

## **1. COM 402 – Lesson 03**

### **2. Defamation**

### **3. Branches of Law**

#### **3.1. Criminal v Civil Law**

##### **A. Committed against**

- a) Criminal: Public
- b) Civil: Individual/group

##### **B. Initiated**

- a) Criminal: State prosecutes
- b) Civil: Injured party sues
- c) State prosecutes on behalf of injured party
- d) Public is injured (despite it being an individual) because it violates social order and harms stability of society

##### **C. Penalty**

- a) Criminal: Fine (to state), prison, death
- b) Civil: Damages (to plaintiff), legal order (injunction--to stop what you're doing)
- c) Huge differences with criminal being more harsh and serious

##### **D. Intent**

- a) Usually Required for criminal, not for civil
- b) See 4.2.A for criminal defamation

##### **E. Burden of proof**

- a) What has to be proven in the case
- b) Criminal: Beyond reasonable doubt
  - (1) Need to prove beyond reasonable doubt because the consequences are so heavy; have to be certain the crime took place
- c) Civil: Clear/convincing or preponderance of evidence
  - (1) Good enough to show part of the evidence, no need to prove 100% that the crime took place
  - (2) Stakes not as high as criminal, though damages can be high

##### **F. Examples**

- a) Criminal: crimes against person (murder), property (theft), morality (obscenity)
- b) Civil: Tort (wrongful act: defamation, negligent driving--can be sued by injured party for falling below legal expectations of driving), contract, property

#### **3.2. Defamation is civil, not criminal, law**

##### **A. However, note Criminal Defamation**

- a) Section 499 of the Penal Code provides for the offence of criminal defamation
  - (1) Punishable by up to two years in jail, a fine, or both.
  - (2) Must show intent to harm reputation, or know that harm would result

## **B. Part of Tort Law**

- a) "Wrongful act . . . that injures another and for which the law imposes civil liability"
- b) "Cause of action based on such an act" - Merriam-Webster Dictionary of Law
- c) There are a list of elements you have to demonstrate to get your compensation (see 3.1-3)

## **4. Plaintiff must prove (Elements)**

### **4.1. Defamatory**

#### **A. Tending to harm reputation**

#### **B. Definition**

- a) Tends to lower another's reputation in the eyes of right-thinking members of society, or makes them shun him
- b) Exposes to hatred, contempt, ridicule—causes loss of good will & confidence
- c) Injures in business, office, employment

#### **C. Example of lowering someone's reputation BUT NOT defamatory**

- a) "The Cenite family are poor mobsters, they snitch on every single piece of information"
- b) Not defamatory in the eyes of right thinking people but definitely offends the mob society
- c) The law will not going to protect your reputaion among people who are not right-thinking

#### **D. Allegation of homosexuality**

- a) Is allegation of homosexuality defamatory in eyes of right thinking members of society?
  - (1) In Singapore yes – 69% people are homophobic with negative attitudes towards homosexuals
    - i) In Singapore, not illegal to be gay but illegal to carry out gay sexual acts
  - (2) Also grey area in other places, but defamatory if you claim a married guy is gay due to the hypocrisy itself

#### **E. Examples of Defamation**

- a) "His was a regular face at certain streets of Geylang. He wasn't there for the fruit at the open-air markets, though you might say he was there to squeeze some melons."
  - (1) Court takes into account extrinsic evidence of associations with Geylang, same goes for slang, figures of speech, ordinary knowledge of the world
  - (2) Defence? Truth (justification): that he really went there to visit prostitutes
- b) "Maria was eager for news from Randi about a junkie they both knew who was doing time in prison"
  - (1) From book about true crime stories, telling story of different victims – Maria was a victim and sued
  - (2) Defamatory? Claims it suggests she is a drug user: But why does being a drug user suggest harm to your reputation? IT'S ILLEGAL!
  - (3) Would it be defamatory merely to be an acquaintance of a drug user? How to deem it defamatory or not? Judge/jury put themselves in shoes of ordinary right-thinking members of society
  - (4) Ruled not defamatory
    - i) Not enough detail about what the relationship was between Maria and the junkie
    - ii) It does suggest that Maria tried to help the junkie perhaps, which is not defamatory

- c) MP Chiam See Tong shown singing karaoke in New Paper ad for Xin Zhang Jiang Restaurant (& handbills)
  - (1) High Court: ads suggested that
    - i) Plaintiff “consented to the use of his photograph for publicity either for gain or to sponsor a private restaurant”
    - ii) “taking advantage of his position as a MP and also for the benefit of promoting himself as an advocate and solicitor”
  - (2) \$50,000 to Chiam
  - (3) Also an invasion of privacy (not so much in Singapore – not many laws to do so), but would definitely prove an issue in many other countries.

## 4.2. Publication

### A. To third party

- a) Cannot be deemed defamatory if it's just between the plaintiff and defendant
- b) The communication of the defamatory statement to the plaintiff alone would not be sufficient

## 4.3. Publication: Libel vs Slander

### A. Slander: spoken

- a) Harder to win than libel
  - (1) Less permanent: not recorded; no more power to affect person's reputation after spoken
  - (2) Words are intangible
  - (3) Can be spontaneously said without thought
- b) Need to prove that the defamation didn't just disappear into thin air, that damage to reputation has occurred

### B. Libel: written or stored (incl. broadcast)

- a) More damaging than slander
  - (1) Permanent
  - (2) Lasting damage
  - (3) Premeditation
- b) Evidence remains and has the power to harm reputation in future
- c) *Damage is presumed, whether or not defamation has occurred*

### C. Four damaging categories where no need to prove damage to reputation in slander

- a) Female chastity, but not male (some discrimination in sexes)
- b) Loathsome, contagious diseases (eg HIV)
- c) Criminality
- d) Disparage in business (any office, profession, calling, trade)

## 4.4. Identification of plaintiff

### A. So that people can tell who has been talked about

### B. Requires:

- a) Name
- b) Identifiable characteristics

#### **C. Gatley (p. 182)**

- a) "The question . . . Is whether the [defamatory material] might be understood by reasonable people to refer to" Plaintiff, directly or indirectly

#### **D. BT use of Vickers Ballas trading website in an article on "When the Net lets you down"**

- a) Reprinted article of Washington Post
- b) Took an image of aVB website just to get people's attention – resulted in an apology
- c) Picture was significantly identifiable of Vickers Ballas Company.

#### **E. Also: wide shots of the streets where people's faces are visible – defamation**

### **4.5. Identification and groups**

#### **A. USA Confidential**

- a) "some Neiman [at the Dallas Neiman-Marcus department chain in US] models are call girls..."
- b) "The salesgirls are good, too--pretty, and often much cheaper..."
- c) "[In the men's store]... most of the sales staff are fairies"

#### **B. Plaintiffs who sued**

- a) 9/9 models ("call girls")
- b) 15/25 salesmen ("fairies" / gay)
- c) 30/382 saleswoman ("good too--pretty, and often much cheaper")

#### **C. Cases considered**

##### **a) Size of group**

- (1) Size of group identified, not the size suing
- (2) If group is too large, none can sue
  - i) Reasoning goes along the line that mud is being thrown, is there enough mud that gets stuck for any one individual?
  - ii) Saleswomen not compensated, too big a group, even though the wording is more encompassing than "some... models"
- (3) No magic number, but good chance if = < 25; very good chance if = < 12

##### **b) Certainty that individual Plaintiff identified**

- (1) Statement that reference to a group not actionable, unless group is so specific the statement can be understood by a reasonable person to refer to plaintiff

### **5. Defendant attempts to prove (Defenses)**

#### **5.1. Justification (i.e. Truth)**

#### **A. Provable facts**

- a) Records
  - (1) Most tangible
- b) Memories (?)

c) Witnesses

- (1) Having reliable and credible ones to testify their memories

**B. An absolute defence**

- a) Malice on part of defendant is irrelevant if justification is proven
- b) But every part of the statement must be proven true, not just parts of it

**C. NOT ENOUGH to honestly believe**

- a) "Rumor is that he burned down his business to collect the insurance money, and I believe it"
- b) Belief is irrelevant

## 5.2. Fair comment

**A. Not a matter of fact (ie true or false), but a matter of opinion**

**B. Potentially fair comment; no agreeable standards**

- a) Even reasonable people can differ in opinions
- b) eg.
  - (1) The cola was flat, warm and watery
  - (2) The starters were of poor quality
  - (3) The chips were pale, greasy and undercooked

**C. Fair (Comment)**

- a) Honest — could honestly hold opinion based on the evidence?
  - (1) Can be exaggerated, prejudiced, unreasonable minority view
- b) BUT NO MALICE—eg. spite, intent to injure reputation
  - (1) eg. Lady Gaga is playing in LA and the person writing the review once lost to her in a contest and defames her in the article; potentially malicious
- c) Must have some factual basis that is laid out, well known, or referred to
  - (1) eg. Lady Gaga was terrible, her rendition of "Twinkle Star" was bad. But truth is she didn't sing that song, and hence cannot be taken as honest.

**D. (Fair) Comment**

- a) Not a matter of fact (ie true or false), but a matter of opinion
- b) Recognizable as comment (opinion), not as verifiable factual allegation
  - (1) eg. Lady Gaga's concert – No true to false as to whether her concert is good or not; an opinion
  - (2) eg. Chee accuses GCT of stealing 17bn, either you steal it or not – hence, hard defence, not fair comment
- c) On matters of public interest
  - (1) Broadly defined to most things that the media would cover

**E. Elements for defence using Fair Comment**

- a) Factual basis, eg. make reference to a 'disgraced' politician currently embroiled in some scandal
- b) Objective, made in spirit of fair discussion, eg honest, no malice

- (1) Would a right-minded person honestly hold the same opinion?
- c) Public interest
  - (1) That the public would be interested in, have a right to know
- d) Comment, not fact

#### **F. If a comment or discussion is honest and fair**

- a) a plaintiff cannot succeed in his action even if such discussion or comment results in the publication of defamatory material

### **5.3. Innocent Dissemination**

#### **A. Anyone circulating defamation can be liable**

- a) Under English common law, which Singapore's laws was based upon
- b) eg. author, editor, publisher, printer, librarian, distributor

#### **B. Passing on of defamatory material but didn't know what was wrong**

- a) Claim should not be held responsible for the content (innocent dissemination)
  - (1) eg. person who delivers the newspaper containing defamatory remarks; librarians

#### **C. TWO PREREQUISITES FOR Innocent disseminator defense**

- a) Unaware of libel
- b) Not due to negligence

### **5.4. Unintentional Defamation**

#### **A. Publisher**

- a) took reasonable care AND
- b) published "innocently"
  - (1) Didn't intend/know might be understood to refer to plaintiff, or
  - (2) Words not defamatory on the face of them, didn't know would be understood as defamatory

#### **B. Can invoke with offer of amends**

- a) Correction & unreserved apology
- b) Reasonable steps to reach recipients of libel

#### **C. Offer accepted?**

- a) Yes --> case closed
- b) No --> partial defense (mitigation in damages)

#### **D. e.g.**

- a) "Mr. Tan was spotted with his girlfriend Saturday night at Crystal Jade Palace"
  - (1) How could this qualify as unintentional defamation?
    - i) Well-known that Mr Tan is married — adultery
    - ii) If the person didn't know that the woman is his wife, then he could say that they took reasonable care and asked a few sources who said it was his girlfriend

- (a) and they also didn't know that the words would be defamatory (it's not defamatory to say that a person is with his girlfriend, without knowing that he is married)
- iii) Lawyer would then send a letter to press on behalf and request apology – without the need of bringing the case up to court

## 5.5. Privilege

### A. True or false, the occasion affords the person the privilege to say what he wants

- a) An libel-free privilege zone (Absolute)
  - (1) eg. floor of parliament, MPs can say whatever they want
- b) Work/duty related privileges, for public interest (Qualified)
  - (1) eg reporter reporting defamatory comments

## 5.6. Absolute Privilege

### A. Even malicious lies cannot be sued for libel

- a) Parliament, courts, public proceedings of international organisations, solicitor-client communication
- b) But can be challenged for abuse of parliamentary privilege
  - (1) eg. SR Nathan v JBJ
    - i) Nathan claimed to have been "maliciously and viciously slandered" when Jeyaretnam alleged that Nathan "had no newspaper experience, but had been head of intelligence and had worked for the Japanese police during the occupation."
    - ii) [http://presspedia.journalism.sg/doku.php?id=cases:1982#marchs.r.\\_nathan\\_vs\\_j.b.\\_jeyaretnam](http://presspedia.journalism.sg/doku.php?id=cases:1982#marchs.r._nathan_vs_j.b._jeyaretnam)

### B. But cannot abuse privilege, else can be lifted by a judge in case of abuse

### C. Important to grant privilege in parliament / criminal proceeding

- a) Don't want to hold back people's opinions
- b) Don't want criminal proceedings to be inflicted with libel suits
- c) Want to encourage people to express their views candidly, the best environment for frank and constructive discussions about governing the country, how to justly prosecute criminals

## 5.7. Qualified Privilege

### A. Mostly for press

### B. See duty-interest test

### C. For DUTY

- a) eg legal, moral, social duties of publisher/reporter
- b) Media as a watchdog to ensure that trial was considered a fair trial
- c) *BUT Cannot have malice*

### D. For INTEREST (of intended recipients in receiving info)

- a) Mostly public interest
  - (1) Generally not "that which the public is interested in", but rather "that which is in the interest of the public"

- (2) eg.
  - i) Proceedings in Parliament, courts, int'l organizations, public inquiries
  - ii) Government notices
  - iii) Findings, decisions of associations for promoting arts, science, religion, learning, professions, businesses, sports
  - iv) Public meetings
- b) Not just curiously, but also if public has stake in finding out the info
  - (1) Media deemed as proxies who act on our behalf, thus a role to report trial as it involves the security of the nation --> the public a stake

#### **E. JBJ-LKY, '92**

- a) LKY sues JBJ for comments made in '88 campaign event
- b) JBJ argued for qualified privilege; comments made on matter of public interest
- c) Singapore's Court of Appeal ruled that:
  - (1) qualified privilege did not routinely apply to election campaign events
  - (2) for qualified privilege, not only must the audience has an interest in receiving them, (interest test)
  - (3) but the speaker must have a duty to convey them that, which Court argued is absent in JBJ's case (duty test)

#### **F. But press can still screw up with qualified privilege**

- a) Biased/unfair/non-factual reporting
  - (1) Portray as guilty even if the trial has not convicted the criminal
  - (2) By not providing factual and fair reports on both the plaintiff and the defence – NOT FAIR
    - i) eg. Coverage about the prosecutor's points for day after day, but no coverage when the defence takes his stand

#### **G. Exceptions to qualified privilege**

- a) P can prove D motivated by malice
- b) D exceeded privilege (?)

#### **H. Duty-interest test: Central Christian Church "cult" case**

- a) Impact (evangelic publication) allowed to claim qualified privilege because it reaches evangelical community
  - (1) Interest in receiving information about this
- b) ST, TNP, Wanbao cannot claim privilege
- c) English authorities on duty/interest, at the time (?)
  - (1) No general media privilege
  - (2) Privilege only if special facts
  - (3) Interest of section of public not enough

### **5.8. Libel-proof?**

- A. Cannot be libelled because your reputation is so low, there's no possibility of a libel that could lower the reputation further**
- B. Rarely used, rarely successfully proved to the court**
- C. *Vanity Fair v. Roman Polanski***
  - a) Offending quote from witness
    - (1) "I watched as [Polanski] slid his hand inside her thigh and began a long honeyed spiel which ended with the promise 'And I will make another Sharon Tate out of you.'"
    - (2) Claimed that Polanski was hitting on another woman on the way to his wife (Sharon Tate's) funeral
  - b) Why low reputation? Polanski convicted of having sex with a 13 y/o; pedophile, fled to France
  - c) Polanski sued in UK, where VF (a US based publication) has substantial distribution
    - (1) Doesn't need to appear in court, allow video conference
      - i) Note also that UK law doesn't need plaintiff to prove falsity compared to US
  - d) Libel-proof defence failed
    - (1) People still have some reputation left
    - (2) Reputation as pedophile in '77 might be different from '02
  - e) Cannot use fair comment, because comment was more factual than opinion

## 5.9. Privileges as protection of falsehood?

- A. *Dunnet v Nelson, 1926***
  - a) "It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be *contrary to public policy* and the *general interest of business and society* that persons should be *hampered in the discharge of their duty* or the *exercise of their rights by the constant fear of actions for slander.*"
- B. Allowing even malicious lies in parliament**
  - a) An overriding policy concern and public interest where people can discharge their duties, without constant fear of being sued for defamation.

### C. Lying in court

- a) Will be prosecuted under perjury, but not under libel law because of absolute privilege
- b) But what if you truly believed at the time? – protected under perjury law, but not libel

### D. To prevent the Chilling effect

- a) Chilling effect = promoting self-censorship to prevent getting into trouble
- b) Thus privileges allow people to mess up and make mistakes once in a while, instead of a chilling effect where people don't say things even when they should

## 5.10. Which are defenses?

- A. Use "may", "allegedly", "in my opinion"**
  - a) Not valid
  - b) Must demonstrate the legal facts that your comment is based upon, prove underlying factual allegations – NOT defence

## **B. Published before without liability**

- a) Not valid
- b) Innocent dissemination defence would not apply
  - (1) Recall two prerequisites: unaware of the libel, not due to negligence on their part
  - (2) Only to the folks who don't have any stakes, interest in the materials; editorial board would be deemed responsible and negligent in not checking

## **C. Mistake (wrong photo/copy), Unintended**

- a) Not valid defence; but we do have the unintentional defamation defence
- b) Could take reasonable care and still make the mistake BUT not a blanket defence
  - (1) eg. Sources told TNP that it was an ex-DPM, but TNP failed to do their own checks, thus fail defence

## **D. Consent to publication**

- a) Valid defence

## **E. Published what someone else wrote**

- a) Not valid
- b) Author/editorial deemed to possess the knowledge of what constitutes as libel and not publish what is considered potentially libelous

## **F. Most know it's true**

- a) Not valid
- b) Have to demonstrate the truth/fact, not enough to show that many people believed it and take it as true

# **6. Damages**

## **6.1. Compensatory / General**

### **A. Distress**

- a) Reputational injury

### **B. Special (aka quantifiable)**

- a) Monetary loss, loss of business

## **6.2. Exemplary / Punitive**

### **A. To punish for recklessness**

- a) If you knowingly said such statements, not caring about repercussions etc
- b) Singapore – one lump sum, justify later. No jury, decided by judges, so damage sum is often consistent

## **6.3. Aggravated**

### **A. Failure to apologise/withdraw**

- a) Allowing the article to continue circulating

### **B. Repetition**

### **C. Conduct in the trial**

- a) eg to attract publicity

## **6.4. Cases of damages awarded, etc**

- A. Damages generally fixed in Singapore, not so in US/UK**
- B. Lose libel case and pay for costs of plaintiff; cheaper to settle out of courts**
- C. Amount depends on your reputation**
  - a) The more established, the further you'll be able to fall, hence greater the amount of damage
  - b) Average person who usually don't sue probably around 10k?
- D. \$500k**
  - a) Wrongly defamed a person by saying he has insufficient funds in his account
- E. \$40k**
  - a) Established professionals may have a range of \$40k of damages (?)
  - b) Louis Yeap, MD of real estate agency (1999)
- F. \$30k**
  - a) CCC pastor in "cult" case
- G. LKY**
  - a) '81 130k, '89 250k, '90 230k, 260k, '95 300k, '05 200k
- H. GCT**
  - a) '95 350k, '05 300k
- I. Ho Ching “nepotism” (to be head of Temasek)**
  - a) Economist (“whiff of nepotism”) 2004:
    - (1) LHL 210k
    - (2) LKY 180k
  - b) Bloomberg News, 2002:
    - (1) LHL 180k
    - (2) LKY 180k
    - (3) GCT 210k

## 7. Libel Reform Proposals

### 7.1. Expand privilege (UK)

- A. Most recent – only come about in the last 10 years**
- B. Tweaks to qualified privilege – to make it apply to more circumstances**
- C. UK tried to expand the range of occasions in which privilege can apply**
- D. Introduction of a Circumstantial test**
  - a) Introduced a circumstantial test – public interest as the main criteria
  - b) Being potentially expanded to a much broader set of circumstances to include more material
  - c) “whether the nature, status and source of the material, and the circumstances of the publication, were such that the publication should in the public interest be protected”
  - d) Responsible journalism
    - (1) Reliable sources

(2) Seek comment

## 7.2. Burden-shifting (US)

- A. Shifting more burden to plaintiff, making it harder for plaintiff to win by increasing both number and quality of elements plaintiff must demonstrate

	US Plaintiff proves	UK/SG Plaintiff proves
B.	Defamatory	✓
	Publication to 3rd party	✓
	Identification of plaintiff	✓
	Falsity	✓ Presumed (truth is defense)
	Fault—communicator goofed up	Negligence — private persons, Recklessness/knowledge of falsity — public figure  No—strict liability

- C. Falsity is presumed in UK/SG, plaintiff don't even have to go to court to demonstrate its false

## 7.3. Different fault standards for Public v Private figures / Issues of public interest (US)

- A. Public figures to demonstrate that defendant screwed up in some way and got the story wrong

- B. They need to prove actual malice with convincing clarity

a) Actual malice does not mean ill will or intent to harm; it means the defendant had

(1) Knowledge of falsity: "knowledge that the information was false"

(2) Acted in reckless disregard for the truth: "with reckless disregard of whether it was false or not"

i) "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"

ii) Carelessness is not usually considered reckless disregard (negligence); ignoring obvious methods of substantiating allegations could be considered reckless.

iii) NYT v Sullivan (1964) sets the actual malice standard for public figures

b) Compared with just negligence for private persons

- C. Descending level of fault: knowledge, recklessness, negligence, none—strict liability

- D. Private persons must also prove lowest level of fault—negligence

## **E. No need to prove fault at all in UK/SG**

### **F. Singapore equal rights argument**

- a) "Persons holding public office or politicians are equally entitled to have their reputations protected as those of any other persons." — JBJ v. LKY (1992)
- b) Article 12 of SG Constitution, "Equal Protection"
  - (1) All persons are equal before the law and entitled to the equal protection of the law.
  - c) vs US attitude towards public figures
    - (1) Public figures assume risk
      - i) In US, deemed to have lower level of privacy
      - ii) Asian values, concept of saving "face", don't want to dissuade people from taking up the job
    - (2) Public officials/figures have media access
      - i) Can just hold press conference, private figures cannot
    - (3) Allowing more criticisms of public figures to encourage debate

## **7.4. Cap damages**

### **A. Put cap/ceiling on amount of damages, or...**

## **8. Libel Alternatives**

### **8.1. Remedies besides damages**

#### **A. Apologies**

#### **B. Correction**

- a) Internet creates lots of possibilities creating opportunities for correction, and...

#### **C. Right of reply; counterspeech**

#### **D. Internet: linking to potential plaintiff's website**

## **9. Credits**

### **9.1. Compiled with the help of notes taken by**

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