

**AN APPRAISAL OF THE DEFAMATION LAW AND SOME  
CHALLENGES POSED BY EMERGING TRENDS FROM SOCIAL  
MEDIA**

## INTRODUCTION<sup>1</sup>

The law of defamation is an arm of the law of tort. The law of tort generally operates to guide, regulate and direct the order of human interaction. Law of tort arises from a breach of duty owed towards persons generally and redressible by an action for unliquidated damages<sup>i</sup>. The law of tort has developed over the years through Common Law; in certain instances, some aspects of the law of torts have even been codified.

God created man with the innate ability to express feelings and emotions, and to protect his name and reputation. Such expressions may be by way of writing, spoken words, signs, works of art, gestures or imagery. The Constitution of the Federal Republic of Nigeria 1999 (as amended) also provides for the freedom of persons to communicate freely. However, such freedom to express oneself must be regulated.

The unregulated or uninhibited right to express may exceed the bound contemplated by law and may cause social problems. Regulations and checks in this regard perfectly fall within the ambit of what is termed the **Law of Defamation**. This law recognizes the right of each man to the unimpaired enjoyment of his reputation and good name, to an extent that “he who therefore directly communicates to the mind of another matter untrue and which substantially disparages the reputation of another is guilty of a legal wrong”<sup>ii</sup>.

## THE LAW OF DEFAMATION

In *Sketch Publishing co. Ltd V. Ajagbemokeferi* (1989) 1 NWLR (pt 100) 678, the court explained that:

*“The basis of the tort of defamation is that every person has a right to the protection of his good*

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*name, reputation and the estimation in which he stands in the society of his Fellow citizens. Therefore, anybody who publishes anything Injurious to that good name, reputation or estimation commits the tort of libel or slander.”*

### So what is Defamation?

Defamation connotes publishing words calculated to hold one to hatred, contempt and ridicule. It also means a publication which would cause someone to be shunned or avoided. It is defamation when expressions are made to injure the character of another bringing him to disrepute or social stigmatization. Therefore a statement is defamatory when it is calculated to lower a person in the estimation of right thinking members of the public.<sup>iii</sup>

In fact, when we talk about reputation, a man's reputation is not what he thinks of himself, but the estimation of which others hold of him.<sup>iv</sup> The law of tort protects a person's general reputation and not the reputation the he thinks he deserves.

Defamation is the broader concept under which lies slander and libel. Slander involves transient form of communication while libel takes a permanent form. That is, the tort of slander is committed either through spoken words and/or gestures. When expression is published in a written or permanent form calculated to injure the reputation of another, then that is Libel. It is submitted that sign languages used as a form of expression by the deaf falls under the category of slander while braille<sup>v</sup>, used by the blinds falls under Libel.

There is no gainsaying that the law of defamation has brought about social orderliness which has accordingly shaped the society today. Not only is any person whose reputation or character is injured through the expression of another guaranteed redress through the court of law; the legal system of defamation acts as a vibrant check to the way individuals express views.

In order to successfully file an action for defamation, the following are the elements that must be present:

- A. A publication of the defamatory matter or complaint. "Publication" would include actual/spoken words, sign languages, visual representations and written words;
- B. The publication must refer to the plaintiff;
- C. The defendant must have made the publication; and
- D. The publication must be false in itself.

So what is defamatory?

- Any imputation which may tend to cause a man to be hated, despised or ridiculed is defamatory of him.
- Words which subject the plaintiff to chaff or banter, but which do not in themselves, tend to render him ridiculous are not defamatory<sup>x</sup>.
- Caricatures of the plaintiff when published may be defamatory<sup>x</sup>
- Words causing others to shun or avoid the plaintiff, e.g. saying that the plaintiff is a mad person and that he does not have control of his mental state can be defamatory.<sup>xi</sup>
- Words demeaning a person in the estimation of others.
- Relative reputation- e.g., to attach or associate the name or trade mark of a well-known manufacturer with inferior goods not of his own may be

defamatory.

- Words imputing intention to commit crime may be defamatory<sup>xii</sup>
- False words suggesting that a person is a criminal or supposing that a person has been convicted of a crime are defamatory, e.g. calling someone a rapist, even if already charged with the crime but not yet convicted is defamatory.
- Honest criticism of government officials or officers of public institutions may not be defamatory.
- Online banter may not be defamatory.

To determine whether or not, a publication is defamatory, the following relevant questions must be considered by the court:

1. Whether, the words complained of are capable of having a defamatory meaning; and
2. Whether, the plaintiff was in fact defamed.<sup>xiii</sup>

In essence, it is possible for word(s) to have defamatory meanings and imputations. But if the plaintiff is not actually defamed by such word(s), then an action for defamation may not arise.

It is important to note that in defamation cases, word(s) should not be taken out of context. The individual meaning of each word is immaterial; the broad impression conveyed by the publication is what deserves actual consideration.

Words are not defamatory when they tend to disparage a man in the face of a section of the community alone. The words must be such that it disparages the reputation in the face of right thinking men generally. It will not be actionable within the law of defamation if it only reduces a man's esteem in the face of a select few and does not affect his reputation in the face of a right thinking man<sup>xiv</sup>.

It has to be stressed that when a defamatory statement is directed to a class of

persons, no individual person of that class is exclusively entitled to say he or she is defamed. In the same vein, an action for defamation does not necessarily lie in favor of a class or group, but in favor of individuals. For instance, a statement that all lawyers are liars and manipulators of law does not confer a legal right on a lawyer to bring an action for defamation against the individual who uttered the statement. The group (of lawyers) can also not complain of defamation.

Vulgar words in themselves may not be defamatory when published in transient or spoken form but may be defamatory if written.<sup>xv</sup> A statement which, when spoken is defamatory on the face of it, but is understood only by those who heard them to be vulgar abuse or taken as a jest are not defamatory. This particular position, of course, excuses comedians and jesters.

Again, for a case of defamation to stand, there must be actual publication. This means that there must be dissemination of the untrue and false statement to third parties. Where the defamatory statement is only made to the plaintiff, then an action for defamation may not arise<sup>xvi</sup>. Where a letter is addressed to a person and contains libelous imputations, such publication will not ground an action for libel unless in the circumstance of the case, the writer knows that such letter will be opened and read by another person other than the person to whom it was addressed, he will be liable for such publication. An innovative way to avoid this situation is to write the word "*private*" on such letter<sup>xvii</sup>. Where this is done and the letter is accessed by third parties, the writer, it is submitted, will not be liable.

This also applies to chats on the social media. Where a libelous publication is made on a group chat, the author will be liable without more. But where it is made to another via personal direct message, an action for libel may not lie. Where however, a defamatory statement is made to a person in personal direct message and is shared by the plaintiff-receiver to third parties, the defendant-sender, it is submitted, will not be liable for publication of

defamatory statement. When sharing, re-tweeting or rebroadcasting information on the social media space, it is submitted that the word “copied from ...” should operate to absolve a person against liability for dissemination of defamatory contents.

It is interesting to note that liability for libel does not depend on the intention of the defamer, but on the actual fact of defamation. The intention of the defendant is immaterial in this case; what should be objectively considered is the actual meaning and understanding of the publication by a reasonable man. The tort of libel can be committed unknowingly, in that someone who draws the attention of passersby to a defamatory writing, picture, effigy or placard by mutely pointing to it unwittingly publishes a libel. A statutory exception is however provided under S. 10 of the Defamation Act Cap. 34 Laws of Oyo State 1978 which makes provision for the statutory defence of unintentional defamation.

However, someone who merely takes a subordinate part in disseminating a publication (rather than authors same) will be liable in defamation, unless he can prove that he does not know that the publication contains libelous contents, does not know that the book was of a character likely to contain libel, or such want of knowledge as a result of negligence.

Talking about defamation in transient form - slander; words spoken which are ambiguous or meaningless, or words spoken in the heat of passion or rage - are not slanderous. This of course would excuse abusive exchanges done in the middle of a fight or a hot disagreement. And in order to be successful in a case of slander, proof of actual damage to the plaintiff is required. This is not the case with libelous actions.

However, there may be instances where proof of damages may not be required for a statement to be slanderous. This would be the case where what is imputed against the person is a criminal offence punishable corporally, or is some disease tending to exclude the party defamed from the society, or even

an imputation of unchastity against a woman, or words calculated to disparage a man in his calling, profession, trade or business.<sup>xviii</sup> Damage is presumed by the law in favor of the plaintiff against the defendant once the words are found by the court to be of a defamatory character.<sup>xix</sup> The plaintiff has no duty to prove damage or injury to reputation.

Hearsay will not be a defence to a slanderous statement. Where a person disseminates statements that were merely heard, it is immaterial that the statement did not originate from that person; he will be liable for slander and if written, a case of libel will lie. This then applies to information going the rounds on social media. For every re-tweeted or shared defamatory statement on any social media space, the person sharing will be liable for slander or libel.

The introduction of some new features on the social media space has brought some new dynamics to the law of defamation. For instance;

*How does one classify defamation committed through the publication of voice notes or video recordings which are broadcast online?*

It's hard to bring either of these under an action for libel or slander. Again, the emergence of memes and temporary posts with the option to restrict some viewers makes it hard to understand how to properly conceptualize what may actually amount to defamation. It is the writer's opinion that publication of defamatory statements made either through voice notes or video recordings would fall under the arm of **slanderous defamation**. This is because, even though their production is enabled in what may seem a permanent form, their publication is intangible and transient. This should obviate the difficulty in trying to identify the class under which defamatory publications of this nature should be brought.

There are however some defences to defamation.

### **Defences to the Tort of Defamation**

- **Fair and Accurate Report:** while it is true that abridged or compressed

versions of events may be made by any report - especially with the press - these must be made honestly and fairly so as to project the just impression of what truly transpired. Where a report of an event is fair and accurate, no action of defamation will lie against any person making such reports. It is submitted though that in making such report, the person making it must produce the report from a first-hand reporting position. It should be indicated in the reportage that the condensed or abridged statement was gleaned from a larger version of the event coverage.

- **Justification:** a statement cannot be defamatory where the statement is the absolute truth. Saying that a mad person is insane cannot be defamatory. Or calling an actual debtor a “despiteful insolvent” should not be defamatory. This defence is necessary because a plaintiff who has no good character or reputation to uphold has no right to an imputation free from such bad reputation and if he has no right to it, he clearly cannot recover damages for a loss of it - *Damnum absique injuria*.<sup>xx</sup>
- **Fair Comment:** in an action for defamation, where words consist partly of facts and partly of expressions of opinion, this defence may arise even if the truth of every allegation of fact is not proved, provided that the expression of opinion is fair. It is a defence that the words complained of are a fair comment of a matter of public interest. Fair comments are criticisms, evaluations and analyses of the merits and demerits of events of public interest, et cetera. The comment must however be based upon true facts. Social and political commentators, public affairs analysts may have a good defence under this head.
- **Absolute and Qualified Privilege:** Absolute privilege is accorded by law. It can be judicial, parliamentary or official. For instance, communications between a lawyer and his client is privileged. Also, a judge has absolute privilege from any statement made in his judicial capacity. A member of

parliament has absolute privilege for any statement made on the floor of the house. It is qualified privilege where a person making a statement has the interest or duty, moral, social or legal to make it to a person who has a corresponding interest or duty to receive it. This duty and interest obviates the element of malice. The defence of qualified privilege can therefore be destroyed by the presence of malice, if the maker uses the opportunity for some other reasons.

It should be noted that there are other defences available under Common Law and statute against an action for defamation. I have decided to limit this discourse to those listed above.

### **Fair Comment versus Public Interest**

It is important to address the raging issue of Fair Comment especially on matters of public interest. Fair Comment as explained, is a defence against an action for defamation. Where statements are made which are critical, analytical and evaluative of a matter of public interests, where such expression is based on facts, then this defence can avail the maker of the statement. In fact, this defence has constitutional backing as established under section 39 (1) of the Constitution of the Federal Republic of Nigeria (as amended). This right ensures that members of the public freely, and honestly express themselves and especially comment on matters of public interest.

Public office holders, politicians, public servants in their duties are subject to criticisms in either their public or private capacities. When members of the public make comments, which in some cases may be damaging or condescending, so long as the statements made are based on facts and made fairly, then such fair comment should be privileged. The private character and conduct of a person who fills a public office or takes part in public affairs may also be the subject of fair comment in so far as it has reference to or tends to throw more light on his fitness for that office or to perform his duties.<sup>xxi</sup>

In this sense, public office holders should understand that the use of this privilege by members of the public with respect to any statement would not be defamatory. The law has drawn a hard-line between the use of this privilege and the protection of the right against defamation of public servants. This line should not be made more elongated by bills or legislations that have the effect of suppressing the privilege or the right to freedom of expression. For emphasis practical, some provisions of the proposed Hate Speech Bill run counter of the privilege provided by law.

In a recent event, the Nigerian Broadcasting Corporation (NBC) fined a broadcasting radio station the sum of 5 million Naira because of what the NBC considered as hate speech. The controversial comment was made by a former Deputy Governor of the Central Bank of Nigeria, Dr. Obadiah Mailaifa. Dr. Mailaifa, who was interviewed during one of the station's programmes, "Morning Cross Fire", had talked on the killings in Southern Kaduna, one of the parts of the North-West Nigeria worst hit by banditry.<sup>xxii</sup> The statement was a comment on a matter of public interests which was clearly predicated on what was alleged to be factual representation of an event which took place.

This writer submits that the statement was fairly made. It was exceedingly unwarranted for the hosting radio station to be fined for that broadcast. The law is very clear that where statements are fairly made on a public discourse, even if the purported statement is at cross purpose with any regulating authority, public institution or government, or against any public office holder, such statements should not be censored under what may be regarded as hate speech. A state that is unreceptive of honest criticisms and public evaluation is a tyrannical state.

## **Conclusion**

## **ENDNOTES**

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- i Sir Percy Winfield. Province of the law of Torts. 1<sup>st</sup> Edition at page 32.
- ii Clark & Lindsell. Torts Law. 14<sup>th</sup> Edition at page 945
- iii Akomolafe V. Nigerian Exchange Insurance Co. Ltd (2000) FWLR (pt 27) 2016 at 2025
- iv Ugbomoh V Hadomeh (1997) 9 NWLR (PT 520) 307 AT 326 (CA)
- v Braille is a system of raised dots that can be read with the fingers by people who are blind or who have low vision.
- ix T.A.O. Tugbiyele, Defamation: Laws, practice and procedures. 2<sup>nd</sup> Edition, p. 6.
- x Amalgamated press V. Allen (unreported) FSC 118/1960 (reprint) HC
- xi Watkin V. Hall (1868) L.R. Q.B. at pg 399.
- xii Akin-Olugbade V. Iro (1980)4-6 CCHCJ 276
- xiii Ita V. Fetuga (1991) 7 NWLR (pt 204) 449 (CA)
- xiv Reg. Trustees of Amorc V. Awoniyi (1994) 7 NWLR (pt 355) 154 at 194 (SC)
- xv T.O.S Benson V west African Pilot ltd (1965) All NLR (reprint) 589 (HC)
- xvi The only exception to this is criminal libel publication. Section 373 of the Criminal Code Act.
- xvii GTB V. Fadlallah (2010) All FWLR (pt 537) 739 at 760-761
- xviii T.A.O. Tugbiyele, Defamation: Laws, practice and procedures. 2<sup>nd</sup> Edition p. 48
- xix Cross River State Newspaper Corp. V. Oni (1995) 1 SCNJ 218.
- xx Asheik V. M.T Nig. Ltd (2010) 15 NWLR (pt 1215) 114 at 163
- xxi Lyle-samuel v. Odhams ltd. (1920) K.B. at 146.
- xxii <https://nairametrics.com/2020/08/13/just-in-nbc-slams-n5-million-fine-on-nigeria-info-over-mailafia-comments/>