

L E A R N I N G

U N I T

F O U R

DEFAMATION



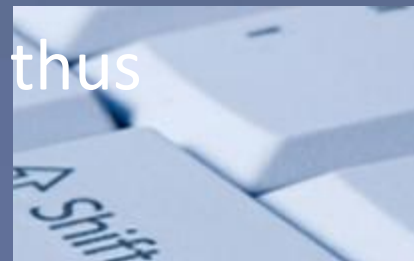
REPUTATION

*A reputation that took decades to build
can be threatened by a single event.*

❑ Defamation = an attack on a person's good reputation

❑ A person's reputation (how a person is regarded by other people) is of great importance. It may take a very long time and hard work to build a good reputation but it could be destroyed over night by rumours or accusations (in the media)

❑ Every person has a right to a good name and thus countries have laws against defamation



Def: “the publication of words or behaviour concerning a person that tends to injure (harm) the good name of that person, with the intention of injuring that person and without grounds of justification.”

Defamation by the mass media = the unlawful publication of defamatory matter referring to the plaintiff, which causes his or her reputation to be impaired

The defamatory act could be any act which damages a person’s name or status as far as the community is concerned, perpetrated in a blameworthy manner and which then gives the wronged person a right to compensation

Defamation could falls under civil law and/or criminal law.
Under civil law it is classified as a delict (=unlawful act)

Elements of a delict:

1. A wilful act/ conduct
2. Unlawfulness (in the absence of grounds of justification)
3. Fault (intention or negligence)
4. Damage or injury to pensions
5. Causal connection

To be successful in a defamation suit, the plaintiff must prove:

1. Publication
2. Of unlawful
3. Defamatory words or defamatory actions
4. About himself
5. Which caused harm

ASPECTS OF DEFAMATION

[PUBLICATION]

□ A comment only constitutes defamation if it is made known to a third party = publication

□ Any and many forms:

- Words
- Published in a letter or newspaper
 - “booing”
- Comical picture or act
 - Imitating someone
- Publication of photographs alongside “undesirable reports”

□ NOT: communication between spouses or between a lawyer and his client

❑ Compensation is ONLY awarded to protect a person's reputation, SO if a third person is not made aware of the defamatory words or actions there is no damage to the defamed person's reputation

❑ ALSO the defamatory words or actions must be understood

❑ If they are in a foreign language or code it is not regarded as published (if it becomes understandable at a later stage it is then considered published)

❑ The compensation amount is determined by looking at the extent of the damage to a person's reputation and how many people heard the remarks

❑ Repetition/ successive chain-like publication = everyone who contributed to the publication of the defamatory statement is liable

[WRONGFULNESS]

□ = there is no ground of justification

□ The plaintiff must prove that the wrongful act of the defendant has wronged them to the extent that their right to a good name has been infringed upon

□ iow that wrongful act resulted in a loss of esteem or respect or regard

The court judges whether a statement is defamatory by:

1. the meaning of the words – in context

Eg. “he has a proper bitch”



2. the reasonable person – look at whether the defamed person’s reputation has been damaged according to the reasonable person with a normal intelligence

who is the reasonable person?

= a fictional person created by the legal system to measure conduct

- Fictional, not hypocritical or oversensitive
- Member of SOCIETY and not just a certain group
- Reaction depends on the circumstances of a certain case

Obviously not easy in SA...



[CAUSAL CONNECTION]

- ❑ Between the act/conduct and the damage
- ❑ Compensation is only awarded where a person's esteem has been damaged DUE TO the defamatory remark

The remark must also refer to a specific person to qualify as defamatory and causing a right to compensation

NOTE!!!

Groups – a plaintiff will have to prove the remark was specifically levelled at them

Deceased person – cannot be defamed

Juristic person – law is uncertain but should not qualify as defamation since it is a separate entity from its members

Government – unsure position in SA

[DAMAGE]

□ This element is taken into consideration ONLY when determining the amount of compensation

□ Difficult to determine the value of a reputation but courts look at:

- Person's position in society
- Group wherein you find such a person
- To whom the defamatory statement was published
- The seriousness of the statement
- Whether the plaintiff's career is dependent on their reputation

[FAULT]

2 forms:

1. intention – willingly and knowingly act wrongfully
2. negligence – honest and genuine mistake where a person did not mean to defame another person BUT the reasonable man would have foreseen harm coming from the statement and guarded against it

In defamation cases, the required form of fault is INTENTION (you cannot negligently defame a person)



REMEDIES

1. Interdict – (prohibitory) restrains publication or further publication

The applicant must show that if publication is not stopped, he will suffer irreparable injury which cannot be compensated

Read the examples on page 78 of the MM

2. Damages – payment of an amount of money to compensate the plaintiffs hurt feelings or to mend the hurt to the plaintiffs dignity and reputation

3. Apology – not a defence BUT it could reduce the amount of damages (court will consider the speed, degree of prominence and sincerity of the apology)

DEFENCES

❑ After the plaintiff has made his case, the defendant is given the opportunity to justify his actions or to give proof against the accusations of the plaintiff

❑ To defend a possibly defamatory remark, it must be proven that the remark was LAWFUL

❑ 4 defences of LAWFUL PUBLICATION

1. truth and public interest
2. fair comment
3. privilege
4. reasonable publication



1. truth and public interest

When the comment is/was true and it is to the benefit of the public to be informed the defendant cannot be held liable.

2. fair comment

Based on the ideal that everyone is entitled to comment on matters of public interest

Must however meet the following 4 requirements:

1. the statement must be a comment or an opinion concerning **facts**
2. the statement must be **fair** (not biased or exaggerated)
3. the facts which the statements relates to must be **true** and **correct**
4. the statement is made on a matter of **public interest**



hns
c 10

3. privilege

There are 2 forms of privilege

absolute privilege

- ❑ The defendant cannot be held liable AT ALL if making a remark during a privileged occasion
- ❑ Eg. remarks made by a member of parliament in Parliament

qualified privilege

- ❑ Defendant has only provisional privilege which arises only when the defendant proves there was a privileged occasion and that the allegations are related to this occasion
- ❑ 3 instances:
 1. allegations made in the fulfilment of a duty or obligation or in the protection of an interest
 2. allegations made in the course of legal proceedings
 3. media reports on parliamentary debates and proceedings

4. reasonable publication

- ❑ This concept is not yet properly defined in law
- ❑ BUT there are some examples of what this might entail
- ❑ Reporters are obliged to keep good records of their information and to investigate a story properly before publishing it



IMPORTANT SELF STUDY:

Pages 79 - 82 of the MM

Independent Newspaper Holdings and Others v
Suliman (Planet Hollywood bombings)

The Hefer Commission (was Ngcuka a spy?)

The M&G Report Card (Minister Sankie objecting to
her M&G report card)

CRIMINAL DEFAMATION



❑ Defamation may give rise to civil action AND criminal prosecution

❑ Prosecution is rarely done because:

1. Civil actions are easier to prove
2. The jurisdiction of the courts –
Magistrates court is not the place for a complex legal dispute regarding defamation
3. Most plaintiffs prefer a civil case (damages)
4. Prosecutors are not greatly interested in defamation prosecution

ICE TASK

For: 20 March 2013

Read pages 83 and 84 of the MM on “The International Defamation Lawsuit Trend” and answer the question posed in the MM in no more than a paragraph.

DEFAMATION AND THE MEDIA



□ Defamation is concerned with protecting the reputation (fama) of a person

Best described as “a person’s reputation is that character for moral or social worth to which he is entitled amongst fellow men” – Keefe v Argus Printing and Publishing

THUS: reputation = good name

reputation // dignity

What others think of you // what you think of yourself

□ Reputation is not constitutionally protected in itself but indirectly as it is included in the right to dignity

□ The law of defamation may thus be described as protecting a person's right to an unimpaired reputation and good name from any interference.

□ Difficult to balance in a democracy as “the law of defamation lies in the intersection between the right to freedom of speech and the protection of reputation and a good name” – Neethling v Du Preez; Neethling v The Weekly



a good
name will
shine
forever.

www.spirituallythinking.blogspot.com

A GOOD
NAME
Is Better
Than
WEALTH

NAME
=
REPUTATION

❑ The wrongful and defamatory publication of material relating to a person's constitutes defamation

❑ To be liable for defamation the following requirements must be met:

➤ A factual violation of the right to reputation (defamatory material is published)

➤ Wrongful and

➤ Intentional

❑ The affected plaintiff bears the onus of proof

❑ The court must determine

1. the meaning of the words

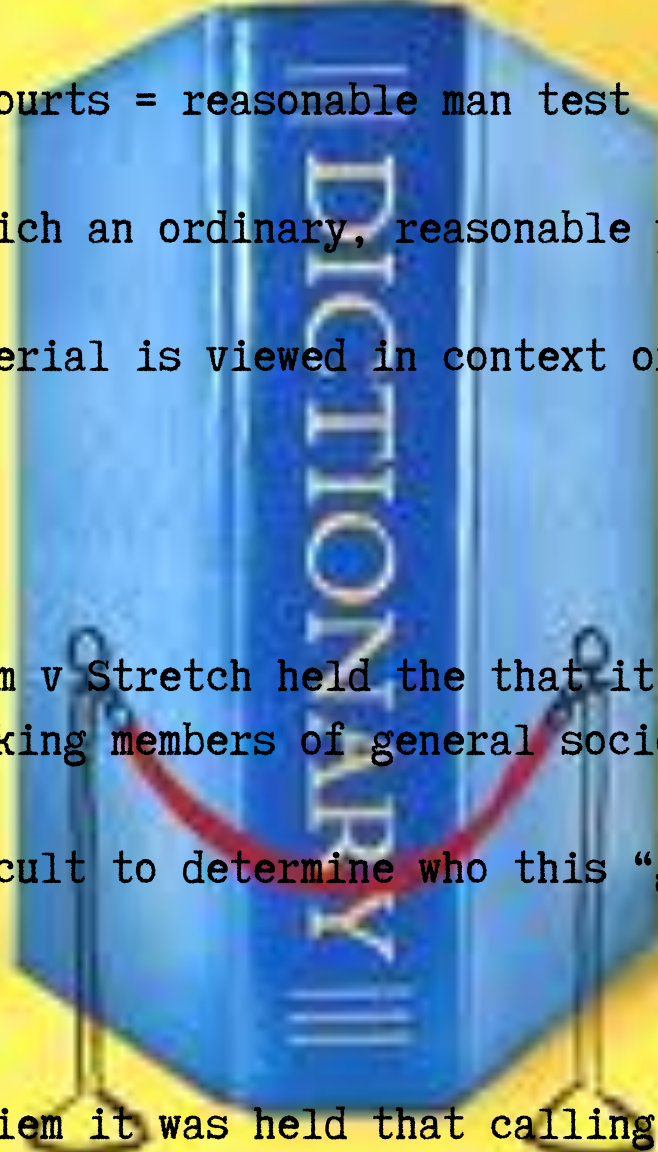
2. if these words are defamatory

To determine the meaning of the words, the courts take note of:

1. the primary/ ordinary meaning	How the ordinary or reasonable reader, listener or viewer would understand these words
2. the secondary/ hidden meaning or innuendo	Where both parties are aware of and know that certain words have second meanings in such CONTEXT
3. quasi innuendo	The words themselves carry a meaning and it is less reliant on context
4. the reasonable reader, listener or viewer	Standard set in Demmer v Wyllie: “a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give meaning to those words which cannot reasonably be attributed thereto”

THE MEANING OF DEFAMATORY

- The test used by our courts = reasonable man test
- Meaning.. the way in which an ordinary, reasonable person would comprehend the material
- The context of the material is viewed in context of the entire publication and not in isolation
- The tone is considered
- The English case of *Sim v Stretch* held that it is when the plaintiff's estimation by right-thinking members of general society lowers
- In SA it is very difficult to determine who this "general society" would be
- Why? DIVERSITY!
- Eg. in *Mohammed v Jassiem* it was held that calling a person "an Ahmadi sympathizer" would only be viewed as defamatory by a certain group and not by general society



“lower a person in the estimation of others” = a statement which injures a person’s reputation by exposing that person to hatred, contempt or ridicule or by reflecting upon their moral character

Defamatory material falls into 4 categories:

- 1. Imputations against a person’s moral character or life style – negative comments on the public life of a prominent person**
- 2. Imputations that leads to hatred and ridicule – remarks on race or gender**
- 3. Communications that leads to the shunning or avoiding that person – spreading rumors about a person’s physical or mental state**
- 4. Impairments of professional or business reputation – making remarks which state or imply that a person is unable to act in their professional capacity or that bring them into disrepute**

SELF STUDY!!! Page 88- 90 of the MM regarding the cases Sindani v Van der Merwe case and Newmann v Beauty Without Cruelty International case

ICE TASK

For: 24 April 2013

Pages 90 -94 of the MM

Group, you tell me, open book, class
test I!

THE GROUNDS OF JUSTIFICATION ASSOCIATED WITH INFRINGEMENTS OF PERSONALITY RIGHTS

1. What does the defence of "truth and the public" entail? (p.90)
2. Discuss the Johnson v Rand Daily Mail case in context of the defence of "truth and the public." (p.91)
3. Explain the defence of "fair comment." (Do not discuss what constitutes an opinion) (p.91)
4. What constitutes an opinion in context of the defence of fair comment? (p.92)
5. Discuss the requirement that the comment or opinion must be fair. (p.92)
6. Discuss liability and the defence of reasonableness with reference to the cases. (p.93)

QUESTION 1 WHAT DOES THE DEFENCE OF KC FONTS TRUTH AND THE PUBLIC ENTAIL?

❑ The defence of truth and public entails that in situations where the material is true and made known to the public, the legal convictions of the community is taken into consideration.

In order to justify this claim you have to include two aspects:

- It must be true.
- It must be in the interest of the public.
- If not it would lead to liability in delict.

❑ Example: Horse/Donkey Meat Story

❑ It was factual and true and it was in the interest of the public to know.

❑ These grounds of justification are intended to convey the notion of public concern provided the information is both important and relevant.

QUESTION 2. DISCUSS THE JOHNSON V RAND DAILY MAIL CASE IN THE CONTEXT OF THE DEFENCE OF TRUTH AND THE PUBLIC

□ The case was between a newspaper and a restaurant (Johnson vs rand daily mail). The papers accused the restaurant of being unhygienic and the article was claimed to be written as to benefit the public. The company argued that the article was exaggerated and left a wrong and unfair impression to the public.

□ The argument is whether the newspaper had the public's best interest at heart or whether the aim was to increase sales of the paper and gain more publicity at the restaurant's expense.

Bontle Mokoena
Julia Bickel

QUESTION 3 EXPLAIN THE DEFENCE OF “FAIR COMMENT”

- ❑ Everyone has the right to freedom of expression and are protected by the constitution
- ❑ Courts protect honest and fair criticism, in addition to opinions and fair comments
- ❑ In the case of fair comment, a comment or an opinion exists. Therefore the protection extends to instances where views and opinions are honestly held and made fairly
- ❑ The criteria used to determine what constitutes fair comment: the material must amount to comment or opinion, and not a statement or fact
- ❑ The defence in respect of fair comment is “truth based”. The comment is either true or false, however the facts upon which comments are made must be true. The comment or opinion is a matter of public interest
- ❑ Example: A Wits student recently released a sex tape. It is fair comment to say that the school is full of loose girls; it is neither true nor false but based on opinion. This comment is a genuine expression of an opinion, and the possibility of other students from Wits being involved in such a scandal cannot be ruled out.

QUESTION 4 WHAT CONSTITUTES AN OPINION IN THE CONTEXT OF THE DEFENCE IN A FAIR COMMENT?

- The opinion needs to be a fair comment, which remains valid, impartial and/or balanced.
- The opinion needs to be relevant without any ulterior motives that could jeopardize the results of the comment as a whole.
- The opinion may not transgress the provisions of the Constitution, though it may be exaggerated to the point that it may cause prejudice and controversy.

Lwandisa Mthembu
Katlego Selekane

QUESTION 5 DISCUSS THE REQUIREMENTS THAT THE COMMENT OR OPINION MUST BE FAIR

- ❑ The material must amount to comment or opinion, and not a statement of fact.
- ❑ You cannot claim that your opinion is true or based on facts, if it's not, although sometimes opinion may be misconstrued as fact. Facts upon the comment or opinion made must be substantially true.
- ❑ Example: it may be someone's opinion that all Muslims are terrorists, but this is not true and not based on facts

Mmadichaba Seabi
Potso Keagile

QUESTION 6: LIABILITY AND THE DEFENCE OF REASONABLENESS

□ Reasonable publication permits a publisher who is able to establish truth in the publication of benefits to do so and avoid liability. BUT IF THE PUBLISHER IS UNABLE TO ESTABLISH TRUTH OR IT IS TOO EXPESIVE OR DIFFICULT, THE PUBLISHER MAY SHOW THAT PUBLICATION WAS REASONABLE

□ The Bogoshi case - It does not matter whether there are statements of fact or opinion. Basically, the emphasis is on circumstances in which the law recognizes free flow of information over the person's reputation. The public interest demands that the courts should not impede freedom of expression

WHAT DOES THIS ALL MEAN?

Publication should be justifiable

IT COULD BE SAID THAT PUBLICATION IS JUSTIFIABLE/JUSTIFIED WHEN...

- the interest in the public being informed
- the manner of publication
- the tone of the material published
- the extent of the public concern in the information
- the reliability of the source
- the steps taken to verify the truth of the information (this factor would also play an important role in considering whether there was negligence on the part of the press, assuming that the publication was found to be defamatory)
- whether the person defamed was given the opportunity to comment on the statement before publication. In cases where information is crucial to the public, and is urgent, it may be justifiable to publish without providing an opportunity to comment.