

Chapter 10

Introduction to Libel

THE ESSENTIAL RIGHT TO FREEDOM of speech is balanced by a requirement of journalists to use that right responsibly - and by the risk that subjects of media reports may have recourse to legal action if they believe they have been subjected to a libel.

Laws covering defamation vary hugely from country to country and it is imperative to have a good understanding of libel and privacy laws within your own country.

Repressive regimes may deploy libel laws to silence their critics, arguing that a report has defamed them, regardless of its accuracy. In the absence of an independent judiciary, such cases have resulted in extended jail terms for local journalists.

England, which has some of the world's most strenuous libel laws, protects people's right to their "good name" and provides wide leeway in defining defamation. But it balances this right with a number of defences available to journalists, although the burden of proof lies with them essentially to prove their innocence. Cases of criminal libel are very rare, though the financial penalties from verdicts in civil cases can be ruinous.

Libel law in the United States sets a very high burden of proof on any potential claimant, especially a public figure (the law is



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different for private individuals). A public personality bringing a libel suit in the United States has the burden of proving that a reporter not only published false information but also did so recklessly and maliciously without attempting to determine whether it was true. In essence, there has to be intent.

The Best Safeguard: Sound Journalism

Journalists must have a healthy respect for laws of libel and privacy because they uphold the right to an individual's "good name" and the right of private citizens to conduct their private lives without intrusion.

That said, there is a balance to be struck. Journalists should not allow concern about the law to prevent them from doing their work conscientiously for the public good. The best safeguard against a libel action is good journalistic practice: thorough, accurate and balanced reporting, careful and sceptical editing, and fair-minded presentation.

Because laws and the way they are implemented vary so widely, journalists must always be sensitive to good practice in their own country and in major countries where they may be disseminating stories.

In practical terms, this means that if reports are being distributed in English, journalists must be aware of the libel laws in England and in the United States. The tough English law sometimes acts as a “lowest common denominator” and will be discussed at length in this chapter.

Forum Shopping

Increasingly 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 be that your article in IWPR is the subject of a libel action in several nations’ courts.

This is known as “forum shopping”, where a plaintiff seeks to bring an action in a country where he or she believes the chances of winning a libel case are greatest.

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

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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 read: "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 could open the floodgates to a large amount of litigation in Australia and in other countries.

Internet libel, in fact, is no different from normal libel. If you libel someone, and the court can prove at least one person has seen it in a specific country, then you might face a libel action in that country. If you publish online, you will be seen in dozens of countries, and could be sued in any one of them..

Media organisations thus face the daunting prospect of having to understand libel law in several different countries. IWPR is monitoring closely the changing environment of multi-national and international libel cases and will advise editors and contributors of any important new developments.

For now, the advice on third-country libel suits is clear:

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

A Common Sense Approach

Before going into the specific details of various laws, it is important to have a common sense approach to the issues:

- Be attentive to complaints about accuracy and fairness, and be prompt in correcting errors. An angry reader treated fairly who sees that you are willing to fix mistakes might be less inclined to take further action. A swift correction can also be seen as mitigating evidence in a court.

- Never ignore a threat of legal action. Talk about it with a senior editor as soon as possible. Do not hope it will go away.
- Be sure that senior editors have a chance to check sensitive articles early before they are published. Decisions that might need legal advice - whether there might be some protection against a person likely to sue or whether a tough statement might be protected because of the circumstances - should not be made by a single sub-editor a few minutes before a publication deadline.
- Good journalism means sometimes taking a risk, but it must always be for a good, well thought out reason. Taking sound legal advice and considering issues of libel is often about risk assessment.

Some countries consider libel a criminal matter, which means the accused could go to jail. Others consider it a civil matter, but losing could incur heavy damages. Some plaintiffs will use both civil and criminal law.

In some countries, insults or even strong criticism against minister or public officials may be considered libellous or even criminal. In other countries criticism of public figures is given wide latitude in the interest of the public good and democracy. There is simply no universal agreement, so journalists must familiarise themselves with local law and practice.

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The London-based organisation Article 19, which promotes freedom of expression for the media, has proposed that universal guidelines could be drawn up on the basis of international law, various national standards and generally accepted legal principles. This would “set out an appropriate balance between the human right to freedom of expression . . . and the need to protect individual reputations”.

Some Broad Definitions

Until that happens, there are no universally recognised guidelines. But there are some common elements covering defamation and privacy that journalists should know.

It is generally not a defence to report what somebody else said if it has not been independently checked

First, what is a libel? A standard definition would be a false statement, published about someone, that damages that person's reputation or business, or holds the person up to ridicule or public hatred. Slander is the same except it is impermanent or spoken, not written. Note, however, that in England, radio and television broadcasts are treated as libel, not slander.

In many countries truth is a defence against libel. But you might have to be able to prove that a statement is true and could be held responsible if you cannot, or if you can be shown to have published without checking its accuracy, especially if it turns out to be false. You might know it to be true but you will have to prove it. In some countries - but not many - the person alleging libel may have to prove it is not true. And it is generally not a defence to report what somebody else said if it has not been independently checked for truth, no matter how reliable you thought the source.

Even a note given to a small number of people, or a summary of an article or broadcast used in a conference of editors planning publication, could be considered "published".

A libel in most countries is about a person or a small group of

identifiable people, generally not about a group of people - unless they are named - or an institution. This is often a question of fact and degree. But in some states, adverse comments about a head of state, a minister or a public official could bring legal proceedings and even jail. Conversely, such criticism may be considered fair in those countries which encourage debate in the public interest for the greater good of society.

A statement about a national, ethnic, religious or similar group might not be libellous, but it might fall under laws banning incitement to hatred or hate speech. Some states place a ban on criticising the heads of friendly nations or even the country itself.

Remember, it is possible that people can be identified in an article even if they are not specifically named. An official could be identified by title or position, by occupation or by address. If a group is so small its members are easy to identify individually - workers in a small office - they may all be able to sue.

In many countries, those suing may have to prove real damage to their reputation. In others, courts may presume damage and defenders may have to prove no damage was done. And the bigger the reputation or place in society, the bigger the damages.

The alarm bells should start ringing when a report goes personal

Alarm Bells

The alarm bells should start ringing when a report goes personal - that is, if it includes accusations of professional dishonesty or incompetence, suggestions of immoral, criminal or improper behaviour, questioning a person's ancestry and allegations that somebody is mentally ill or suffers from the likes of a sexually transmitted disease.

A city official might be scorned in his community if he is convicted of drunken driving, or a restaurant owner might lose business if an inspector reports a violation of health rules. If true, accurate reports of them should not give rise to a libel action. But if these people have not been convicted in a court, how will you prove it true?

English Libel Law

Organisations which distribute news in England, such as IWPR, must be familiar with the specifics of English libel law and its defences.

The classic definition of defamation in English law is “a statement that lowers the reputation of a person in the mind of a right-thinking person.” Who that might be is a difficult concept but it is generally taken to mean the average man in the street.

There are four main possible defences:

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 1993, the magazine *New Statesman* wrote a story about rumours that Prime Minister John Major was having an affair with a caterer. The rumours were ruled defamatory and the paper had no defences. Major settled the dispute out of court, but he could almost certainly have pursued his claim and probably put the magazine out of business.

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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 *News of the World* as having “All the nudes fit to print, and all the news printed to fit.” The newspaper’s editor, Derek Jameson, sued the BBC. The court accepted that the statement was defamatory but accepted the defence of “fair comment,” because the statement seemed justified by the lurid contents of the newspaper.

3. *Privilege*: Statements made in Parliament, or in English courts, may enjoy “privilege.” Likewise, a privilege to publish information that turns out to be false may be permissible in other situations, through this is a very complex area of law and is always a question of fact. 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 be

coverage of any reply or counter accusation, even if in a subsequent issue, and the report must be contemporaneous, ie, 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 the man they had been searching for, he called a press conference and told the journalists “We’ve got him.” Many papers, including the *Darlington Evening Dispatch*, ran the story with those words as its headline. The Ripper was charged later that day. The papers claimed protection 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 decision - they might in other circumstances have been sued for libel.

4. *Death*: Someone who is dead cannot be libelled. Basically, this is because there is no one to sue. But be careful that libel of the dead does not also implicate the living. Defaming a

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dead man may also defame individuals and institutions he was associated with.

It is equally important to be aware of what is not a defence under English law. These common excuses do not work:

- “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 U.S. magazine for libel not in his native Russia, or even in the U.S., but in London. This is possible because the magazine sells a few copies in London.

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

Limited liability and 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.

- “But the other paper reported it...”

Repeating a report already published: It is not a 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.

- “But everybody knows that already...”

Rumour/hearsay: Saying that you are reporting a rumour or hearsay is not a defence against libel. 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?

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Reporting someone's denial is no defence if the court decides that the statement still lowers the person's reputation

- “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.

- “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.

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

Unwitting link: Anything that could link your subject to specific individuals may be libellous. 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.

- “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.

- “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 still may not save you from a libel suit.

- “But it was an honest mistake . . .”

Ignorance: Claiming you did not know the law is no defence. Nor is it 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.

*Ignorance of the law
is no defence*

- “But I used the word ‘alleged’...”

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

Public Interest Defence

In some countries, public interest can be a defence. This is not what “interests the public”, but the higher argument that it is for the welfare and good of the public. This is a standard that some courts apply in many cases, such as alleged breaches of privacy or confidentiality and sometimes even security - depending on the individual country and how much public debate is encouraged. But it is not universal law and accuracy and fairness still applies. You need to know whether this defence applies in your country. There is no general public interest or public figure defence in England.

Again some countries recognise more latitude to opinion and comment, provided the facts are not distorted. A reviewer might say that a new play was a waste of time and money so long as no personalities were specifically attacked and where judgement was clearly a matter of opinion and not of fact.

Actors have been known to sue successfully, however, where their professionalism has been attacked. They have also lost - so it is a gamble for them and it may depend on the reputation of the reviewer.

Opinions may be strongly held and strongly stated as long as they are relevant and based on sound observations, not conjecture. And they should not try to present opinion as fact.

“The play is a waste of time because it says nothing new about our lives” is clearly an opinion; “the lead actor appeared to be drunk” is much riskier. Is it a fact? Can you prove it? Is it damaging to the actor’s reputation?

But there is another major factor other than what the law says - what is culturally acceptable in that society. One has to consider whether there is good reason to challenge this. And bear in mind that cultural issues may also influence the courts.

Highly exaggerated statements or satire may be protected if it is clear that it is meant to be a joke or poking fun. But cultural attitudes make a big difference here. What might be seen as fun in one society may be seen as insulting in another. Making fun of a prominent person or of an ethnic minority might be seen

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as highly damaging. Once again, the journalist has to exercise proper care or be ready to take the consequences in the interest of something worthwhile, like bringing about some form of improvement.

Reducing the Risk

Here are some suggestions on how to practise safe journalism:

- When someone's reputation is at stake, be careful with every word and every detail. A 2,000 word report might pass muster with every lawyer in the country, but it can still be undone by a single careless word in a headline or photo caption.
- Review your work carefully, especially if you or someone else has made significant changes, for implications that you did not intend. If a photo caption refers to "drug dealers," are you confident that everyone who can be identified in the photo is a drug dealer? Anyone in the picture, even a passer-by, could sue if they are not drug-dealers. Even if they are, can you prove it?

- The difference between “X happened” and “A said X happened” is crucial to safe reporting about accusations of crime or improper performance. If you report that the police have accused someone of a crime and your report is based on an official document, you may be safe - even if the accusation is later shown to be false and the person is absolved. You would have no protection if you simply reported as fact that the person had committed the crime before any conviction.
- Accounts of an event by victims or witnesses might be compelling, but unlike police or court documents, they are not usually protected by the privilege to report on official proceedings. When these accounts touch on the behaviour of identifiable people, treat them with caution, especially if they go beyond what you can confirm from other sources.
- Be especially careful with what neighbours, colleagues, friends or others say about the past lives of people who are suddenly in the spotlight. The source may be prejudiced about the person.

- Be sure that you understand the distinctions between different types of crimes - some charges are more serious than others. In some legal systems, homicide could mean murder, manslaughter or an accident of some kind. Do not take shortcuts just to be brief or dramatic. It could land you in trouble.
- Do not assume that a set of events represents a “plot” or a “scheme” if an innocent explanation is possible. Even if the facts are protected by privilege, a conclusion based on those facts might not be.
- In some countries, the law may not be as important as the local cultural attitude towards honour. People in some societies might injure or kill in defence of a reputation.
- People affected must always be given the chance to reply or defend themselves from accusations

Privacy Laws

Privacy laws are another hazard for journalists. Some countries do not have them, others have very strong ones. Some do not protect people obviously in the public eye; some specifically protect such

people. Pop stars and footballers may have less protection than other people because they depend on the media for their popularity. But many laws still protect them in certain cases.

France, for instance, has a much stronger privacy law than the United Kingdom. Some laws say that while individuals are not protected, say, from paparazzi in a public place, they may be on private premises, especially their homes. You need to be aware that children often have special legal protection.

Even prominent people have a right to be left alone. Journalists usually have wide freedom to report about events that are in the public interest or in areas easily accessible to the public, even if some of the subjects of news stories and photos might be embarrassed. In many countries local journalists' associations or unions also have ethical codes of practice governing such things as privacy. Particular caution should be exercised in relation to using long lens or intrusive photographs.

Here are some tests to consider:

- Is an event or person truly of significant interest?
- Is it in public?

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Good journalists avoid language which smacks of prejudice and try to be sensitive to people they are reporting on

- Is it really “news”? Of course news about pop stars, footballers and the like may be entertainment news rather than so-called hard news. But of course it might also be scandalous - the question should be, Is it fair?
- Are you using someone’s name or picture for commercial gain without permission?
- Are you using someone’s name or picture in a manner that casts them in a false light - for example illustrating a story about street crime with a picture of a vagrant or using someone without their permission to illustrate something that is not specifically about them?

Incitement to Hatred

Apart from issues of libel, good journalists also seek to avoid using language which smacks of prejudice and try to be sensitive to the people they are reporting on. This not a question of being politically correct, but rather of ensuring use of appropriate language and especially not using language that may incite hatred or violence. It is not about what the law may allow, though in some countries the law does penalise such language.

For instance, in the United Kingdom, there is a law against race discrimination. Ridiculing a disabled person may be against some laws. Following genocide in Rwanda, a United Nations tribunal sent some broadcasters and journalists to prison over the use of hate language that may have inspired some of the killings.

Every community has words that are clearly insulting to another. Good journalists should generally avoid using them to describe a particular person or group of people.

It is worth remembering that a story that is legally safe to publish, might still fall short of standards for fairness, relevance or taste.

“Can we publish this?” is a question for lawyers. “Should we publish this?” is a question for reporters and editors. Equally, a decision might be taken that it is in the “public interest” to publish something that might breach the law for the greater good of the public. That is a risk and decision that only a senior editor, publisher or owner should take. Responsible journalists draw such risks to their editor’s attention.

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EXERCISES

To recap, in this section you have learned that:

- Laws on libel and other restrictions on freedom of speech vary widely from country to country and you must ensure you know what rules apply for where you work.
- There are some common elements of libel law - especially regarding publication, identification and defamation.
- Truth is the best defence against an accusation of libel. Make sure you know whether some form of privilege might apply or whether there could be a public interest defence.
- You should introduce essential safeguards into your own newsroom and into your own methods of reporting.
- You should retain your research materials as they may become relevant evidence.
- Laws, ethical and cultural rules and practice vary widely and you must know what applies in your country.

Read the following examples and questions and discuss your answers with your colleagues:

1. During a campaign speech in your town, one legislator describes a rival as a “clown,” contends that he has taken repeated bribes from the building industry and calls him a “traitor to his party”.
 - Are any, all or none of these statements safe to use in your report? Should you refer your story to anyone else?
2. Work is to begin on a long awaited highway near your town. One evening, a man calls your office and says he has seen documents that prove the main contractor of the highway is using inferior material and defrauding the government. The caller refuses to give his name but says he works for the highways department.
 - If you do not print an article exposing this, he says he will take his story to a competing publication. He will call you back in half an hour for your answer.
 - What do you and your colleagues - and your boss - need to do immediately?
 - What will you say to the mystery caller when he calls back?

- Is there a possible strategy for getting the story or do you reject it out of hand?
 - How should the fact that a competitor might run the story influence you and your publication?
3. Several new restaurants appear in town. You hire a writer to review one of the most popular. Here are some sentences from his review:
- I wouldn't feed the kebabs to my cat.
 - I think the kebabs were left at room temperature too long.
 - The health department's file on this place is thicker than the kebabs.
 - Health department inspectors reported finding rat droppings in the kebabs.
 - My sources at the health department would not go near this place.
 - This is the worst restaurant in the universe.
 - Would you use any, all or none of these statements or modify them in any way? Why?

Remember the differences between facts and opinions, between protected and unprotected sources of information, between facts and exaggerations, between local law and culture.

ADDITIONAL READING & REFERENCES

For an up-to-date overview of English law from a journalist's perspective: *McNae's Essential Law for Journalists*, by Tom Welsh and Walter Greenwood, published by Butterworths Law.