

The meaning and types of defamation law general essay

Law



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4. 0 Introduction

Freedom of the press forms part of freedom of expression where one can seek, receive and impart ideas. However, there are some expressions which are intolerable as they cause harm to societies. Hence, when other rights conflict with freedom of the press, some limitations are needed. According to Article 19(3) of the ICCPR[1], a limitation can be legal only if it is legally provided, has a lawful aim and is deemed necessary. This chapter aspires to provide an analysis on the different types of legal limitations present in Mauritius like defamation, right to privacy and contempt of court.

4. 1 Protection of Reputation

4. 1. 1 Meaning and Types of Defamation

' Defamation is committed when the defendant publishes to a third person words or matter containing an untrue imputation against the reputation of the claimant'[2]. In other words, defamation can be said to be any deliberate false accusation made on someone to harm his reputation. Actions are taken against defamation in order to protect someone reputation. In the media industry, everyone is alert on the tort of defamation. In Mauritius, S288 of the Mauritian Penal Code defined defamation. Our law on defamation has been taken out from Article 29 of the Law on the Freedom of the Press of 29 July 1881[3]. S288 of the Criminal Code treats only criminal defamation as compared to Article 1384 of the Civil Code, which treats defamation as a civil offence. Defamation law is more or less the same in any country. In UK, there is the Defamation Act 1996 which regulates defamation. In USA, defamation is protected under the First Amendment. There are two types of defamation;

libel and slander. Libel is a statement made in a permanent form or in written[4]and " slander applies to defamation made in a transitory form, such as spoken words or gestures"[5]. Something that is only heard is more difficult to prove as compared to a written statement. This shows that slander is less easy to prove than libel. For slander, damages must be proved whereas for libel, it is in itself illegal. Nowadays there is hardly a difference between libel and slander as publication and broadcast, irrespective of any forms, are permanent. Public speeches on radio or television are recorded nowadays.

4. 1. 2 Action in Defamation

According to the definition itself, defamation arises when a false statement has been published concerning another person. To establish a case of defamation, the statement published should be defamatory as a whole and must refer to the plaintiff and in USA, the defendant must have committed a certain degree of fault. One essential element in any defamation case is that there should have been the publication of defamatory information from the defendant. Publication includes usual forms such as newspapers, books and magazines. It can also be oral comments. A person will be accountable for any publication which " he intends, he can reasonably anticipate or where there is unintentional publication"[6]. Under most jurisdictions, including UK, USA and Australia, the element of publication is a must. Under S288 of the Criminal Code of Mauritius, the press will be found guilty only if the publication of a defamatory statement has taken place. Once the publication has been recognised, the next element is whether that publication concerned a ' defamatory matter'. The words used must bear a defamatory

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meaning. The responsibility of a press organisation will not be engaged if only one word or sentence, bearing a defamatory imputation, has been found in an article. " What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to mean"[7]. A newspaper can be acquitted even if only the title of an article is prejudicial as the article as whole does not bore any defamatory meaning[8]. The English and US law do also take into consideration the circumstances and the context of the article to determine whether a statement is defamatory. Usually, the words used by the defendant arise from innuendo, which means the words used have a hidden meaning which has to be recognised when considering other facts. In *Tolly v Fry & Sons Ltd*[9], it was held that the advertisement for Fry's chocolate was defamatory as it carried the allegation that the plaintiff was using his amateur status wrongly. There is true innuendo and false one. It is the court that will decide on it by looking at what the " usual reader" has understood by the " innuendo". Another essential element in a defamation action is that the words must refer to the plaintiff. Journalists can make reference to a person in such a way that there is no mention of his name and even his identity is concealed. If reasonable people identified a defamatory meaning against a plaintiff, the defendant will be liable[10]. Even if the defendant states that the work was fictional, he will still be liable. A journalist may be liable to an individual only even if the article was about a group or class of persons. In *Francois E v La Sentinelle Ltee & Ors*[11]the plaintiff was not able to prove that the word " führer" was referred to him in a poem dedicated to five persons including him. In USA, journalists enjoy a great

margin of protection concerning the element of plaintiff. There, the defamatory portion should be of and concerned the plaintiff[12].

4. 1. 3 Defences

All those working in the media industry are well aware about the defences for defamation whether under civil or criminal law. Those defences should be invoked in order for the journalists to be exempted. The common defences which are invoked are truth, fair comments concerning matters of public interest and good faith.

4. 1. 3. 1 Truth as a defence

" It will be a defence for the defendant to show that the article complained of is " true"[13]. The defendant must be able to prove that all the materials contained in the libel were true. " There must be substantial justification in the whole libel, even though it is not necessary to prove every truth of the libel"[14]. This means that even if some facts are false but the " gist" of the article is true, so the defendant can count on this defence. However, it is not an easy task to support that defence as the defendant may not be able to provide enough admissible proof in front of the jury. In, McDonalds Corp v Steel and Morris[15]there was no concrete and clear evidence of justification and the defendant was not able to make use of this defence. Sometimes, there is a duty of confidentiality that is made about the key resources. Those who knew that the article is true may also be unwilling to convince. This may cause inconvenience for the defendant.

4. 1. 3. 2 Fair Comments

" It is trite law that fair comment made in good faith on a matter of public interest is a complete defence to an action in defamation and that the burden is on the defence to establish it"[16]. For this defence to take place, the defendant must prove that comments, based on true facts, concerned matters of public interest. The comments must be without malice then the court will give protection to them. Newspapers prefer to rely on fair comment rather than on truth (justification). In UK, the fair comments in a defamation action are based more on " opinions" rather than on " facts" as compared to other European countries[17]. As compared to Mauritius, the defence of fair comment is obtainable only if the article is based in true facts[18]. In *Dookhony R. R. v La Sentinelle LTD & Anor*[19]the defendant gained his case based on fair comment as it was held that the facts were of true nature and were, at the time, strictly of great public interest. Both in UK and Mauritius, if the facts are incorrect, the defence of fair comment will be useless even if honestly made.

4. 1. 3. 3 Good Faith

" In a case of defamation based on article 1382 it is, first, incumbent upon the plaintiff to establish ' faute'. But once this is done, it is for the defendant who sets up good faith as a defence to prove that he was acting in good faith ' surgie d'un ensemble de faits justificatifs'"[20]. In Mauritius, defendants may defend themselves upon good faith. However, proof should be brought to prove that he acted in good faith because when a defamatory statement is published, it is presumed in law that " the author has had intended such a result"[21]. Under English law, if there is malice, it is equal to absence of

good faith. When there is malice, all relevant documents must be produced in order to check whether it exists or not.

4. 2 Privacy

4. 2. 1 Right to Privacy

The compromise between freedom of the press and the right to privacy has always been an issue which is treated in an atmosphere full of confusion. Both interests are inherent in a democracy and they often clash due to a publication on someone name, life or image. Privacy means protecting our own movements, conversation and information from the public. ' It covers people's freedom to make their own decisions about their private lives (...)'[22]. As compared to defamation which has been in centuries for so long, privacy is an issue which just has just evolve in modern age. The right to privacy appeared for the first time in the American law as a tort. It was considered as a constitutional right where governmental interference was prohibited against the personal space of an individual[23]. Privacy is an essential human right accepted by the UDHR, ICCPR and other international and regional agreements. In Mauritius, indirectly section 4[24]and section 5[25]of the constitution cater for right to privacy. Section 9[26]caters for privacy only in terms of home and other property. Without forgetting section 12(2) of the Mauritian Constitution, right to privacy can be derived from it as sometimes restrictions on freedom of expression can be lawful in cases of protection of reputation and private life of persons. A comparison between the law of privacy and the law of defamation can be made. Firstly, as compared to defamation law, where only the false statements are actionable, in privacy law all the published facts are true and the very truth

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of the particulars gives rise to invasion of privacy. Moreover, in a defamation case the main interest is to protect one reputation in the outside world. As for a privacy case, " the interest affected is the subjective one of injury to the inner person"[27]. Finally, when there is defamation the truth or falsity will be fought based on marketplace of ideas but for privacy, the latter will cause more harm. The need for right to privacy is becoming obvious every day. The constant governmental intercession in public life and the development of new technology which helps in digging out and monitoring everyone personal affairs, make the need for creating a law of privacy in order to protect the upcoming wellbeing of our society. This new law should be reconciled with the principles of press freedom. The press would be advised about the necessity of the new privacy right.

4. 2. 2 Protection of Privacy

As right to privacy is considered as a fundamental right, it is significant to see the protection given to this right by our legislator. More protection to privacy is provided by the civil law rather than the constitution in many legislative systems. For example in USA, when the disclosure of private facts, uninteresting ones, are done or even, when interfering into the private space of someone, the law of tort is afforded. According to the Mauritian Civil Code, Art 22 affords a statutory protection to privacy. Our Art 22 is a mere reproduction of the Art 9 of the French Civil Code. There exist different aspects which have been treated under Art 22. This provision protects one of the major aspects of private life which is family life and intimacy at home. According to the definition of privacy itself, one should be free from observance and disturbance by other people. Often journalists enter in the

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private life of an individual in order to obtain 'sensational' news for their newspapers. Recently in Mauritius, an interim order was issued to prohibit two press companies from publishing anything concerning the private life of a woman and her children[28]. However a second judgement was proclaimed on the same case where the interim order was discharged as the applicant did not satisfied the threshold test but, as for her children, as one was minor, no publication should be done on him. When mentioning intimacy at home, this involves the address of a private residence. If a private address has been disclosed to the public without the person consent, this amounts to a violation of the right of privacy. This may result in some "actes de malveillance"[29]. This is equivalent to the tort of trespass in the English law. However, in UK, the remedy is quite limited for the tort of trespass.

Nowadays there are new means of intruding in the family life or even in the residence of someone. With the introduction of technology, there are electronic surveillance devices like cameras which are used to have a long distance focusing. Often journalists make use of these means in order to obtain information. For example, the press was held responsible for the death of Princess Diana as journalists were following all her movement, even when she met with the accident. Last year Ségolène Royal, who was on holidays with her family in Mauritius, was chased by some paparazzis. She was photographed in a bikini and photographs have been published in the magazine 'Closer'.

One more aspect of private life which is greatly exposed to invasion and to which protection of Art 22 applies fully is the personal relationship that one holds with other individuals. In this section, press tries to reach for

information, for example concerning love affairs of celebrities. In Mauritius there was the famous Collendavelloo/Patten case where Mr. I Collendavelloo, a well-known lawyer plead for a court injunction to prevent the press from publishing the confirmed affidavit of his concubine, Miss P. Patten. He wanted to be protected against intrusion in his private affairs. Another renowned international case is the Monica Lewinski affair which involved the ex US President, Bill Clinton. His private doings appeared on the headlines of the media across the world. In this matter the media did an amazing job in making the President confessing the truth. The court held that protection of one's personal relationship should be supreme in the case of protection of privacy. The personal life of public figures is of greater interest than an ordinary citizen to a journalist. A public figure due to his possession of a public office receives less protection concerning their private life. In other words, when someone decides to become a public figure, he should cede some of his right to privacy. In Mauritius, due to its size, the local celebrities cannot hide much of their private lives.

4. 3 Contempt of Court

4. 3. 1 The Law of Contempt

Contempt of court is basically viewed as behaviour that is against the authority, impartiality and dignity of the court. Any act or publication which impede, harm or hinder the fair administration of justice may be sanctioned by the law of contempt. The Mauritian law of contempt is in substance similar to that of English law. Usually, when dealing with matters relating to law of contempt, English decisions are often referred to. Section 18C of the Court Act 1975 does make provision for any contempt committed. Contempt

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of court can be categorised as either civil or criminal. Criminal contempt occurs when the contemnor actually obstructs the proper functioning of the court. As for civil contempt, it occurs when the contemnor intentionally disobeys a court order. However Lord Scarman stated that: The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the difference between them. On one hand there is contempt such as 'scandalizing the court', physically interfering with the course of justice, or publishing matters likely to prejudice a fair trial, and on the other side there is contempt which arise from non-compliance with an order made, or undertaking required in legal proceedings[30] For civil contempt, the applicant will be punished only by imprisonment as compared to criminal contempt where the applicant can be punished either by fine or imprisonment or both[31]. Concerning criminal contempt there are two forms and they are namely Contempt in facie and Contempt ex facie. Contempt ex facie can be classified under two main headings namely scandalising the court and comments on pending judicial proceedings. For the purpose of this dissertation, we will deal mainly with contempt ex facie.

4. 3. 2 Contempt of Court and Freedom of the Press

If judiciary is the source of fairness, free press is the medium of freedom of expression of all citizens. In a democratic state, the public has the right to get all the information that is in their interest. Concerning the law of contempt, it is often in conflict with freedom of the press. The press usually presents information about court cases and judicial proceedings in order for the public to know what is happening around. When an informed press published court proceedings it can benefit firstly in proving individuals with a

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maximum of information about a particular case and proposing new information also. This may prevent untruthfulness, coming from the public, about the witnesses. Moreover, court wrongdoings can be prevented as the public is in a sense ' monitoring' the case. Finally, discussions on public issues are promoted[32]. In most cases of contempt, courts hold the proprietors and publishers of newspapers responsible rather than individual journalists. Often the most vulnerable one is the editor. According to the law of vicarious liability, the editor is responsible for what one of his journalists has written[33]as he did accept the article before the publication.

Traditionally, editors have been taken responsible for matters found in their journals even if they were not involved in the composition or the decision to publish it[34]. It is held that the public is becoming familiar with the regular scene of ' pseudo-trials' in the news media and in the long run it can have nefarious consequences for the acceptance of the courts as the appropriate aid for the settlement of legal disagreements[35]. A balance needs to be held between the judiciary and the free press, taking into consideration both their duties. However, newspapers cannot enjoy the freedom of disseminating information as they are often sued for the offence of contempt of court.

4. 3. 3 Scandalising the Court

" Any act done or writing published calculated to bring a court or judge of a court into contempt or to lower its authority"[36]is used to describe the crime of scandalising the court. Often due to the scurrilous abuse made on the administration of justice by the media, the public tend to lose confidence on the judiciary system. This also creates anxiety in the minds of the people

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concerning the honesty, the skill and the impartiality of a judge. According to *Ahnee v DPP*[37], where a journalist, his editor in chief and the proprietor of the newspaper were found guilty of scandalising the court, the judge held that there should be a need for that offence as the administration of justice in Mauritius is vulnerable due to its size as compared to that in UK. The principle is entrenched in the English Common Law. It is obvious that the offence of scandalising the court represents an important limit on free speech and expression. However, the judiciary can be criticised to the extent that the disapprovals made are in good faith and just; based on reliable facts. The offence of scandalising the court must be evidenced stringently as compared to the seriousness of the offence charged. In *DPP v Masson & anor*[38], where a scandalous newspaper article was published regarding the Magistrates of the Intermediate Court, proofs have not been able to be proved beyond reasonable doubt. Recently, in *DPP v Dhooharika*[39] the chief editor was imprisoned for contempt of court as the scandalous articles were proved to be gratuitous, cruel and highly defamatory against the chief justice. However, if a respondent is found liable, and if he expects a less severe punishment, he should 'express regret for harm done to those who have been attacked, and not simply regret for his own mistake'[40].

Defendant can defend himself based on the principle of "intention". In the Australian case *Gallagher v Durack*[41] it was held that consideration can be accepted concerning the fact that the accused was with no intention to harm the court. Nevertheless, the prosecution need to prove the element of intention beyond reasonable doubt based on the gravity of the offence. This approach is recommended in Mauritius also. Besides intention, another

defence that could be opted is the right to criticise. " Courts are alike opened to criticism and if reasonable argument is offered against any judicial act as contrary to law or public good, no court could treat that as contempt of court"[42]. The criticism should be kept within the limit of courtesy and good faith[43].

4. 3. 4 Comments on pending judicial proceedings (The Sub Judice Rule)

The most important role in the law of contempt in most common law jurisdictions is the use of the sub judice rule. It means that there should not be any interference in a pending legal proceeding. This rule is used to prohibit the media from publishing matters or comments on pending proceedings as it may cause prejudice. The emphasis of this rule was laid on into Attorney-General v Times Newspaper Ltd[44]. Sometimes a publication about a pending proceeding may harm the parties involved in the proceeding. This may even prevent one from attending court. There may be a publication about issues such as proclaiming that the accused is at fault, which are not acceptable as proof in court, and this may make a jury biased. Any publication made during a pending case might amount to contempt of court. A comment on a pending proceeding will be considered contemptuous according to the risk associated with it. If there is a risk that the trial of the case will be prejudiced due to the comment, then this may result in a case of contempt of court. The element of risk is interpreted differently in various legal systems. According to the Contempt of Court Act 1981 in UK, the risk needs to be substantial, only then the comment will be considered contemptuous. Concerning Mauritius, there is going to be contempt of court

only if the article is tending to influence the trial. In *Procureur Général v Delaroche*[45] the article was said to be offending as it attempts to influence the pending trial. Often it is said that journalists can comment on pending proceedings as it is up to the judge to be influenced. If the latter has enough confidence in his work he should not be influenced by a simple newspaper article. However, witnesses might be influenced and they may retract themselves which may harm the case of the judge. According to the US law, only when there is clear and present danger to the administration of justice that the publication will be contemptuous[46]. Finally, the element of mens rea can be held as it is an essential element in criminal offences. Under this particular form of contempt, intention is not given so much importance as it is more important to look at the matter complained rather than the intention of the authors and printers[47]. In Mauritius, the element of mens rea is not a relevant factor to contempt of court as constituted in *AG v Cabon*[48]. However, if there is contempt, the intention of the contemnor will be taken into consideration when deciding the punishment[49].