

The Law of Defamation, The European Convention on Human Rights and The Human Rights Act 1998

The aim of this study is to consider, via an analytical approach, the effect on the law of defamation of the implementation of the European Convention on Human Rights and the Human Rights Act 1998 and whether or not the law of defamation strikes an appropriate balance between the need to protect reputation and the general right of freedom of speech. During the conduct of this study a number of points will be discussed. The points to be discussed are the law of defamation and where it is located, and its working. There will be an indepth analysis of how the law addresses the difference between what is considered to be defamatory and the right to freedom of speech. Finally, the effect of the implementation of the European Convention on Human Rights and the Human Rights Act 1998 and whether or not it has struck an appropriate balance between the need to protect reputation and the general right of freedom of speech will be subject to an indepth and thorough analysis.

Before the impact and effect of the implementation of the European Convention on Human Rights and the Human Rights Act 1998 on the law of defamation can be discussed, it is imperative that an in depth analysis of the law of defamation is undertaken. This analysis will address what the law of defamation is, where it can be located and how it is applied in scenarios where defamation has occurred.

Defamation, which is the generic name for the torts of slander and libel, is an area of tort which has two names according to Stanton. He states that the first of these two aims is to provide a remedy with which a person can protect his or her reputation from attack. This particular role of the tort of defamation aims to safeguard a person's reputation rather than his or her privacy. The tort of defamation provides a remedy against the publication of untruths as opposed to unfair revelations of long forgotten truths or intrusions into a person's private life. The second aim of the tort of defamation is to protect the right of freedom of speech and thus the ability of the press to investigate, and to bring to the public's attention, malpractice. Stanton is of the view that there can be no doubt that both of these aims of the law of defamation can conflict and that the attempt to maintain a proper balance between them is one of the explanations for the complexity of this particular area of tort law. Giliker and Beckwith agree with Stanton in recognising that the law of defamation must therefore attempt to balance the competing rights of freedom of expression and protection for one's reputation. They are of the opinion that the only way to approach defamation is logically and in stages: (a) Is the statement defamatory? (b) Does it refer to the claimant? (c) Has it been published? (d) Do any of the defences apply?

Jones states that the tort of defamation protects a person from untrue imputations which harm his reputation with others. He states that it should be distinguished from an untrue statement which does not cause damage to the plaintiff's reputation but does cause harm. With the law of defamation, if the words complained of are defamatory then there is a presumption that the words complained of are untrue unless proved otherwise by the defendant. It is important to note that with defamation maliciousness is not an element that is essential and the majority of forms of defamation are actionable per se. Jones states that defamation is a very peculiar tort in that it

is one of the few forms of civil actions that are still tried with juries. It should be noted that actions for defamation can only be brought in the High Court. Gatley states that:

“a man commits the tort of defamation when he publishes to a third person words containing an untrue imputation against the reputation of another.”

This definition of defamation does require some form of clarification. Basically, a defamatory imputation is an imputation in a form of words which tends to have the following effect on the claimant. The imputation will lower the claimant in the estimation of fair and right-thinking members of society in general, or it will expose him to hatred, contempt or ridicule, or it will cause the claimant to be shunned and or avoided. An imputation may be defamatory and thus lead to a successful action against the defendant even where the imputation is true. An imputation is not necessarily defamatory where it is deemed to be untrue. Carey also makes the suggestion that defamation is, in fact, a cause of action which seems incapable of having a precise definition. He states that judges have offered definitions only to be criticised by other judges and academics. It was not until the Faulks Committee on defamation recommended the following definition:

“the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.”

Carey states that whatever definition of defamation people wish to use the principles which have already been discussed above are certainly and totally true.

Carey states it is imperative that all communicators must be aware of the tort of defamation. He states that the threat of such an action is probably the most serious curb to media freedom in this country. Those working in the media industry must be alert to the risk of defamation at every stage of the publishing or broadcasting process. Carey goes on to cite several factors which make the risk of a defamation action a particularly serious influence on the media. It is possible to commit the tort even where one is unaware that a person's reputation is affected by the communication in question. Every person in the chain of communication may be sued for damages by the claimant.

To conclude this section it is vitally important to note that defamation actually takes on two different forms. The two different forms are libel and slander. These two forms are quite different. Libel relates to the written published word and slander is defamation in a transient form such as the spoken word. Libel is actionable per se and is a crime as well as a tort. Slander, which may be subject to certain limited exceptions, has the requirement that the claimant must provide proof of special damage. Special damage is damage which is damage that is qualifiable in monetary terms. Slander can be actionable per se but only in exceptional cases. An example of the exceptional cases concerned are those in which the claimant is imputed to have committed a criminal offence punishable with imprisonment.

The final part of this section that must be considered before the analysis of the impact and effect of the implementation of the European Convention on Human Rights and the Human Rights 1998 on the law of defamation can be discussed and analysed in depth is where the law of defamation located. The law and principles that regulate the law of defamation may be found in the Defamation Acts of 1952 and 1996.

This investigation will now place its emphasis on the analysis of the impact and effect of the implementation of the European Convention on Human Rights and the Human Rights 1998 on the law of defamation. There are two main provisions of this legislation. The first of these main provisions is Article 10 of the European Convention on Human Rights. Article 10 provides that:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribe by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder of crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 10(2) of the European Convention on Human Rights recognises that the right to freedom of expression cannot go unchallenged. Article 10 of the European Convention on Human Rights has now been incorporated into English law by the Human Rights Act 1998. The second of these main provisions may be located in Section 12 of the Human Rights Act 1998. Section 12 makes provision for the freedom of expression and provides as follows:

- “(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Covention right to freedom of expression.
- (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is

satisfied –

- (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
- (a) the extent to which –
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published.
 - (b) any relevant privacy code.
- (5) In this section –

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).”

The Human Rights Act 1998 came into force in the United Kingdom in October 2000 and the purpose and meaning of the Human Rights Act 1998 was to give a form of further effect to the rights and freedoms which have guaranteed by the provisions under the European Convention on Human Rights.

Jones states that it was the Faulks Committee that suggested that the purpose of the law of defamation was to preserve a balance between the individual’s right to protect his reputation and the general right of free speech but it is questionable whether the presesnt law strikes the correct balance. The crux of the problem is very well and quite neatly illustrated in *Tolstoy Miloslavsky v. United Kingdom*. In this case the plaintiff obtained a declaration from the European Court of

Human Rights that libel damages of £1.5 million awarded against him by an English jury amounted to a violation of his right to freedom of expression under Article 10 of the European Convention on Human Rights. Even though the United Kingdom is a signatory to the Convention, however, it has not formally adopted it as part of its constitutional law. Therefore, the decision in *Tolstoy Miloslavsky v. United Kingdom* can only be symbolic and the plaintiff's victory pyrrhic. Jones states that on the other hand it is significant that the House of Lords drew heavily on a more generalised common law principle of freedom of speech to justify their decision in *Derbyshire County Council v. Times Newspapers Ltd.*, but it remains to be seen whether or not this will herald a new era in which, in the absence of a formal constitutional footing, the right to freedom of expression might nonetheless enjoy more positive judicial protection. In *Derbyshire County Council v. Times Newspapers Ltd.* the plaintiff, a local authority, had brought an action for damages for libel against *The Times* in respect of two newspaper articles which had questioned the propriety of its financial dealings.

Gatley also reserves a valid opinion regarding the right to free expression. He is of the view that the freedom of expression will provide a powerful restraint on the enforcement of rights to reputation because of the high value placed upon it by the Court. In *Lingens v. Austria* the court stated that:

“freedom of expression, as secured by paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”

This means that the right is also to be viewed in broad terms as applying to both information and ideas, opinions and comments as well as objectively verifiable facts.

In order to conclude this study it is essential that the future relationship of the European Convention on Human Rights with United Kingdom be analysed. The present Labour Government gave a commitment in 1997 that European Convention on Human Rights would be incorporated into United Kingdom law. Assuming legislative implementation follows the plans that they announced via a consultation paper it is widely expected that the new domestic Bill of Rights will incorporate the substantive rights in the European Convention on Human Rights and will allow all domestic courts to apply the Convention and to make rulings based on it. Gatley states that this will extend the impact of the Convention in English law by ensuring it can come into play in all cases, including where a statute is clear within its own terms or where common law is settled. Gatley finishes by stating that Convention arguments are also more likely to be

raised in United Kingdom courts if it is only to ensure the exhaustion of domestic remedies so as to permit an application to Strasbourg.

Giliker & Beckwith have come to the conclusion that the law of defamation is a difficult and very complex area of law but it is an area of law which is of considerable interest to anyone who is concerned how the law of tort deals with the difficult issues of freedom of expression and the rights of individuals to protect their reputation from attack. Giliker & Beckwith are of the view that although the Defamation Act 1996 has made an attempt to deal with these problems there is quite clearly quite a long way to go until these problems are eradicated. They say that it seems likely that the incorporation of the European Convention on Human Rights into English law by the Human Rights Act 1998 will serve to encourage the debate.

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