



A4ID Online Defamation Training Transcript

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Module 1 – Introduction to Defamation

Module 1a:

Introduction

- Covers the law of defamation in England & Wales
- Seek local advice when working or writing about people elsewhere
- Other relevant areas of law, e.g. privacy and data protection

Hello, my name is Guy Vassall-Adams QC of Matrix Chambers in London.

This online course provides an introduction to defamation - the area of law which protects reputation.

This course was designed for NGOs and campaigning organisations that face the risk of being sued for defamation as a result of their publications.

However, substantially the same risks arise for all publishers - people who communicate information to the general public - whether as campaigners, journalists or citizen bloggers. This course is therefore relevant to many different types of publisher. It aims to give you an awareness of the risks of defamation that can arise in your work and general advice on how to manage those risks.

I will cover defamation law as it applies in England and Wales. English defamation law is also relevant in many other parts of the world which have a similar legal system. Furthermore, England and Wales has often been the chosen forum for claimants to bring defamation claims relating to international publications. I will cover the issue of forum later in this module.

But you should be aware that defamation law varies between countries, so for example, certain defences outlined in this course may not apply in other parts of the world.

While this course provides a general overview of the law, it isn't a substitute for legal advice and if you are concerned about being sued for defamation for a particular publication, you should seek local, in-country advice wherever possible.

Defamation is not the only legal issue that you need to be aware of in your work. Researching and publishing information about individuals may also have implications for other areas of law such as privacy, breach of confidence, data protection and copyright. These issues are not covered in this course.

What this course will cover?

Six modules:

1. Introduction to Defamation
2. Defamatory Meaning
3. Defences
4. Protecting against Defamation Claims
5. Responding to Claims
6. Quiz

This course starts by introducing the essential ingredients of defamation, such as the components of a defamation claim and who can sue, and be sued for defamation.

Module 2 is concerned with the meaning of a defamatory statement, which is highly relevant because it determines how easy or difficult it would be to defend a claim.

As I explain further in Module 4, it is important to think about the meaning of an allegation you intend to make before publishing it, to be confident you could defend the publication if necessary.

Module 3 looks at all the main defences to a defamation claim including truth, honest comment, public interest and different types of privilege. It's good to bear in mind potential defences when researching, writing and preparing to publish a report that makes defamatory allegations.

Module 4 gives practical guidance on how best to avoid getting sued for defamation. By acting responsibly when researching, writing and preparing to publish a report, many potential claims can be avoided.

Module 5 gives some practical tips in case you find yourself having to respond to a claim.

Module 6 is a quiz, which tests your understanding of the previous modules.

Module 1b:

Why is defamation important for campaigning organisations?

- Campaigning organisations publish information criticising individuals and organisations
- If that information is potentially harmful to reputation, there is a risk of being sued for defamation
- With awareness these risks can be managed

Campaigning organisations want to publish hard-hitting publications that attract public attention and advance their cause in a compelling way. Often, this will involve exposing misconduct by individuals, businesses or organisations, or subjecting them to criticism.

As you may have experienced, this important work may provoke a backlash from the people or companies whose reputations are likely to be affected. They may threaten legal action. Commonly this will be a threat to sue for defamation.

Having an awareness of the principles of defamation law should enable you to take steps to carry out your work in a way that reduces the risk of being sued successfully for defamation.

What is defamation?

- Protects personal and professional reputation
- Provides legal protection against unjustified attacks on reputation
- Two types of defamation
 - Libel: written down or in a permanent form
 - Slander: spoken word or gestures
- Libel is the focus of this course

The law of defamation protects the reputations of individuals and organisations against things that are written or said about them by other people.

If a campaigning organisation publishes information that is likely to damage the reputation of an individual or organisation, it risks being sued for defamation.

In this course, I refer to persons or organisations bringing claims for defamation as “claimants”.

Whether or not a claimant can sue successfully for defamation depends on whether what is written or said about him can be defended by the publisher. Defences are covered in module 3.

You may have heard mention of libel and slander. These are simply two categories of defamation.

Generally, *libel* concerns the written word and covers anything that is said in writing or semi-permanent form. So a defamatory statement published in an article, a report or a press release would be a libel. Libel also includes things said during television or radio broadcasts, or which is published on the internet.

Slander concerns the spoken word, for example a speech at a public meeting, words shouted out at a demonstration or something said in conversation.

It is very unusual for someone to be sued in slander these days and this course is concerned principally with libel. In this course, I use the terms libel and defamation interchangeably.

Components of defamation

1. Words/images referring to a person or organisation
2. Published or spoken to a third party
3. Serious harm to reputation

You can see from the slide that there are three main things that are required for defamation to take place. For a claimant to have any chance of succeeding in a claim for defamation, he or she would need to show each of these things.

They are:

1. That there has been a publication which refers to the claimant.
2. That it has been published to a third party.
3. That the publication has caused, or is likely to cause, serious harm to the reputation of the claimant.

If a claimant can persuade a court of these matters, he can bring a claim and seek compensation and other remedies such as an injunction. Whether the claim will succeed, however, depends on whether the publisher has a defence. Defences are considered in module 3.

Each of these elements is introduced in the slides that follow.

Module 1c:

What is defamatory?

- A defamatory statement is one which is likely to harm the reputation of that person
- The test is objective - what would a hypothetical reasonable person think
- Since Defamation Act 2013, claimants must establish “serious harm” to reputation

A defamatory statement is one which is likely to harm the reputation of the person against whom it is directed and to lower that person in the eyes of other people.

What matters is what a reasonable, ordinary person would think of someone upon reading or hearing the statement.

In many situations it will be obvious that what was published is defamatory due to the nature of the allegation. Allegations of wrongdoing, incompetence and immoral conduct are all defamatory.

However, since the Defamation Act 2013, in order to bring a claim for defamation a claimant must show that the statement has caused or is likely to cause “serious harm” to their reputation.

Reference to the claimant

- Usually by name, but may be other identifying information
- Key issue is whether the claimant is identifiable from the publication
- Sufficient that others would believe he is the person referred to
- Take care with small groups of people
- May be accidental

In most cases when someone sues for defamation, that is because they have been named in the publication. However, naming someone is not the only way of referring to them.

People are also identifiable from other information, such as their job titles, for example the prime minister of a country or the CEO of a company.

In principle, any information that identifies a person is sufficient for her to be referred to - this includes identification in images, cartoons and diagrams.

The key issue in all cases is whether the claimant is identifiable to the public or a section of the public.

Added care is necessary when referring to small groups of people, such as the board of a company, all of whom will be identifiable, as this may allow any or all members of that group to sue for defamation.

It doesn't matter whether a reference to a person or organisation is deliberate. Mistakenly using the wrong photograph of a person as part of a defamatory allegation would allow that person to sue, even though this wasn't the person the publisher intended to refer to.

Publication

- Communication in any written form: e.g. hard copy, online, exhibitions
- To one or more third parties
- Everyone involved in the publication is potentially liable e.g. author, editor, publisher
- Irrelevant if unintentionally published
- Repeating what someone else said or published is enough

Publication to a third party is an essential element of any defamation claim.

Publication means “communication” and can take many different forms. Defamatory allegations may be published in a report, or a press release, or a podcast, or a broadcast interview, or a tweet and they may be published in hard copy like a report or a book or online in a blog or a posting.

Anyone involved in the publication is potentially liable, not just the author. For example, in the case of a report by a campaigning organisation, the author of the report, the editor of the report and the organisation itself will all be publishers, as will be people and organisations who re-publish the report.

Publications are usually deliberate, but they don't have to be, for example an email sent to the wrong people, or something tweeted inadvertently, or an internet post accidentally made available to the public would amount to publication.

Publication must be to a third party - so an email exchange between two people couldn't give rise to a claim, but if the same email was copied to a third party, liability would arise. This is because defamation is about damaging the reputation of a person in the eyes of other people.

Module 1d:

The repetition rule

- Every publication is a separate libel
- You can commit a libel by repeating what others have published
- No defence to say the same information has been published elsewhere
- Claimants may sue the original publisher and/or anyone who repeats the same allegation

It is commonly and mistakenly believed that only the original publisher of a libel is at risk of being sued for libel and that repeating what has been published elsewhere is a defence, or is safer than being the original publisher. Unfortunately, that is not the case.

Every publication is treated as a separate libel and a claimant can decide to sue the person who repeats the defamatory allegation as well as, or instead of, the original publisher.

This means that similar care is required when repeating defamatory allegations or republishing information, as when you are the original publisher.

It's very common, of course, for campaigning organisations to refer to and rely on information published by others in their own publications, for example articles by journalists, reports by other organisations or academic studies. This is both necessary and unavoidable. However, it is important to try to rely on reliable sources of information if you intend to repeat a defamatory allegation.

Online publication

- Material published if put online in England & Wales
- Also published when downloaded or viewed in England & Wales
- Location where material is put online is irrelevant if accessed here

In most cases, a publisher will intend to publish a report in a particular country. However, when a report is posted online, publication can occur at the same time in many parts of the world.

In English law material is published online when it is accessed or downloaded in England and Wales. This means that material posted in another part of the world is published here when someone clicks on and reads the URL address, while in England.

A claimant can therefore bring a claim in England against a foreign publisher. But if the publisher is outside the UK and EU, for example a US newspaper or a Canadian blogpost, the claimant would have to show that the UK is the most appropriate place to bring the claim. We will come back to this point later in this module.

The serious harm test

A statement must have caused, or be likely to cause, serious harm to the reputation of the claimant

- In the case of companies: "serious harm" = "serious financial loss"
- Likely to depend on:
 - Seriousness of allegations
 - Extent and means of publication

- Existing reputation of the person/organisation
- Need to prove serious harm unless implied because allegation extremely serious

The serious harm requirement was introduced by the Defamation Act 2013 and its purpose was to make it harder for individuals and companies to sue for libel.

Now it is not sufficient to show that a statement is likely to cause some harm to reputation. A claimant must show that the statement is likely to cause “serious harm” to reputation.

This makes it less likely that a defendant will be sued for trivial allegations, or where publication has been on a very small scale, or where the person concerned already has a bad reputation.

Where the defamatory allegation is very serious, such as an allegation of criminality or serious wrongdoing, the court may infer the likelihood of serious harm without requiring evidence. But in the case of less serious allegations, the court may expect the claimant to produce evidence of actual harm.

In addition, in the case of companies, they must show that the defamatory statement has caused, or is likely to cause, serious financial loss. Often, this will be hard for companies to establish.

Organisations who seek to criticise the conduct of companies now have greater protection from defamation than they did previously.

Module 1e:

Who can sue?

- Living individuals
- Organisations
- Companies
- EU/UK resident or show England clearly most appropriate place to sue
- Not central or local government or political parties

In the UK, living individuals, organisations and companies can all sue for libel. However, central and local government and political parties cannot bring a claim on free speech grounds, although if an allegation implicates individual politicians or officials they may sue in an individual capacity.

Since 2013 it has become much more difficult for people who are not residents of the UK or EU to sue people in the English courts for defamation. This is because Parliament was concerned with what is known as libel tourism.

People or organisations outside of Europe are unlikely to be able to sue in England unless they can show that they have a strong connection with this country making it clearly the most appropriate place for them to sue for defamation.

To determine whether England is the most appropriate place to sue, a court would look at, for example, how many times a statement available online has been published or read in England as compared to other countries and where the claimant lives and works and enjoys his reputation.

You should still be aware that even if a person or organisation cannot sue in England they may be able to sue you in another country. If this happens or if you are threatened with legal action in another country, it is important that you seek specialist advice in that country.

When can people sue?

- One year from the date of publication
- Period can be extended by a judge

The general rule is that a libel claim must be brought within 1 year from the date of publication, although this period can be extended by a judge. This is known as the limitation period.

Where a publication has been continuously published online, the limitation period now starts to run from the date of first publication. So if a report was first published online two years ago, the limitation period for a claimant to bring a claim will already have expired one year ago.

Similarly, where an organisation republishes an earlier publication in the same or a substantially similar form, the limitation period now runs from the date of the original publication. So if a report was originally published 5 years ago, limitation will have expired four years ago and a claimant won't be able to sue on the re-published report that only came out within the last year.

However, if the new report is significantly different from the original publication, it is likely to be treated as a fresh publication and limitation will run from the date the new report was published.

In addition, there are circumstances in which a court can extend a one-year limitation period after it has expired, where the justice of the case requires such an extension.

Module 2: Defamatory Meaning

Determining meaning

- Judge decides
- Objective test: what would a reasonable reader/listener/viewer think?
- Looks at publication as a whole
- Single meaning rule

Meaning is very important in defamation cases. The reason is simple. One of the most important defences to any libel claim is truth. A defendant needs to prove that the facts alleged are substantially true. So, the meaning of the publication determines what the defendant has to prove in order to succeed with a truth defence.

Let's take a concrete example. There's a big difference between a direct allegation of guilt that Mr Jones is a corrupt businessman, on the one hand, and an allegation that there is some evidence that would justify an investigation into whether Mr Jones is a corrupt businessman, on the other. In the case of the former, a publisher would have to prove that Mr Jones is corrupt, in the case of the latter, only that there is some evidence suggestive of corruption. So, the more serious the allegation a publisher makes, the stronger the evidence required to support it and the harder the publication would be to defend at a trial.

In a defamation case, it is the judge who decides on the meaning of the publication, by asking himself what the statement would mean to an ordinary, reasonable reader or viewer. The basic rule is that the judge looks at the whole publication and that first impressions count, as ordinary readers don't scrutinise texts like lawyers do.

The defamatory allegation is given a single meaning and if there are different allegations in the same publication, they are each given different meanings. This is known as the single meaning rule.

Allegations of misconduct: Three levels of gravity

- Guilt: someone actually committed an act
- Reasonable grounds to suspect s/he committed an act
- Grounds for investigating whether s/he committed an act

Claims for defamation usually involve the publication of an allegation that someone has engaged in some form of misconduct, wrongdoing or reprehensible behaviour.

As I have already explained, defining the meaning of an allegation is very important because it determines what a defendant has to prove in order to establish its defence.

The courts have laid down that there are three levels of meaning, with the most serious being a direct allegation of guilt (level 1), then reasonable grounds to suspect that a person committed an act (level 2) and finally grounds for investigating whether someone has committed an act (level 3).

Sometimes it can be difficult to distinguish between different levels of meaning. But the reason this is important is that one of the ways of reducing the level of risk of a publication is to turn a direct allegation of guilt, into an allegation of reasonable grounds for suspecting, or grounds for investigating.

This is a technique frequently used by investigative journalists to reduce the risk of having to prove the truth of a direct allegation of wrongdoing. We will return to this in later modules.

Module 3: Defences

Defences covered in the module

- Public Interest
- Truth
- Honest opinion
- Absolute privilege
- Qualified privilege
- Website operator defence

If you say or write something that causes serious harm to someone's reputation this does not necessarily mean that you will be liable and required to pay damages.

There are a range of defences available to people who are sued for defamation which, if deployed successfully, would prevent a claimant from being able to get an injunction against, or damages from, your organisation.

These defences exist to provide a balance between, on the one hand, the rights of individuals and organisations not to have their reputations unjustifiably harmed and, on the other, the right to freedom of expression and the right of the public to receive information.

An understanding of defences is important because it enables publishers, writers and speakers to make informed decisions about whether there is likely to be any legal risk in saying or writing something that is harmful to someone's reputation.

When planning and conducting a research or investigative project that is likely to criticise people and organisations, it is advisable to have regard to the defences that may have to be relied on.

Public Interest Defence (I)

- Statement on a matter of public interest or
- Part of a statement on a matter of public interest
- Reasonable belief publication was in the public interest
- Need not be true

The public interest defence is relied on every day by journalists working for serious newspapers and broadcasters and it is also highly relevant to the work of campaigning organisations. A good way to protect yourself from being sued for libel is to ensure that you could defend your publication on the basis of the public interest defence by acting responsibly when making serious allegations.

Unlike the truth defence, which is discussed next, a publisher does not need to show that the defamatory allegation is true, just that the requirements of the public interest defence were met.

This defence has two main elements. First, a publisher has to show that the statement was on a matter of public interest. This is relatively easy, as most publications concerning serious political, economic or social issues or topics of public concern will be on a matter of public interest. NGOs which campaign

about corruption, or human rights, or poverty or environmental harm will be publishing information on matters of public interest.

Secondly, the publisher must show that it reasonably believed that publication of the statement was in the public interest. This is considered in the next slide.

Public Interest Defence (II): Relevant Factors

- Seriousness of the allegation
- Nature and quality of the information
- Steps taken to verify the information
- Reliability of sources
- Whether comment sought from the subject
- Whether the subject's view or side of the story is included

To rely on the public interest defence, a publisher needs to show that they reasonably believed that publishing the statement was in the public interest.

This means that the publisher must not only show that he believed that publication was in the public interest, but also that his belief was objectively reasonable in the circumstances.

When a court looks at whether a publisher “reasonably believed publication was in the public interest”, the focus will be on whether the publisher acted responsibly and fairly when making the allegation.

The court would look at all the circumstances of publication and the kinds of issues a court would take into account are: would address at this stage would be:

- Did the defendant use reliable sources - or at least sources he had good reason to believe were reliable?
- Did the publisher himself believe the information to be true?
- Had the publisher taken reasonable steps to check the accuracy of the allegation?
- Was the allegation put to the claimant prior to publication?
- The tone of the article - was it responsible or was it sensationalist?

It is clear from these factors that even though a defendant does not have to establish the truth of an allegation for this defence, they do have to show that they used reliable information, took proper steps to investigate the allegations and acted fairly by putting the allegation to the person concerned before publication. So what happens before publication is very important when seeking to rely on this defence. No one factor is determinative, for example it is not always possible to get comment prior to publication of an allegation, but a court will look at all the circumstances.

As the guidance in module 4 shows, you can protect your organisation by making sure your publications meet the standard of the public interest defence prior to publication.

Truth Defence (I)

- No liability if the statement is substantially true
- Meaning ascribed to a statement by the court must be true
- Truth based on facts as they existed at the time
- Defendant has the burden of showing truth

A person publishing a defamatory statement will not be liable if she can show that the statement was substantially true.

If a defamation claim were to go to court, the court would decide on meaning and it would adopt a single meaning that the publisher would have to defend, as explained previously.

But at the decision-making stage, a publisher has to take its own view as to what meaning a publication will bear and whether if it was required to, it could defend that meaning as being true.

The facts that are necessary to establish that a statement is true will depend on the specific allegation, but these are two common examples based on the categories of allegation we explained in Module 2.

- If a statement alleges that a person is guilty of having done something, a defendant could only succeed with a truth defence if she can prove that he is in fact guilty. This is why it is high risk to make or repeat an allegation that someone has committed a particular act unless there is clear evidence to support the allegation. So if you allege Mr Jones is corrupt, you have to prove Mr Jones has in fact acted corruptly.
- If the allegation is that there are reasonable grounds to suspect a person of having done something, a defendant arguing that the allegation is true would need to show that there are facts which gave rise to grounds for suspicion. This is much easier than proving guilt. So if you say there are reasonable grounds for believing Mr Jones is corrupt, you have to prove the facts that support this e.g. the evidence of suspicious dealings.

Truth Defence (II)

- Not every detail needs to be true
- Defendant must prove the “sting of the libel”
- Multiple allegations: sometimes sufficient to prove only the most serious allegation

For a statement to be substantially true, it is not necessary to prove that every detail is true. A person defending a statement as true need only to show that the overall allegation, which is sometimes called the “sting of the libel”, is true.

So if, for example, it was alleged that during a criminal investigation a police officer beat every detainee, but at trial it became clear that the police officer had beaten the majority of detainees but not all of them, the publisher would succeed with a truth defence because the substance of the allegation - that the police officer beat detainees - had been established.

Equally, if in a single publication there are separate allegations with different degrees of seriousness, it is usually sufficient for the publisher to prove only the most serious allegation. For example, if it was alleged that a police officer beat and swore at a detainee, the publisher would win if he established the assault allegation, even if the swearing allegation was not proven.

Honest Opinion

- Statement is an expression of opinion – not a statement of fact
- Statement indicates the basis of the opinion

- Opinion could be honestly held on the basis of known facts (or privileged information) existing at the time
- The claimant cannot show that the opinion was not genuinely held.

This defence protects statements of opinion or what are also sometimes called “value judgments”.

Someone sued for defamation will have a complete defence if they can establish that the first 3 criteria set out on the slide are met - that they have expressed an opinion, that the publication showed the basis for their opinion and that the opinion could have been honestly held on the basis of the known facts at the time.

In these circumstances, the defence can only be defeated if the claimant can establish that the defendant did not genuinely hold that opinion, which is usually hard to do.

The statement must be recognisable as an opinion to a person reading or hearing it - it cannot be a statement of fact. The statement should also indicate the facts on which the comment is based and the defendant will have to prove that these facts are true - the defence cannot succeed if the opinion is based on false information.

So if, for example, the comment was made that, “Mrs Jones is one of the most unscrupulous businesswomen in this country”, the same publication would need to set out the facts that support that allegation e.g. mistreatment of employees, misleading of consumers, dishonesty in his business dealings, or whatever the facts were. To succeed in an honest opinion defence, it would be necessary for the publisher to establish that those factual allegations were true.

Absolute privilege (I)

- Applies if a statement made in specific contexts/for specific purposes (see next slide)
- Complete defence - immunity from liability
- Truth and motive for making statement irrelevant

The law recognises that there are certain situations when people should be able to speak freely without any fear of being successfully sued for libel. These situations are protected by a defence known as “privilege”.

There are two types of privilege, absolute and qualified. Both provide important protections for free speech, but absolute privilege is a stronger defence than qualified privilege, for reasons I will explain.

Absolute privilege provides a complete defence meaning that the person who made the statement cannot be liable regardless of whether it causes serious harm to reputation.

If a statement is absolutely privileged it does not matter whether the information is in fact false or whether the motive in publishing it was to harm someone’s reputation.

Absolute privilege (II): Examples of where absolute privilege applies

- Comments made in parliamentary proceedings
- Things said or written in judicial proceedings
- Reports to police and other investigators
- Fair, accurate and contemporaneous reports of judicial proceedings

Absolute privilege applies to specific categories of statement which the law has recognised as requiring special protection. The slide gives some of the most common examples.

For the purposes of this course, the most relevant situation in which absolute privilege applies is when reporting on judicial proceedings anywhere in the world while they are happening or very shortly afterwards.

It is permissible to report on what has been said in court and these remarks may be defamatory. For example, a witness may make allegations against a person or company and as long as such reports are fair, accurate and contemporaneous they will be protected by absolute privilege. The reporting should be balanced and there should not be any substantial inaccuracies or omissions. It is important that any quotes taken from the proceedings are attributed.

Absolute privilege might also be relevant where e.g. a staff member of a campaigning organisation gave evidence to a Parliamentary Select Committee. If they made defamatory remarks about another person, those would be protected by absolute privilege, in the same way as MPs' statements in the House of Commons are protected by absolute privilege.

Qualified privilege

- Applies in 2 main areas
 - Communications made in the public interest where the publisher and recipient have a common duty and/or interest in the matter
 - Specific types of public interest publication are also protected by legislation
- Defence can be defeated in certain situations

The qualified privilege defence protects statements where there is also strong public interest in people being able to speak freely, without fear of being sued for libel, however it is called "qualified" because it does not protect statements that have been made maliciously.

Qualified privilege applies in two different types of situation.

First, the qualified privilege defence protects statements where there is a common duty or interest in publication between the publisher and the recipient. For example, if an employee suspected a fellow employee of theft and reported it to the employer, that statement would be protected by qualified privilege. The same applies to a statement made at a public meeting where everyone concerned had a common interest in the topic under discussion. Employment references and credit checks are other examples of specific types of document protected by qualified privilege. In all of these situations, the public interest in freedom of expression is so strong that even false statements are protected providing that they have not been made maliciously.

Secondly, Parliament has decided that publishing fair and accurate reports of certain kinds of proceedings should also attract qualified privilege and some of these are very relevant to the work of NGOs.

Qualified Privilege (II): Examples of material to which Qualified Privilege applies

Fair and accurate reports of:

- Proceedings in public of a legislature
- Proceedings in public before any court
- Proceedings in public before any public inquiry
- Proceedings in public of any international organisation

- Public press conferences and lawful public meetings
- Fair and accurate extracts from official documents/reports

This slide shows the situations in which fair and accurate reports of certain kinds of proceedings anywhere in the world will be protected.

This is important for NGOs because it allows them to rely on official proceedings or reports without having to establish that any defamatory allegations made in those proceedings are true, providing that their own report is a fair and accurate account of the proceedings. The full list of protected situations is set out in Schedule 1 to the Defamation Act 1996.

So fair and accurate reports of proceedings in legislatures, or courts of law, or public inquiries, or international organisations or international conferences are all protected.

However, as with the honest opinion defence, the qualified privilege defence can be defeated if the claimant can show that the defendant published the defamatory allegation maliciously, for an improper purpose or without any genuine belief in its truth. So care should be taken when reporting wild allegations that are not credible, even if they come from a parliament or a court, for example.

Website Operator Defence

- Operators of e.g. comment pages, discussion forums and blogs
- Defence for website operators against claims for statements posted by third parties if:
 - Operator did not post/modify statement
 - Removes the statement promptly when given notice

Many organisations and individuals run websites which provide a platform for people to post material. Posts may be in response to an article posted by the operator of the website; for instance, a human rights NGO might put up articles on its website with a comments function. Alternatively, an organisation campaigning for constitutional reform might host a blog to which anyone can contribute posts. Information posted by third parties may be defamatory.

A website operator may be sued for defamation for statements posted on their site if a claimant cannot identify the person who posted the statement. But website operators have a complete defence against such claims if certain criteria are met:

- First, the website operator must not have posted statement that is said to be defamatory.
- Second, if the website operator has been given notice of the statement that is said to be defamatory, it must have responded promptly. The response required varies depending on whether it is possible to contact and get a response from the original poster. Generally a website operator will need to have either contacted the original poster and/or taken down the statement within 48 hours.

Module 4: Avoiding defamation claims

1. Protecting yourself from defamation claims

- Thorough research and fact checking
- Making serious allegations in a responsible way
- Giving the subject a chance to comment before publication

There are three stages in the preparation of an article for publication: research, writing and final steps such as seeking comment before publication. NGOs and campaigning organisations can get the best protection against defamation claims by acting responsibly at each of these three stages.

2. Research

- Be thorough when gathering evidence
- Use privileged sources where possible
- Get witnesses to sign their statements
- Obtain written evidence wherever possible
- Look critically at your evidence
- Double check critical facts
- Hang on to your evidence

The best possible protection against being sued for libel is to publish accurate information that you could prove to be true if required to do so. Factual accuracy is vital for a truth defence but is highly relevant to all the other defences as well.

The basis for an accurate, defensible publication comes at the research stage. Undertake thorough research before publication. Try to find reliable sources. If you will rely on the evidence of witnesses, take written statements and get them to read them through and sign to indicate that they agree the contents. Try to find written evidence to back up the accounts of witnesses, rather than just relying on witness evidence.

It's important to look critically at your evidence and to double-check critical facts. If a witness makes a serious allegation against a person, don't take it at face value, ask questions to satisfy yourself whether it is accurate and reliable. Ask yourself: is this something the witness has seen first-hand? Is this something the witness would be in a position to know? Is this really evidence of the wrongdoing the witness is alleging, or is it consistent with a different kind of wrongdoing or an innocent explanation?

If you want to rely on other publications, remember that it isn't a defence to re-publish information already published elsewhere, so try to rely on reputable publishers. Wherever possible, make good use of official publications such as government reports or the reports of international organisations, which are protected by privilege. Remember also that fair and accurate reports of proceedings in parliament or international conferences, for example, are also protected by privilege.

Once you have collected your statements, notes and copies of other publications - make sure you hang on to them for at least one year after publication in case you ever need to defend a claim. If the case ended up in court, would need to explain each of the steps you took prior to publication.

3. Writing

- Only make allegations you can support with evidence
- Do you need to make a direct allegation of wrongdoing?
- You could point to the evidence and assert suspicion or call for an inquiry
- Attribute allegations from specific individuals
- Reference significant factual assertions
- Look at tone

In some cases you may be lucky enough to have clear and reliable evidence of wrongdoing that you feel very confident you could prove to be true if you were sued for libel.

But in many cases, it's not possible to be so confident. Let's say your organisation campaigns to save the rainforest and villagers from Brazil have alleged that a UK company is complicit in illegal rainforest destruction. You may have received credible reports from the villagers and you may be satisfied the area is a protected area, but you may have doubts about whether the British company is involved.

Let's imagine that at the research stage you felt there was some, but not conclusive evidence, of the company's involvement and the company didn't respond when you put the allegation to it. In these circumstances, it would be high risk to publish a report alleging illegal rainforest destruction by the company.

But you might be able to publish a very similar article pointing to the evidence of the company's involvement, saying that the company failed to respond when the allegations were put to it and calling for an inquiry. By doing this, you have drawn the same issue to public attention but without making a risky direct allegation of wrongdoing, the truth of which you might find it impossible to prove.

This relates to the levels of defamatory meaning discussed in module 2. The more serious the allegation, the harder it will be to prove the truth of it and the harder it will be to succeed in a public interest defence. So you can manage the degree of libel risk to a significant extent by adjusting the seriousness of the allegations you make to match the strength of the evidence you have to defend a potential claim.

In some cases a source will want to be anonymous and that must be respected. But where sources are willing to go on the record it adds credibility to a publication to attribute specific allegations. Likewise, where you rely on another report or article it's important to cite it.

Tone is also important. It's much easier to use the public interest defence to defend an article that is written responsibly, than it is to defend an article conveying very similar information that has been written in a sensationalist way.

4. Final steps

- Seek comment before publication
- Report any response or lack of response in the publication
- Watch out with press releases

An important issue to decide is whether, before publication, you want to seek a comment from the person or company against whom you plan to make a defamatory allegation.

In some situations there may be good reasons for not giving prior notice e.g. if doing so could expose an in-country source to danger.

But in many cases giving notice of the allegation and an opportunity for comment is important, as this is part of the fairness expected of a responsible publisher and makes it more likely you would succeed with a public interest defence if you were sued.

Giving an individual or company the opportunity for comment usually makes it less likely you'll be sued. It's a normal human reaction for people to react more violently when they are taken by surprise by a defamatory publication. If you give the person or company concerned the opportunity to comment, it can take some of the heat out of the situation.

In addition, putting the substance of a factual allegation to a potential claimant can be an effective way of checking if a story is accurate or if the claimant has a credible answer to the allegation. Sometimes an answer that is just general PR guff and doesn't address the substance of an allegation is a telling indication that the story is true.

It is very difficult for anyone to get an injunction in advance to prevent the publication of a defamatory allegation in the UK. This means that you can usually be confident that putting the allegation to the person concerned will not jeopardise publication, just delay it. The position regarding injunctions is different if the publication involves confidential or private information, where injunctions can be obtained more easily.

If a defendant does give a substantive response to the allegation, it is wise to include some reference to that response in your publication. Sometimes it suffices to refer to a denial and maybe include a link to the full response; at other times you may wish to quote or paraphrase part of a response. There is no golden rule about how extensively you need to cover a response; it's a matter of judgment and depends on the facts of each case. If the potential claimant doesn't respond at all, you should refer to the lack of any response in your publication.

If you are publishing a press release at the same time as a full report, take particular care with the press release as it's a separate publication which a claimant can sue on independently of the main report. Often press releases are produced at the last minute and errors tend to creep in. There is also a tendency to hype things up in a press release, which may mean that you end up publishing a more serious allegation in the press release than in the actual report, which carries additional libel risks.

Module 5: Responding to complaints or claims

General points

- **Seek legal advice before responding**
- **Act promptly**

Getting sued for libel is a serious business for any person or organisation. Individuals can claim compensation in the hundreds of thousands of pounds for serious libels, while legal costs can mount rapidly even if a case never goes to trial. It can be very embarrassing and damaging to the credibility of an organisation to have to retract a serious allegation and apologise publicly.

If your organisation receives a letter threatening legal action or is notified that a libel claim has been commenced, it is advisable to take immediate legal advice. By acting quickly in response to a letter of claim or an actual claim, it may be possible to avoid liability altogether or at the very least to take steps which greatly reduce the damages the claimant can recover.

For example a swift retraction and apology in response to a letter of claim may mitigate the damage of a defamatory publication so completely that the claimant is no longer able to show serious harm to reputation at the time of issuing the claim. Alternatively, there is a specific legal procedure called the offer of amends which can be used to get out of a full-blown libel claim relatively cheaply and quickly.

Alternatively, a strong and carefully thought through response to a letter of claim may be all that it takes to get rid of the claim altogether. By acting swiftly to take legal advice you can explore the different options and decide how best to address the issue.