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English libel law for journalists: A brief guide

Mantra:

Don't write what you know;

Write what you can prove

Overview:

This narrative explanation of English civil libel law is aimed at trainers, journalists and editors to help them understand the basics of the legal system in which we publish our material. The laws related to libel in England are often difficult to understand. This guide presents a practical step-by-step process to assist writers and editors when assessing a text for potential libel. It also offers some pointers to keep in mind when considering libel issues.

nb: This training material only covers the law in England and Wales. As a working journalist, you should also be very familiar with the laws relating to the media in your own country.

The check:

Checking for libel is a two-stage process:

- I. **First**, the author or editor must examine the entire text and note which words defame individuals.
- II. **Second**, the author or editor must ensure the text contains a solid defence of each and every instance of defamation.

We will deal with each one of these in turn.

Step one: Highlighting defamation

As a journalist or editor, imagine you possess a defamation light, and shine it on the text, highlighting all the bits that could defame. When you first do this, it may be best to simply print the text and literally underline those words, phrases and sentences that are defamatory.

Defamation's definition changes occasionally, but is basically held to be a positive answer to the question: "Does this statement lower the reputation of this person in the mind of a right-thinking person?" So, imagine a "right-thinking person" looking at the story. Which statements would make that person think less of the individuals written about in the text?

Remember, though, that most news stories will contain statements that could be reasonably assumed to lower the reputation of those individuals, companies, corporations or organisations mentioned in the text. That is often why the statements are news in the first place. But we are not eliminating any statements from the text at this stage; we are simply highlighting potential trouble spots.

Note: Slander and libel mean the same offence: Libel is written, slander is spoken or broadcast. For our purposes here, the word libel is used throughout.

¹ Source: IWPR

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The “right-thinking person” can be a troublesome concept, but it could be defined as the normal, majority opinion. The English rule of thumb is to ask whether it would lower the reputation of the defendant in the mind of “the man on the Clapham bus,” that is, the average man.

Of course, this might be difficult for a non-Englishman to understand. It is best to simply look at the language itself: does the statement make the person look bad? If so, it is defamation.

Note also that at least one right thinking person must have been involved as a reader or observer of some kind. You cannot libel someone if he or she is the only person who read or heard the insult, or if you wrote something that nobody would read, such as in a secret diary. It is enough, too, that one person sees this statement for it to be ruled as libellous.

Step two: Is the defamation also libel?

Basically, having established that the information damages someone, you need to make sure you have a defence. You have to determine that each and every defamatory statement highlighted in stage one is legally defensible. There are five possible defences you can deploy in law:

- 1) **TRUTH:** This is the most obvious defence. But remember our mantra: the issue is not about what you believe to be true or even what you know to be true; the issue is what you can PROVE to be true.

Example: In the 1990s, the magazine *New Statesman* wrote a story about rumours that prime minister John Major was having an affair with his cook. The rumours were ruled defamatory (step one), but the paper had no defences. The statement was one of fact, but it could not be proved to be true. Major in the end settled, but he could have pursued his claim and probably put the magazine out of business.

- 2) **FAIR COMMENT:** This defence applies to statements not of fact but of opinion. The statement must be obvious to readers that it is a comment or opinion. However, the underlying facts on which the comment is based must be true.

Example: In the 1980s, a BBC satire programme described (the tabloid newspaper) *News of the World* as having “All the nudes fit to print, and all the news printed to fit (ie, invented).” The newspaper’s editor, Derek Jameson, sued the BBC. The court accepted that the statement was defamatory (step one), but accepted the defence of “fair comment,” because the statement seemed justified by the lurid contents of the newspaper.

- 3) **PRIVILEGE:** Statements said in the UK Parliament, or in the UK courts, may enjoy “privilege.” In England, statements from parliament enjoy absolute privilege: in other words, they can be recorded, and you cannot be sued. Statements in courts enjoy qualified privilege. Although you can report what is said in court, the report must be fair – there must coverage of any reply or counter accusation, even if in a subsequent issue, and the report must be contemporaneous, it must be the first opportunity for your newspaper to cover the story.

Example: In 1980, police captured the Yorkshire Ripper, an infamous serial killer, by chance, when his car was stopped for a routine reason. When the police chief realised he was guilty, he called a press conference and told the journalists “We’ve got him.” Many papers, including the *Darlington Evening Despatch*, ran the story with those words as its headline. The Ripper was later that day charged. The papers claimed protection

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against contempt of court and libel arguing that the police press conference was qualified privilege. The courts agreed, but probably because so many papers had gone along with it. But it was close – they might in other circumstances have been sued for libel.

Qualified privilege: In some situations a publisher may have a duty to publish certain information where the readers have a reciprocal interest in receiving the information. If the information turns out to be incorrect, the court may allow a defence of “qualified privilege”; however, for this defence to succeed, not only do you need to establish the duty and reciprocal interest, but the court will also look very carefully at all the steps the journalist took to verify the allegations, as well as other journalistic methods. (In other words, this is not a licence to get things wrong or an excuse for sloppy journalism.) This is the closest thing in England to a “public interest” defence.

- 4) **DEATH:** Someone who is dead cannot be libelled. Basically, this is because there is no one to sue. But watch that libel of the dead does not also implicate the living. Defaming a dead man may also defame individuals and institutions he was associated with.

- 5) **HONEST MISTAKE:** This defence is harder than it looks. First, libel law is seen as similar to the Highway Code regulating car travel: ignorance of the rules is no defence. Also, the test for this particular defence is very strict: It is NOT enough to say that you “did your best” to contact the subject for their side of the story. You have to have had firm grounds for believing the story to be true. A successful defence of this kind is quite rare, and it is best not to rely on it.

Completing the check

Quite simply, if a defamatory statement you found in step one cannot be supported by one of the legally acceptable defences in step two, then that statement should be cut from your text.

Excuses That Are Not a Defence

The five defences are the only defences that could possibly be used in an English court. Other defences of defamatory statements are not acceptable, no matter how credible or logical they might seem. The following excuses are NOT acceptable:

I. “But I don’t live in England...”

Different country: You can be sued for libel in any country in which your material appears. For example, Russian businessman Boris Berezovsky is suing a US magazine for libel not in his native Russia, or even in the US, but in London. This is possible because the magazine sells a few copies in London.

II. “But it wasn’t me; it was my publisher...”

Limited liability & individual responsibility: Working for a limited company does not protect individuals from libel suits. You can be sued for libel personally. Libel suits can be sent simultaneously against the newspaper, the reporter personally, and thirdly, against the distributor of the media, whether this is a newspaper deliverer, shop, or Internet provider. This is an odd exception to the laws of limited liability in England.

³ Source: IWPR

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III. “But that other paper reported it...”

Repeating a report already published: It is not defence to repeat a libel. Jeffrey Archer, a former MP, won libel damages from the Daily Star in the late 1980s, after it ran a version of a story about his paying a prostitute, which was written in another paper. The first paper had contacted the prostitute, but the Star had not, and it had no defence. Remember: no matter how many other people may have written the story, do not write it unless you know you yourself can prove it.

IV. “But everybody knows that already...”

Rumour/ hearsay: It is no defence to say that you are merely reporting a rumour. If the court decides that the “man on the bus” might have a lower opinion of the subject as a result, you are not protected. It is also no defence to say “it is widely known that...” or “everyone believes that Mr A deals in drugs.” The test is: can you PROVE that he does it, not just that people think it?

V. “But that’s what he really said...”

Reporting comments that defame: One popular misapprehension goes like this. Man A says something bad about Man B. The paper reports the comments, on the basis that Man A really did say them. But this is no defence. The judge is not concerned with whether the comments are accurately reported, but rather, whether they defame the subject. Likewise phrases such as “it is generally believed that Man A sells drugs” are not acceptable.

VI. “But he denied it openly...”

Denials: Reporting someone’s denial is no defence if the court decides that, in the mind of the right-thinking person, the statement nevertheless lowers reputation. Statements such as “The Palace denied that Charles fed his cat to his dog” are unacceptable. Remember step one: does any part of your story lower his reputation?

VII. “But I wrote about his company, not about him...”

Unwitting link: Watch for libel links, anything that could connect your subject to specific individuals. British courts are likely to allow a head teacher to claim defamation if his school is criticised – likewise company chiefs and police chiefs. Companies, corporations and organisations also have reputations and can sue in their own right.

VIII. “But I didn’t even use his name...”

Safety in numbers: Anonymity can get you into trouble. If you write a story saying a member of a football team had sex with an under-aged girl, but do not name him, you will not get a single libel suit; you will get eleven libel suits.

IX. “But I obeyed the ethical code...”

Following the rules: Many journalist associations have ethical codes that say each story should be accurate, fair and balanced: it should carry both sides of the argument, and the journalist should not comment. These guidelines are all very well, but they will not save you from a libel suit.

X. “But I used the word ‘alleged’...”

Blurring words: Using “alleged,” “reportedly” or similar words is no defence.

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Other peculiarities of English libel law:

In addition to the two-step libel check, there are some other details of English libel law you should be aware of.

- I. **Delays:** Never delay; acting quickly in the event of problems can help you. In online publishing, for example, it is best to pull stories offline as soon as serious legal questions arise and while they are pending. Acting quickly shows you are behaving responsibly in the event of later legal action and maybe even mitigate the libel to some extent.
- II. **Juries:** In England, civil libel cases are generally heard by juries, not judges. Juries are harder to predict than judges, who operate on a legal sliding scale. Juries may also want revenge against journalists. Juries also know that the bigger the award, the bigger the headlines they get.
- III. **Non-standardised compensation:** Quantifying the value of a reputation is difficult, and therefore damages in libel cases vary greatly. Again, that makes libel trials hard to predict, though the awards are often very high: hundreds of thousands of pounds or even millions. Compare this to other damages: if a car hits you and you lose a leg, for example, the value of that lost limb is more or less established by precedent, and the subsequent loss of earnings is easily calculable. But how do you determine the financial cost of damage to reputation?
- IV. **Even more costs:** If you lose your libel case, you will not only pay the damages awarded to the plaintiff, but you may also pay a large proportion of the plaintiff's legal costs. Add that to your own legal costs, and it adds up to huge sums. It is easy to see why publications in England are so careful about libel and try to settle out of court if at all possible. Legal costs often far exceed damages.
- V. **Dirty linen:** If you are taken to court, the defence lawyer will have privilege to say anything they like about you. They may try and discredit you by producing any erroneous stories you have written or written by your newspaper in the past. Equally, some papers escape libel suits because they hint they will reveal even worse things should the litigant take them to court.
- VI. **Public office:** Public figures are generally thick-skinned. The British prime minister is unlikely to sue if called an idiot, or mad, or evil – anything that is clearly comment. However, more specific allegations of fact could be dangerous, such as accusing him of corruption, of specific actions, or of matters relating to his private life.
- VII. **Lawyers:** Deciding not to learn libel law because you can always send it to the lawyer is a cop-out. First, lawyers are there for specialist advice, not to advise on every little thing. Secondly, lawyers' advice will be circumspect: they cannot give a hard and fast answer, only an expert opinion on the chances of you being sued. Lawyers can only advise on risk or the risk of being sued; they cannot research the truth of your story, and their advice cannot replicate good journalistic practice. In addition, lawyers are expensive, especially in England. So, the advice for all journalists is: know the law.
- VIII. **Truth is absolute:** One positive point, at least from the journalist's perspective... A common complaint is that a journalist takes a single line from a ten-page report and focuses his article on that line only. But do not fear; this is fine. There is no legal requirement to balance such information if it is true and reported accurately.

Notes on extra-territoriality:

An increasing number of libel cases are being heard by courts outside what might normally be thought of as their natural jurisdiction. Print publications are sued in courts in countries not where they are published and not even where the journalist is working, but in countries where they are sold or distributed. With the expansion of the Internet, there are even more of these "extra-territorial" cases, and it could happen that your article is the subject of a libel action in several nations' courts.

⁵ Source: IWPR

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One recent example of this, and perhaps a key case in the extra-territorial jurisdiction issue worldwide, is the case of *Dow Jones & Company Inc v Gutnick* in Australia. On December 10, 2002, the High Court of Australia ruled that publisher Dow Jones could be sued in the Australian state of Victoria for an article posted on Barron's Online, a US-based Website owned by Dow Jones. Despite submissions to the Court in support of Dow Jones from the likes of Reuters and Amazon.com, among others, the Court ruled that, regardless of the location of the hosting server, the alleged defamation of the plaintiff, Joseph Gutnick, took place in Victoria.

Apparently, it took place everywhere else, as well. The judge's ruling reads: "For myself I would see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she, if so advised might not litigate the case in each of those jurisdictions." This ruling in the case of *Dow Jones & Company Inc v Gutnick* could open the floodgates to a large amount of litigation in Australia and in other countries.

With internet development, you may eventually face the daunting prospect of having to understand libel law in several different countries.

For now, our advice regarding third-country libel suits (ie, not in your country and not in England) is straightforward:

- I. Know the law in your own country;
- II. Know the law in England;
- III. Assume that any third country would be just as strict on libel as England.

Remember, too, that Internet libel is no different from normal libel. If you libel someone, and if the court can prove at least one person has seen it in that country, then you might face a libel action in that country. If you are Internet based, you will be seen in dozens of countries, any one of which could bring a libel case against you.

However, many democratic countries have tests for libel that are roughly similar to those in England. Basically, if you publish a statement that harms another person, you need a good defence.

Summary:

Put yourself in the mind of the judge. Her first question will be: does this statement damage someone? If so, then, she will ask: is there a defence for such defamation in law?

In general, the first advice is "if in doubt, leave it out." However, a popular definition of a news story is: "something that someone somewhere does not want to see published. All the rest is advertising."

Put the two together, and it is clear that that art of journalism is to use your knowledge of the law to report what can legitimately be reported.

Finally, don't be scared by all this. Remember: if your story is true and you can PROVE it is true, then it is extremely difficult for the subject to bring a libel case against you.

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