

- the test is the same whatever the employment;
- there are no occupations that should be regarded as intrinsically dangerous to mental health;
- finally where dismissal or demotion is the only reasonable and effective procedure open to an employer but the employee wishes to work on and the employer lets him or her do so he or she will not normally be liable if injury results.

It is worth noting that a differently constituted Court of Appeal threw some doubt on this last statement at least so far as physical injury is concerned. In *Coxall v Goodyear GB Ltd* [2003] 1 WLR 536 the danger arose from a new paint put into use by the employer, the claimant was allergic to it and in spite of using protective equipment provided by the employer he still suffered from asthma. The employee wanted to go on working and the employer allowed him to do so. The claimant became too ill to work and left his employment. He then claimed damages for his employer's negligence. The Court of Appeal ruled that his claim succeeded. If there was no alternative to the claimant working with the paint the employer should have dismissed him (even though the employee wanted to go on working) and could be in breach of his duty as an employer if he did not. The only sensible resolution of these decisions is to dismiss in mental and physical injury cases. The employer should have a good defence in either case if there is no alternative employment. If the claim is for disability discrimination as it might be the defence would apply with the difference that the employer is required to consider and make if possible adjustments to the workplace to enable the disabled person to do the job. There would appear to have been no such adjustments that could have been made in the *Coxall* scenario.

Stress-related injury: the House of Lords rules

The House of Lords has now ruled on the liability of an employer for the occupational stress injury of an employee. While the House of Lords finds *Hatton* to be a valuable contribution, their Lordships depart in a significant way from certain parts of the *Hatton* judgment.

In *Barber v Somerset County Council* [2004] 2 All ER 385, it appeared that Mr Barber was an experienced teacher. He had two jobs: one as head of maths and the other to market his school. Between 1995 and 1996 he was working between 61 and 70 hours per week. This workload caught up with him and he had three weeks off sick during the summer term. His medical certificates referred to 'stress' and 'depression'. He subsequently returned to work but nothing was done to deal with his workload. The headmistress and senior staff were unsympathetic and eventually he left work. The only advice from the deputy headmaster was to prioritise his workload. The House of Lords found this to be a totally inadequate response and affirmed the trial judge's award of damages against the employer.

Their Lordships considered in particular the ruling of the Court of Appeal in *Hatton*, which was to the effect that an employer is normally entitled to assume that an employee can stand the pressures of the job unless he or she knows of some particular vulnerability or problem. This carries the suggestion that the onus is on the employee to complain about stress problems. The House of Lords rejected this ruling and stated that employers must be proactive by giving positive thought to the safety of the workforce in the light of what they know or ought to know. The senior management team should have made enquiries about the claimant's problems and have discovered what they could have done to ease them in both Mr Barber's case and throughout the school. Their Lordships placed the onus on the employer to develop a knowledge of occupational stress and to keep up to date with effective precautions that can be taken to alleviate it. **This is a significant change of emphasis.**

Health and safety statutes

There are numerous statutes which are designed to protect the health, and provide for the welfare and safety, of employees. The relevance of such statutes for our present purposes is that where the breach of a statutory duty, e.g. failure to fence a dangerous machine, has caused injury to a worker, he may be able to sue his employer for damages by using the breach of statutory duty to establish the duty of care under the principles already discussed.

Millard v Serck Tubes Ltd, 1969 – A statutory duty of care (423)



Torts against business interests

It is a tort knowingly to induce a person to *break his contract* with a third party whereby that party suffers damage. It is also an actionable wrong for two or more persons to combine together (*or conspire*) for the purpose of wilfully causing damage to the claimant. There is also an action for *passing off* which occurs where A represents his goods or services to be those of B.

Inducement of breach of contract

If A induces B to break his contract with C, C can sue A.

Trade union activity often involves interference with contract and the position as regards the immunity or otherwise of trade unions in this context has already been considered in Chapter 8.

Lumley v Gye, 1853 – Inducing a breach of contract (424)

Daily Mirror Newspapers v Gardner, 1968 – Boycotting a newspaper (425)



Conspiracy

Where two or more persons act without lawful justification for the purpose of wilfully causing damage to the claimant and actual damage results, they commit the tort of conspiracy. The tort was fully considered in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* (1942) (see below), where the following principles were laid down:

- (a) the tort covers acts which would be *lawful if done by one person*;
- (b) the combination will be justified if the predominant motive is self-interest or protection of one's trade rather than injury to the claimant;
- (c) damage to the claimant must be proved.

Crofter Hand Woven Harris Tweed Co Ltd v Veitch, 1942 – The principles of conspiracy (426)



Passing off – generally

Any person, company or other organisation which carries on or proposes to carry on business under a name calculated to deceive the public by confusion with the name of an existing

concern, commits the civil wrong of *passing off*. Other examples of passing off are the use of similar wrappings, identification marks, and descriptions. Thus in *Bollinger v Costa Brava Wine Co Ltd* [1959] 3 All ER 800, the champagne producers of France objected to the use of the name 'Spanish Champagne' to describe a sparkling wine which was made in Spain and they were granted an injunction to prevent the use of that term.

However, passing-off claims have become more frequent in recent times in the areas of marking, style of trading and appearance of goods. For example, the House of Lords accepted in *Reckitt & Coleman Products Ltd v Borden* [1990] 1 All ER 873 that lemon juice sold by the defendants in lemon-shaped, lemon-coloured containers misled the public into thinking they were buying 'Jif' lemon juice – the product of Reckitt and Coleman. In the leading case of *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 (the *Advocaat* Case) the House of Lords decided that four characteristics must be present in order to create a valid action for passing off:

- (a) That there has been a misrepresentation. (To engage in the same line of business as the claimant and use the same or a similar name may be passing off.)
- (b) The misrepresentation was made by a trader in the course of trade, which includes a profession such as lawyer or accountant. Thus in *Kean v McGivan* [1982] FSR 119 a claimant who claimed that the defendant was wrongly calling a political party the Social Democratic Party could not successfully sue in passing off.
- (c) It was calculated to injure the business or goodwill of another trader (in the sense that it is a foreseeable consequence). It is a matter for the judge to decide on the evidence whether the defendant's misrepresentation was calculated to deceive.
- (d) It has caused actual damage to the business or goodwill of the other trader or will probably do so.

It will be seen from the above characteristics that mere confusion is not enough. An illustration is provided by the decision of the High Court in *HFC Bank plc v Midland Bank plc* (1999) *The Times*, 22 September. The Midland Bank and many other companies within the Hong Kong and Shanghai Banking corporation group rebranded their business, branches and services as HSBC. HFC Bank plc brought an action to restrain Midland Bank from passing off its business as HFC business by using the name HSBC which it claimed was confusingly similar.

The High Court ruled that the fact that customers might be confused by similar competing brand names was not enough for a passing off action to succeed; there had to be a misrepresentation causing damage to goodwill. HFC had not proved this and its claim failed. The judge seems to have taken the view that, although there had been some confusion, this could be dealt with by managing it in terms of marketing. The solution should be commercial not legal.

It is also necessary that the users of a name be in the same line of business. Thus, the High Court held in *Safeway Stores plc v Hachette Filipacchi Presse*, 13 December 1999 (unreported) that the defendant magazine owner could not prevent the name of its magazine 'Elle' from being registered as a trade mark for the claimant's sanitary products, as there was no real tangible danger of a substantial number of members of the public being made to wonder whether the sanitary products were connected with the magazine or its owner.

However, in *Pfizer Ltd v Eurofood Link (UK) Ltd*, 10 December 1999 (unreported) the High Court held that naming a beverage that was to be marketed as an aphrodisiac 'Viagrene' was an infringement of UK and Community trade marks protecting the well-known drug 'Viagra' and constituted passing off.

As regards remedies:

- (a) An injunction is on general principles available to prevent the continuance of the wrong but, being an equitable remedy, it is up to the court's discretion whether to grant it.

- (b) The claimant may also recover damages for loss of profits incurred because business is diverted away from him to the defendant and for loss of business reputation and goodwill.
- (c) As an alternative to an assessment of damages at common law, a court may direct the equitable remedy of an account of profit actually made by the defendant because of the passing off.

In connection with passing off, the effect of the Trade Marks Act 1994 should be noted. It is now possible to register a business name as a trade mark as where Mr Ahmed trades as 'Ahmed's Barbican Tandoori'. Such geographical marks are registrable under the 1994 Act and once the mark is registered any infringement is automatically illegal and the court can give redress by means of damages, injunction, or an account and payment over of profits made from illegal use of the trade mark.

As we have seen, passing off is a more difficult matter to prove. For example, proof of deception is essential (*Hodgkinson & Corby v Wards Mobility Services* (1994) *The Times*, 3 August). Since the Act also applies to the registration of the shape of goods, things such as the shape of a Coca-Cola bottle can also be protected in this easier way.

Passing-off: use of own name

It does not follow that because a person trades in his or her own name they will be able to mount a successful defence against passing off. Thus in *Asprey & Garrard Ltd v WRA (Guns) Ltd* [2001] All ER (D) 163 (Oct) the claimants for a passing off and infringement of trade mark rights were a well known and established trader in luxury goods. The defendant company traded in the same line of business in London, i.e. the same location as the claimants *in the business name* of William R Asprey Esq. William Asprey who was a former employee of the claimants effectively controlled the defendant company. The High Court granted an injunction against passing off and infringement of the claimant's trade mark. The court dismissed the defence of own name on the ground that it must not as here be used to cause deception.

Passing off – on the Internet

The High Court has shown itself willing to issue an injunction, to prevent the use of an Internet domain name, in a passing-off claim (see *Pitman Training Ltd v Nominet UK* [1997] Current Law 4875). An additional problem that has arisen because of the rapid growth of the Internet and its use by business organisations for e-mail and commerce generally is the parallel growth of a breed of speculators who register domain names that form a crucial part of a particular business website and e-mail address in the hope for example of offering it for sale to the business concerned with the possibility of receiving a high price for exclusivity. In *BT v One in a Million* [1998] 4 All ER 476 the Court of Appeal affirmed the High Court's granting of injunctions to restrain the defendants who had registered company names and/or trade marks, e.g. Marks and Spencer and J Sainsbury as domain names on the Internet on the basis of passing off and trade-mark infringement. The decision means that, at least in the UK, it should be easier to protect Internet domain names.

Defamation

Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person.

Byrne v Deane, 1937 – What is defamation? (427)



In order to constitute a tort the statement must be false and capable of bearing a defamatory meaning. Lord Reid in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at p 258 indicated how a trial judge might proceed in deciding whether words in their ordinary and natural meaning are capable of bearing a defamatory meaning.

What the ordinary person would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the [claimant] has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary person will infer from them, and that is also regarded as part of their natural and ordinary meaning . . . In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious, and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question.

In consequence, the ordinary and natural meaning of words is to be gathered not only by considering a strictly literal interpretation but also from the inference which would be drawn by the ordinary person who heard or read the words. Statements of *opinion* may be defamatory; defamation is not confined to statements of fact. Thus in *Slazengers Ltd v Gibbs (C) & Co* (1916) 33 TLR 35 the defendants stated during the First World War with Germany that the claimants were a German company and would, in their opinion, be closed down. This statement of opinion was held to be defamatory of the claimants.

It was held in *Berkoff v Burchill* [1996] 4 All ER 1008, by the Court of Appeal that derogatory references to an actor's physical appearance were capable of being defamatory and the matter should go to trial. The actor was described as 'hideously ugly'. The defendant's appeal on the basis that to be defamatory words had to cause injury to a person's *reputation* was rejected by the court. The words were capable of lowering the claimant's standing in the estimation of the public and of making him the object of ridicule.

Publication

The essence of the tort is the publication or communication of the falsehood to at least one person other than the person defamed, and other than the author's own husband or wife. Obviously publication to the claimant's spouse is defamatory (*Wenman v Ash* (1853) 13 CB 836). Every successive repetition of the statement is a fresh commission of the tort. Hence, a defamatory statement written upon a postcard is published by the sender not only to the ultimate recipient but also to the postal officials through whose hands it may pass, and to every individual who legitimately handles the message, e.g. the secretary of the sender or the receiver. Similarly a libel contained in a newspaper is published by the reporter or author, and by the editor, the printer, the publisher, the proprietor, the wholesaler and the retail seller of that newspaper.

However, at common law mere *mechanical distributors*, e.g. news vendors, booksellers, libraries and the like, were not liable for their acts if they were unaware of the libel. However, if, as in *Viztelly v Mudie's Select Library Ltd* [1900] 2 QB 170, the library had overlooked a

publisher's circular requesting return of copies of a libellous book, then there was and is a liability. Persons lending books gratuitously or making gifts of them and tape and record dealers were also protected if unaware of the defamation. There is, of course, no need to consider the liability of the Post Office because it is exempt from any liability in tort in regard to postal packets. Nor is there any need to consider the liability of British Telecommunications because, although the telecommunications service is run under contract, there are excluding terms.

Section 1 of the Defamation Act 1996 now deals with the defence of innocent dissemination and has constricted its ingredients in some respects. At common law the defence was available to a distributor who did not *know* that the publication was a libel. Now the defence will only apply where the distributor or other secondary publisher did not know or *have reason to believe* that he was causing or contributing to the publication of a libel. This means that secondary publishers will have difficulty in setting up the defence where the main publisher has a track record of publishing defamatory material. However, under the Act Internet service providers are protected from liability for defamation as are broadcasters of live programmes in respect of statements made by persons over whom they have no control.

Under s 1(3) of the 1996 Act Internet service providers are not publishers under the Act, i.e. in a statutory sense. However, it was held in *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342 that they can nevertheless be publishers at common law in appropriate circumstances. The High Court ruled in the case that an Internet service provider that was notified that it was carrying a libellous statement on a Usenet newsgroup but took no action could face defamation proceedings. It could not rely on the defence of innocent defamation under s 1 of the 1996 Act because, although it was not an author, editor or publisher under s 1(3), it had published the statement at common law without taking reasonable care as required by s 1(1)(b) of the 1996 Act. The posting in this case was made by an unknown person in the USA and was said to be obscene and defamatory of the claimant, a lecturer resident in England.

However, in *Bunt v Tilley* [2006] 3 All ER 336 the High Court ruled that as a matter of law an Internet service provider that performed no more than a passive role in facilitating postings on the Internet could not be regarded as a publisher at common law.

While on the subject of Internet defamation an Australian landmark case relating to the liability of online publishers is worth considering. The case is entitled *Dow Jones & Co Inc v Gutnick* [2002] HCA 56. Dow Jones published an article called 'Unholy Gains' in its publication *Barron's* magazine. It carried the imputation that G, who was a well-known Australian business man, was purporting to be a reputable citizen but was in fact money laundering and evading tax. Dow Jones also placed the article on its website which was a subscriber website called Barrons. Dow Jones had 550,000 subscribers to the site: 1,700 of these paid by Australian credit cards. G refuted the allegations and sued Dow Jones for defamation in Victoria, Australia for damage caused to his reputation by the Victoria publications. The defendants contended that the case should be heard in New Jersey, USA where Barron's online server was located and the law there applied. G argued that the claim was validly brought in Victoria where the article was viewed. The Australian High Court agreed with G. The case was rightly brought in Victoria and Australian law would be applied. Under both English and Australian law every communication creates a separate cause of action which arises in every place where the defamatory matter is read or heard. It was near certain that UK courts would have reached the same conclusion since English and Australian law on defamation is largely the same.

In fact, a UK court did take that line in *King v Lewis and Others* [2004] All ER (D) 234 (Oct) where the Court of Appeal affirmed the High Court's ruling that the common law of England and Wales takes the view that the act of defamation, i.e. publication of the defamatory

material, takes place when the information is downloaded and if downloaded in England and Wales by Internet users the proceedings in respect of it may be brought here even though the statement was not originally made in the UK.

The case followed New York attorney Judd Berstein's allegedly defamatory statements in the US about the boxing promoter Don King. The court rejected Mr Berstein's contention that UK courts had no jurisdiction to try the matter, the statements having been made in the US though downloaded in the UK. The court said it had jurisdiction. There was a real potential loss to Mr King in the UK because he had a substantial reputation to protect. US law is more liberal.

The situation for online publishers could hardly be worse. They are potentially liable for publication anywhere on their website and will be judged by local law. Where defamatory material is published within the EU the position is the same and is reinforced by the provisions of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968.

So far as defamation arising from a US online publisher is concerned a major difficulty will be enforcing say a damages judgment in the USA. The US court may very well refuse to enforce a foreign judgment on the grounds that it infringes the defendant's right to free speech.

As to what precautions can be taken the best approach for UK online publishers would seem to be to have a material defamation reading by a UK specialist lawyer. UK defamation law is amongst the most strict and conservative of any in the world and if the material is cleared under UK law it should not be regarded as defamatory in other more liberal jurisdictions.

A defendant is not liable when a father opens his son's letter (*Powell v Gelstone* [1916] 2 KB 615), or the butler opens the unsealed letter of his employer (*Huth v Huth* [1915] 3 KB 32). However, a correspondent should expect that clerks of the claimant, if a business person, might in the ordinary course of business open letters addressed to him at his place of business and not marked 'personal' or 'private', etc., and such a correspondent is responsible for publication of a libel. It should also be noted that marking the communication 'private', 'personal', etc. may not prevent publication in the case of a very busy public figure such as the Prime Minister.

The third person who receives the defamatory statement must be capable of appreciating its significance. A written defamatory statement cannot be published to a blind person except in Braille. It is not publication to repeat a defamatory statement in a foreign language in the presence only of persons who cannot understand the tongue. But if X writes a defamatory statement to Y in, say, German, knowing that Y cannot understand it, X will be responsible for the publication which results from Y's showing it to a linguist for the purpose of translation. In addition, to constitute publication, the person to whom the statement is communicated must understand that it refers to the claimant.

Republication

Problems can occur where the main damage emanating from defamatory material is caused by reason of its republication. Can the republications be regarded as independent acts or where the claimant is suing the maker of the defamatory statement can that person be made liable for the damage resulting from republication? The matter was raised in *McManus v Beckham* [2002] 4 All ER 497. It appeared that the defendant, a well-known singer, visited the claimant's shop which sold autographed memorabilia. It was alleged that while in the shop she advised other customers that the signature on a photograph of her husband, a well-known footballer, was a fake. The incident was widely reported in the tabloid press. The

claimants' case was that they had suffered loss to their business because of the negative press coverage and that the defendant's remarks suggested that they habitually sold memorabilia with fake autographs. They said they bought their goods from reputable sources and had offered to have this particular signature checked by Mr Beckham. The defendant asked the court to strike out the claim for damages in respect of republication. The claimants were not claiming against the media but seeking recovery of the wider media publication losses from the defendant.

The matter reached the Court of Appeal which refused to strike out the claim for republication damage. The whole matter rested, as in many tort situations, on foreseeability. Republication was reasonably foreseeable here said the Court of Appeal. However, it must be said that in these defamation republication cases the maker of the statement is only likely to be held liable for republication damage where republication is, as in this case, a *significant risk*, arising as it did here from the known interest of the media in the Beckhams.

Who may be defamed?

No action lies at civil law for defaming a dead person, no matter how much it may annoy or upset his relatives. Although from time to time there have been discussions as to reform, the same is currently true where either the victim of the defamation or the defamer dies after publication of the defamation but before judgment has been obtained. There may possibly be a prosecution for criminal libel if the necessary or natural effect of the words used is to render a breach of the peace imminent or probable.

As regards criticism of a trader, it is not defamatory merely to criticise his goods so long as the trader himself is not attacked. To say that a trader is bankrupt or insolvent is defamatory, but to say that he has ceased to be in business is not, for it does not reflect on his reputation (*Ratcliffe v Evans* [1892] 2 QB 254) nor as in *Berkoff* is it capable of lowering the claimant's standing in the estimation of the public or of making him the object of ridicule. As we have seen, the law of defamation applies to corporations as it does to private individuals (*D & L Caterers Ltd v D'Anjou* (1945) – see Chapter 20).

However, the House of Lords held in *Derbyshire County Council v Times Newspapers* (1993) 91 LGR 179 that a local authority could not sue for defamation. It was, said their Lordships, in the highest interest of the public that a council should be subject to scrutiny and criticism and it would be against such interest for such authorities to have any right under the common law to bring a claim for defamation.

It should also be noted that in *Goldsmith v Bhojru* [1998] QB 459, it was held that it was contrary to the public interest for a political party to have a right at common law to sustain an action for defamation. In a free and democratic society parties which put up for office should always be open to criticism. The public interest in freedom of speech should not be fettered. Candidates could bring claims but to extend this to political parties was not in the public interest.

Libel and slander

The form of publication determines whether the tort committed is libel or slander. *Libel* is defamation in some permanent form; *slander* is a statement of a like kind in transient form. Pictures, effigies, writing and print are clearly libel. Speech is slander, and probably gestures and facial mimicry also. It has been held that a defamatory sound film was a libel, and legislation states that the broadcasting of defamatory matter is libel, whether sound or visual images are transmitted (Defamation Act 1952, s 1). (See also Theatres Act 1968.) Publication on the Internet is libel (see *Godfrey v Demon Internet Ltd* (1999) (above)).

Youssouf v Metro-Goldwyn-Mayer, 1934 – A film is libel (428)



It is necessary to determine whether a tort is libel or slander for two reasons:

- (a) libel may be a crime as well as a tort;
- (b) libel is actionable without the claimant having to prove special damage, i.e. pecuniary loss, whereas the claimant in an action for slander must as a general rule prove such special damage.

Slander is actionable *per se*, i.e. without proof of special damage, in the following cases:

- (a) Where there is an imputation that the claimant has been guilty of a criminal offence punishable with imprisonment, e.g. a statement such as 'I have enough information to put John in gaol'.
- (b) Where there is an imputation of unchastity to any woman or girl (Slander of Women Act 1891). This probably includes the case where a woman is alleged to have been the victim of rape and seems to include a false allegation of lesbianism (*Kerr v Kennedy* [1942] 1 KB 409).
- (c) Where there is an imputation that the claimant is suffering from venereal disease and possibly other contagious diseases, e.g. leprosy or plague, which might cause him to be shunned and avoided. To say that a person *has suffered* from these diseases is not actionable *per se*.
- (d) Where there have been words calculated to disparage the claimant in any office, profession, business or calling, by imputing dishonesty, unfitness or incompetence (Defamation Act 1952, s 2). However, it is not necessary for the claimant to show, e.g., that he has lost his job as a result, but the remark must be one likely to lower his standing in his trade or profession. Presumably, therefore, the old case of *Lumbe v Allday* (1831) 1 Cr & J 301 is still good law. In that case the court decided that a statement that a clerk employed by a gas company associated with whores was not actionable *per se* because his quality as a clerk would be in no way diminished by his association with prostitutes.

A suggestion, therefore, that a clergyman has been found guilty of immoral conduct, or that a solicitor knows no law, is actionable without proof of special damage. Spoken words in a broadcast are actionable *per se* since they are regarded as libel (Defamation Act 1952, s 1).

It is not enough that the words are abusive. Thus to say of A, a bricklayer, that he is a legal ignoramus is not defamatory, though the same words would be defamatory if said of B, a solicitor. Difficulties might arise if the words were said of a chartered accountant who is required to have a knowledge of certain branches of the law.

To resolve problems such as these, two questions must be answered:

- (i) Are the alleged words capable of bearing a meaning which is defamatory of the claimant? (This is a matter of law and is decided by the judge.)
- (ii) If so, in this particular case are the words in fact defamatory of the claimant? (This is a matter of fact to be decided by the jury.)

What is special damage?

Some material loss is required, e.g. refusal of persons to enter into contracts with the claimant, or the loss of hospitality from friends who have provided food or drink on former occasions (*Storey v Challands* (1837) 8 C & P 234). Illness resulting from mental suffering is probably special damage. There were some early cases which said that it was not, but the better view is that these would not be followed now.

Innuendo

Cases may arise where the words are not at first sight defamatory, and only appear as such when the surrounding circumstances have been explained. Again a statement may be ironical, or accompanied by a wink or a gesture, or it may be ambiguous, e.g. the statement that 'X drinks'. In such a case the claimant must show that the words contain an innuendo or hidden meaning and that reasonable persons could, and in fact would, interpret the *words* used in a defamatory sense. However, a newspaper article may be defamatory of a person whom readers only identify from their own knowledge of extrinsic facts. The defamation need not arise from words themselves. Evidence is admissible to show that innocent words have a defamatory meaning. The judge decides as a matter of law whether the words are capable of bearing the innuendo alleged by the claimant, and the jury decides whether in fact the words do bear that meaning. The meaning sought to be placed upon the words by the innuendo pleaded must be reasonable, and the court will not read into a statement a defamatory sense which is not there on a reasonable interpretation. Furthermore, a claimant who claims that the innuendo to be drawn by those with special knowledge of the facts from a publication is libellous is bound to particularise those readers of the publication whom he alleges to have such special knowledge.

Cassidy v Daily Mirror Newspapers, 1929 – Innuendo: at the racecourse (429)

Morgan v Odhams Press, 1971 – Innocent words may have a defamatory meaning (430)

Tolley v Fry, 1931 – An amateur golfer defamed (431)

Sim v Stretch, 1936 – Defamation must appear on a reasonable interpretation (432)

Fulham v Newcastle Chronicle and Journal, 1977 – Who has special knowledge? (433)



Where a claimant relies on an innuendo he must prove that the words were published to a specific person who knew *at the time of the publication* of specific facts enabling that person or persons to understand the words in the innuendo sense. Facts which come into existence afterwards do not make a statement defamatory.

Grappelli v Derek Block (Holdings) Ltd, 1981 – Innuendo must arise at the time of publication (434)



Reference to the claimant

If the judge decides that the words are capable of bearing a defamatory meaning, he must then consider whether the words are capable of referring to the claimant. This again is a question of law. If he finds the answer to be yes, he must leave to the jury the question: 'Do the words in fact refer to the claimant?' This is a simple matter where the claimant has been referred to by name, and until recently the rule was that an author used a name at his peril if it turned out that it could reasonably be taken to refer to the claimant. Indeed the more obscure the name selected, the greater the chance of success of a claimant who bore that name should he sue for libel. It is not uncommon to attach a disclaimer at the beginning of a work of fiction: 'The persons and events described in this book are wholly imaginary', but it is doubtful whether this affects the author's liability.

Hulton v Jones, 1910 – Do the words refer to the claimant? (435)



The practical restriction on so-called 'gold-digging' actions was the power of the jury to award contemptuous damages of a farthing (when that coin was in existence), but the costs involved in defending an action might well lead a defendant to settle out of court for a substantial sum. The position has been modified by the Defamation Act 1996, ss 2–4, which provide for an offer of amends.

It sometimes happens that a whole class of persons is the subject of a defamatory statement. Here a member of the class may only sue if he can show that he himself is the person pointed out by the defamatory statement.

Knupffer v London Express Newspaper Ltd, 1944 – A class libel fails (436)
Schloimovitz v Clarendon Press, 1973 – How 'Jew' was defined (437)



Words may, of course, be defamatory of the claimant without his being mentioned by name, if the statement can be shown to apply to him (see *Youssouppoff v M-G-M* (1934)).

The defendant's motives are generally immaterial. The most laudable motives will not by themselves prevent a defamatory statement from being actionable. But where the defendant puts his motives in issue, as where he pleads fair comment or qualified privilege, or relies on ss 2–4 of the Defamation Act 1996 (unintentional defamation), the claimant may then prove the malice of the defendant, or improper motive, to rebut the defence.

Defences

There are certain special defences which are peculiar to an action for defamation, but these defences do not preclude a defendant from denying in addition that the words are defamatory, or asserting that they do not refer to the claimant, or that they were not published.

Justification

There is no burden of proof on the claimant to establish that the defendant's statement is untrue; all the claimant has to do is to prove publication plus the defamatory nature of the statement. However, as the essence of defamation is a false statement, a defendant may always plead the truth of the statement as a defence in civil proceedings (but not in an action for criminal libel, where the rule is: 'The greater the truth, the greater the libel', since true libels are more likely to influence passions). If the statement is true, no injury is done to the claimant's reputation; it is simply reduced to its true level. It does not matter that the statement was made maliciously or even that the defendant did not believe it to be true; so long as it is true the defence of justification is complete.

In the defence of justification the defendant asserts that the statements are 'true both in substance and in fact'. He must show not merely that the words are literally true, but also that there are no significant omissions which would affect the truth of the statement taken as a whole. If, however, the statement is essentially true, an incidental inaccuracy will not deprive the defendant of his right to justify.

Alexander v The North Eastern Railway Co, 1865 – The defence of justification (438)



However, that which is proved to be true must tally with that which the defendant's statement is interpreted to mean. Thus in *Wakley v Cooke* (1849) 4 Exch 511 the defendant called the claimant 'a libellous journalist'. The defendant proved that the claimant had had