

Defamation – Strategies for Risk Management

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There is an old adage that “Loose lips sink ships” and this wisdom is worth thinking about in relation to defamation.

Whether calling out slogans during an election campaign or uttering comments in a council meeting, elected members can manage the risk of legal action for defamation if they know some basics of this area of law.

Freedom of Speech v. Damage to Reputation

Controversial issues can evoke strong public debate and discussion. Such activity is an exercise of the right to free speech, where all citizens are entitled to express their honest opinions on matters of public interest.

The law of defamation exists to balance the exercise of the right to free speech in public against the protection of a private individual's reputation. In the heat of debate, you may be tempted to make personal attacks against someone you disagree with. However, this is an easy way to get into trouble with the law of defamation. Therefore, avoiding personal attacks or ridicule is one risk mitigation strategy.

Matters can be defamatory whether they are true or false. The key is identifying if the reputation of the aggrieved person has been damaged. So, be mindful of what you say, even if you think it is true. Truth is, of course, a defence, but there is still a cost to defending yourself against a claim.

Publishing statements

Before a statement can be considered defamatory, it needs to be *published*. In defamation law, the term “publication” means dissemination, distribution or communication. That can be through the written or spoken word. It includes print media, emails, blog posts and sharing on social media. Even gestures, such as the placement of the aggrieved person's picture in a gallery of pictures of notorious criminals, can amount to a publication of a defamatory statement, even though no words are spoken.

Key Strategies

- Avoid personal ridicule in public debate
- Be careful about communicating damaging information in writing, whether through traditional or social media - and whether true or not
- Be particularly careful not to make disparaging comments about someone's competence or capability in their trade or occupation
- Take note of context (or the story behind the story), which can make an innocent statement defamatory by implication

Thinking carefully before speaking, writing or gesturing about someone could therefore be a valuable risk management strategy.

It is commonly believed that defamation action can only be brought against someone who has made allegedly defamatory statements to a large number of people.

In law, however, defamation can occur even if only one person sees or hears the defamatory statement. For example, if a councillor receives an anonymous letter containing untrue, disparaging and unjustified statements about a local government officer, and they show the letter to one fellow councillor, this can amount to defamation. Therefore, the risk management strategy here is to be disciplined when it comes to showing potentially defamatory statements to other people, whether few or many, and whether they have been made by you, or someone else.

Criticising performance

The law of defamation gives more scope to an aggrieved person where the defamation is in relation to their occupation, trade or employment. Such a person, if defamed, need not prove damage, or loss of income. They only need to

prove that they were defamed in relation to their occupation for damages to be awarded. Put simply, there are fewer obstacles for such a person to sue for defamation where the prospective defendant says that he or she is incompetent or incapable of doing their job properly.

Therefore, it is a good strategy to think twice before criticising the performance of an officer within the administration, or even contractors to your local government, or an opponent in Council, with reference to their competence or capability in their trade or occupation.

Innuendo

The law of defamation does not only govern explicit statements that might damage a person's reputation, it also covers statements which can be said to be defamatory *by implication*. Such statements may be innocent until the context is known.

For example, the description of a person as "facing charges" can imply that they have actually been charged with a criminal offence, even though there was no explicit statement that they did a criminal act. Similarly, referring to someone as Mrs X seems harmless until one knows that in fact she is married not to Mr X but to someone else!

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So, this aspect of defamation law can include risks that exist where there is a story behind the story! What kind of risk mitigation strategy should you use then? Perhaps, where a lot of gossip or rumour circulates in a small group or community, the best strategy is to resist the temptation to be too clever in your public remarks. Where innuendo is involved, more lawyer time is needed to work it out on paper – and that translates into extra cost.

Finally, the law of defamation does not care whether a person intended to defame someone. It only looks to whether that person was actually defamed. Somewhat like traffic offences, it is possible to be penalised for exceeding the speed limit even when you did not intend to.

The risks of defaming someone can sneak into your daily activities in local government, whether in an election campaign or a council meeting. Arm yourself with some discipline and strategies before making or repeating statements, to reduce your risk of being sued for defamation.

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