. Allegations which cannot be proved or are disputed must be presented as such and not as undisputed facts.

3. The statement was protected by privilege

Either parliamentary, court, commission of inquiry or other similar public body (but beware of inaccurate or incomplete reporting, which negates the privilege. Remember too that what lawyers tell you outside the courtroom is not covered by privilege).

(A practical guide to Media Law: Milo, Stein, Lexis Nexis South Africa 2013)

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And there is fair or protected comment:

It must be marked as comment or opinion

- The commentary must be fair, even if it is extreme. It must, objectively speaking, qualify as an honest, genuine (even if prejudiced or exaggerated) opinion relevant to the facts upon which it is based – not the malice of the author.
- The facts on which it is based must be true or substantially true and stated as such in the commentary – unless these facts are widely known.
- The commentary should be on a matter of public interest.

(A practical guide to Media Law: Milo, Stein, Lexis Nexis South Africa 2013)

Defamation v invasion of privacy

The two are separate areas of law but do interrelate. There needs to be the same justification for both:

- Truth
- Public interest
- Fairness

Celebrities, politicians and the famous who live their lives in public have less justification for keeping their lives private when they decide to – especially when they are out in public. Their children and other relatives have far greater rights.

But the famous still have rights. The old newsroom rule of thumb is: if a cabinet minister is quietly drunk at home on a weekend night, that's their right. If they're quietly drunk in their office on a Monday morning, that's news.

Let's look at what invasion of privacy is:

- Intercepting, recording, monitoring communications (in SA law you can record a communication in which you are participating)
- Surveillance, stalking, harassment
- Entering a private home
- Eavesdropping
- Searching a person
- Interrogating a person
- Hacking (unauthorised access) into a computer

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Then there's the disclosure of 'private facts'. These have been defined in South African law as:

- Health and medical information (such as HIV status, terminal disease)
- Financial affairs
- Sexual life (sexual orientation)
- Family life
- The contents of private correspondence

So, this introduces another aspect of the law: how were the private facts obtained?

If you obtained them legally and then published them, you would rely on the defence of public interest. If you obtained them illegally, you would have to prove an overwhelming public-interest defence – this is normally what happens in the case of the publication of whistle blowers' evidence. But then there's also the case of the Sunday Times in South Africa and the then Minister of Health Manto Tshabalala-Msimang. [In brief, the minister was an alcoholic and had forced the hospital to ignore this so she could get a liver transplant, this to replace her original one, which had failed through alcohol abuse. The newspaper claimed they were justified in publishing her medical records, which had been leaked to them on the grounds of public interest, because the truth spoke to her unfitness for office both personally and professionally.]

Equally, if one party consented to the publication of the story (i.e. in the case of a paternity issue), the embarrassed party would not be able to sue for invasion of privacy and the publication of private facts. (A practical guide to Media Law: Milo, Stein, Lexis Nexis South Africa 2013)

Beware the allure of social media

Every rule that exists for defamation applies equally to social media. The problem with social media is that everything is fast. It's designed that way, but the consequences are even faster. The disclaimer of 'retweets are not an endorsement' is not a get-out-of-jail-free card. Instead, the onus will be on you, if you are sued, to prove that that you weren't defaming the person.

It's far easier just to own it. If you are going to retweet, either condone or condemn the statement you are retweeting – and live with the consequences. It's especially vital with hashtags. After all, the reason you're placing them in your tweet is to drive engagement with other people.

And remember, the moment something goes into the ether under your name – you've published it. It's that simple. Everyone with a social media account is now a citizen journalist, with all the downsides and checks and balances that entails. The fact that no one has begun to aggressively police this doesn't mean it's not going to happen.

In South Africa, we have multiple cases of racism that have been exposed and prosecuted, although no one yet for defamation.

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Another vital thing to remember about social media is that it's trackable. The complainant (and their lawyers) can gauge just how far your tweet has travelled or how many times your retweeted video has been seen.

If you are running a website, be very careful about monitoring comments. These degenerate into defamation and *crimen injuria* with incredible speed. As the publisher, you will be liable for publishing them even if you didn't write them yourself.

Resources

<https://www.freedomforuminstitute.org/first-amendment-center/primers/libellaw/>

<https://hamiltonfraser.co.uk/knowledge/avoid-claim-defamation/>

<https://www.johnsflaherty.com/blog/five-steps-to-avoid-online-defamation>

https://www.newmediarights.org/best_practices_avoiding_defamation_social_media

