

Ringmer Parish Council

Defamation – briefing note- the legal framework Communications Policy

Definitions

A defamatory statement is one “which tends to lower a person in the estimation of right thinking member of society generally or cause him/her to be shunned or avoided or expose him/her to hatred contempt or ridicule, or to convey an imputation on him/her disparaging or injurious to him/her in his/her office, profession, calling trade or business” – *Halsbury laws of England*).

A defamatory statement may be made in actual work or by images, pictures and the like. A statement made on radio or television is in permanent form. Websites, social media and blogs are included in these definitions. A defamatory statement made orally or in some other transient form (e.g. a gesture) is called slander.

The law of defamation is governed by common law and statute such as the Defamation Act 1996 and the Defamation Act 2013. One of the objects of the 2013 Act, which came into force on 1st January 2014, is to discourage trivial defamation claims.

Actionable defamation

The person defamed can only sue the defamer where the defamatory statement is communicated (in legal terms “published”) to some other person. Thus, a defamatory letter written by a Person A about person B is not actionable if it is sent to Person B and seen only by him/her. However, if the letter is sent to Person C who passes it on unopened to Person B there will be no communication to a third party.

A statement is not defamatory unless it has caused or is likely to cause serious financial loss to a person. – Section 1 of the 2013 Act.

Who can bring action for defamation?

Any living person can be defamed and bring action against the defamer. Individual Councillors or Council Staff can sue for defamation. A company can also bring a defamation action.

Public and local authorities including local councils can **not** be defamed and cannot sue. This is now settled law. The House of Lords held that it was in the 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 action for defamation. In contrast, however, trading or non-trading corporations (i.e. bodies who have identity rights and responsibilities distinct from those individuals who form them), e.g. companies can be defamed by statements affecting their trading reputation. An unincorporated body is an association of individuals or bodies not recognised by the law as having a separate legal existence for the National Association of Local Councils or a sports club. An unincorporated body cannot be defamed. If words disparaging an unincorporated body reflect on certain individuals, those individuals could sue.

Even though a statement cannot be defamatory of a local authority itself the same statement can be personally defamatory of a member or officer who can bring personal action in their own name.

Who may be sued for defamation?

As a general rule, the person to be sued is the person who “publishes” the defamatory statement. Every person who participates in publication may be liable as a “publisher”. Thus, where a liable appears in a newspaper, the originator, reporter, editor, printer publisher and vendor may be liable as well as the author. Section 10 of the 2013 Act confines legal action to the author, editor or publisher defined by section 1 of the 1996 Act) of the defamatory statement unless it is not reasonably practicable to bring an action against them. However, innocent dissemination of libel does not amount to a publication, thus a postman who delivers a letter in the ordinary course of his duties without knowing it is defamatory is not liable as a publisher.

In contrast to the rule above, a public or local authority (including a local council) may be sued for defamation. A commercial trading company may also be sued. These bodies may also be liable for any act of publication by an agent or employee if done within the scope of his authority or employment. An agent or employee may also, as an individual be liable as a publisher, but if acting under instruction he would be entitled to be indemnified against any personal financial loss.

A local council may be liable as a publisher of libel in any of the following cases if:

- It directly authorises the making of a defamatory statement (e.g. in the words of a resolution reproduced in its minutes).
- It authorises a member or instructs an officer to write a letter etc in terms which are defamatory.
- A member or officer is given general authority to express the council’s views on a matter and does so in defamatory terms; and:
- A council cannot, in itself be libel for slander since acts which constitute slander can only be carried out by living persons. Thus, the making of a slanderous remark by a councillor at a council meeting will result only in personal liability on the councillor. However, a slanderous statement by a council employee, acting in the course of his/her employment, will make the employing council liable.

Defences

The main defences to an action for defamation:

1. Truth

Section 2 of the 2013 Act creates the defence of “truth”. A defendant must prove that the statement is substantially true.

2. Absolute privilege

Absolute privilege means that a person who makes a defamatory statement in certain circumstances has an absolute defence (arising under various statutes) to a defamation action. 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.

Those circumstances are:

- Court or tribunal proceedings;
- Proceedings in parliament;
- Contemporaneous fair and accurate reports in any medium of publication of court proceedings;
- Authorised reports of court or parliamentary proceedings (e.g. official law reports – Section 2 of the Parliamentary Act 1840);
- Investigations by the local government ombudsman – Section 32 of the Local Government Act 1974;
- Statements made in the course of judicial proceedings; and
- Affairs of the state (unlikely to affect local councils).

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

3. Qualified privilege

The defence of qualified privilege can arise from statute or in common law. Pursuant to paragraph 11 of schedule 1 of the Defamation Act 1996, fair and accurate reports of proceedings at a public meeting of a local authority which includes local councils have qualified privilege without explanation or contradiction. This means it is not possible to sue for defamation unless it can be proved that the statement was made with improper motive or malice. In the case of reports of local authority proceedings anyone who considers he has been defamed has a right to have the newspaper publish his explanation or contradiction.

At common law, the defence will apply where a person making a defamatory statement has an interest or a legal, social or moral duty to make it 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 also 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. Qualified privilege can be destroyed if the defendant is proved to have been actuated by spite or ill-will. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair. 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. The facts are of no particular relevance, but the following words of Lord Diplock in this Court of Appeal case are worth reproducing in full: "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 which 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 words can also be applied to written communications sent by a local council in the course of official business.

4. Publication on matters of public interest

S.4 of the 2013 Act creates a defence if:

- The defamatory statement was, or formed part of, a statement on a matter of public interest and;
- He or she reasonably believed that publishing the statement was in the public interest. The defence applies to a statement of both opinion and fact.

5. Honest opinion

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).

6. Offer of amends for unintentional defamation

This defence is available where the defendant did not know or have any reason to believe that the statement referred to the claimant and was untrue and defamatory of him. 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:

- A suitable correction to the statement complained of; and
- A suitable apology to the aggrieved person; and
- 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”).

It is always possible that an offer of amends may be made and accepted without the statutory formalities.

7. Innocent dissemination/operators of websites and secondary publishers

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 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:

Implications for local councils

Local councils, councillors and council staff will be able to take advantage of the appropriate defence(s) if threatened with a defamation action. In particular, those of qualified privilege and fair comment will often be relevant. However, care should always be taken not to make statements which might be defamatory; if in doubt, they should take legal advice before taking any action. The same care should be exercised before publishing statements made by others, e.g. by reading out letters from constituents at council meetings or reproducing complaints etc verbatim in the minutes of a meeting or permitting third parties to post material on their websites. Where a potentially defamatory matter needs to be reported or recorded then so far as possible only the gist of it should be included in report or minute, so as to exclude publication of defamatory matter. A distinction must be drawn between statements etc. made by councillors in their public and private capacities. A defamatory statement made in a private capacity does not attract any of the defences specified above, especially that of qualified privilege.

Insurance

Pursuant to Article 6(3) of the Local Authorities (Indemnities for Members and Officers) Order 2004 (SI.3082), a council is able to provide indemnity to members and officers in order to allow them to defend a defamation action. An indemnity cannot be provided for the bringing of such an action by a member or officer.

Court Proceedings

If court action is threatened, the parties to the claim must comply with “Pre-Action Protocol for Defamation” published by the Ministry of Justice. This 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

In case of potential challenge or uncertainty, first contact the Parish Clerk.