

An Overview of Defamation*

(Or how not to get sued for your social media rants)

I. Introduction

1. Of all the weapons man could invent, the most terrible – and the most powerful – was the word.¹ In today's digital era, statements made on social media can be easily shared, forwarded, and reposted, making social media sites a breeding ground for rumours and falsehoods. The recent allegations concerning Ivan Lim, his decision to stay the course, and then to suddenly recant shows that sometimes, indeed, the pen is mightier than the sword. More recently, Daniel De Costa, a political commentator for The Online Citizen, including its editor, Terry Xu, was charged with criminal defamation. But this article is not about politics. It is about giving a brief overview as to how the tort of defamation operates. Along the way, the article will highlight certain points for consideration, and also explain the measures that the reader can take to avoid being sued for defamation, including the defences available.

II. Discussion

A. What is Defamation?

2. Generally, defamation is the communication of a false statement about another that unfairly harms his or her reputation. Defamation can take two forms, either by way of spoken words (“**slander**”) or written words (“**libel**”).² Notably, defamation can also be considered a criminal offence where one has the intent of harming the reputation of the accused.³ The focus in the present article will however not be on criminal defamation – it will instead focus on civil, in particular, *written* defamation.

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¹ Paulo Coelho, Best-selling Author, *The Alchemist*.

² Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2015), [12.003].

³ Penal Code (Cap 224, 2008 Rev Ed), s 499.

B. Elements Of Defamation

3. As a general guide, three elements are required in order to successfully bring a claim in defamation.⁴ First, the statement in question must be defamatory in nature. To ascertain whether a statement is defamatory, the court will consider whether the statement tends to lower the victim's reputation in the estimation of right-thinking members of society generally.⁵ This means that the statement must either cause the victim to be shunned by society in general, or expose him to ridicule (see, *e.g.*, *Berkoff v Burchill*,⁶ where the victim was said to be uglier than Frankenstein's monster).

4. Notably, the test is objective. What matters is how your statement is seen from the eyes of a reasonable member of society, and the fact that you did not intend to defame the victim is irrelevant.⁷ Thus, if you post a statement on Facebook stating that "Company X cheated me of my money – don't buy from them!", it is likely that the court will find that, from the perspective of a reasonable Singaporean, Company X's reputation has been lowered, and so such statements would be viewed as defamatory. By contrast, statements which are light-hearted, jocular in nature, and replete with slang phrases, are unlikely to be taken seriously by a reasonable audience, and consequently, the court.⁸ To be prudent therefore, when making jokes or side comments about others, you should always ensure that the statement is phrased in such a way that there is no doubt that it was intended as a joke.

5. Second, the statement must refer to the person bringing the suit. For instance, a book that accuses the victim of being a thief by referring to him by name or a picture would satisfy this requirement.⁹ Nevertheless, an explicit reference is not necessary for the purpose of identifying the relevant victim. For instance, in *Review Publishing v LHL*,¹⁰ while the post there referred only to "Singapore's great and good", it was understood

⁴ Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2015), [12.009].

⁵ *Sim v Stretch* [1936] 2 All ER 1237, 1240.

⁶ *Berkoff v Burchill* [1996] 4 All ER 1008.

⁷ *Sim v Stretch* [1936] 2 All ER 1237, 1240.

⁸ Gary Chan, "Reputation and Defamatory Meaning on the Internet" (2015) 27 SAclJ 694, 709. See *Chambers v Director of Public Prosecutions* [2013] 1 WLR 1833, 1844, where a Twitter post that read, "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!" was ruled not to be defamatory.

⁹ *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

¹⁰ *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

that the post was alluding to both the former and current Prime Ministers of Singapore (*i.e.*, Lee Kuan Yew and Lee Hsien Loong), although not explicitly named.

6. Third, the statement must be published or conveyed to a third person. Thus, if you have published the statement on a webpage inaccessible to the public, or the statement has only been read by the defamed, this requirement will not be met.¹¹ Ideally, therefore, there must be evidence that the statement in question has been read by others. Of course, one way to ensure the privacy of your statements online would be to limit the privacy settings of your post, but notably, even though the risk of getting caught for defamation decreases, once the offending statement is made privately to any third party, this would still suffice for the purposes of fulfilling the requirement of publication. The extent of publication would however affect the quantum of damages awarded to the victim.
7. A person who has been defamed (*i.e.* the victim) can launch a suit against the defamer. Simultaneously, as defamation is a criminal offence¹² as well, the victim can also lodge a police report in conjunction with the civil suit.

C. Certain Areas of Difficulties

8. There are however certain areas of difficulties – particularly in the context of group or virtual defamation, and other seemingly innocuous matters like unfavourable reviews.
9. In the case of group defamation, in order for the entire group of individuals to be able to bring a defamation suit, the mass emails or posts must be understood to have targeted every member of the group.¹³ For instance, if A, a travel agency, spreads false rumours with respect to B's fraudulent business practices on a private Facebook group for travel agents, A would be considered to have defamed all of B's employees.¹⁴ This is so, even if the group is private in that only group members may view the posts. As mentioned above, the fact that third parties are able to view the offending statement would fulfil the requirement of publication. Thus, if the statements were found to be patently untrue or malicious, A would be found liable for defamation.

¹¹ *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 (citing Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2nd Ed, 2005) at para 5.04).

¹² Penal Code (Chapter 224) Rev Ed 2008.

¹³ *Aspro Travel Ltd v. Owners Abroad Group Plc* [1996] 1 WLR 132.

¹⁴ *Aspro Travel Ltd v. Owners Abroad Group Plc* [1996] 1 WLR 132.

10. Nevertheless, if mass emails were sent only to B's employees by an employee of A accusing them of stealing customers, this would unlikely be considered defamatory. This is because given that the recipients are all employees of (and therefore, agents of) B, the requirement of publication (to a third party) is not fulfilled. In such a case, B's employees may wish to seek recourse against A's employee (and not the company since it was a personal act) by applying for a protection order¹⁵ if they had received multiple emails. The protection order prohibits the perpetrator from sending further emails.
11. Statements made in the virtual world can also be defamatory. For some virtual games, the terms of service prohibit the participants from posting defamatory statements, and the consequences for those users who post defamatory remarks include suspension or termination of their accounts.¹⁶ Nevertheless, it should be noted that the law is only concerned with the reputation of the user, and not that of the avatar. Therefore, it must be shown that the defamatory words would lower the reputation of the user, and this can be done through establishing a linkage between the user and avatar, presumably where users link their avatars to real-life profiles on social media.¹⁷
12. As for negative reviews, it comes as no surprise that given the increasing use of online (feedback) platforms such as TripAdvisor, disputes often arise when owners of certain establishments come across unfavourable reviews of their businesses. Amy's Baking Company (made infamous on Kitchen Nightmares) is but one example.
13. In such a case, an unfavourable or negative review may be considered defamatory where it, for instance, identifies the business and causes it to be generally viewed as unfavourable by society. If the review was posted on a website or social media, it would also fulfil the publication requirement, regardless of the number of people who have read it. Consequently, if the negative reviews have resulted in losses to the business, the owner may sue the reviewer for monetary compensation and furthermore seek an injunction against any further negative reviews. This is however, of course, subject to any available defences, such as the defence of justification or fair comment.

¹⁵ Protection from Harassment Act (Chapter 256A, Rev Ed 2015).

¹⁶ Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet" (2015) 27 SAclJ 694, 707.

¹⁷ Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet" (2015) 27 SAclJ 694, 708.

D. What Can One Do If Sued For Defamation?

14. If you are being sued for defamation, but did not intend the statement to be defamatory, the first thing you should consider is to make amends. This is otherwise known as an Offer of Amends, and can be done by publishing a correction to the relevant statement, which should also include a public apology to the victim.¹⁸ If the victim accepts the offer, he or she will no longer be allowed to pursue any further legal action against the statement-maker. Nevertheless, an apology may not always be sufficient to avoid a defamation suit. As such, the reader may wish to consider the following defences, *i.e.*, the defence of justification, fair comment, or innocent dissemination.

15. With respect to the defence of justification, as long as you have told the truth, that will be a complete defence to any action for defamation.¹⁹ In this regard, the defence will succeed so long as you prove that the gist (or the “sting”) of the allegation is true. To elaborate, if you were to accuse A of stealing \$50 from you, the “sting” of the allegation is really that A has stolen money from you, so it would probably suffice if you could prove that A has actually stolen money from you. Of course, the greater the variance in numbers or accuracy, the lower your chances of success will be – the court may, for instance, characterise the sting of the allegation as being that A has stolen a *substantial* sum of money from you, as opposed to merely a sum of money.

16. The defence of fair comment, by contrast, recognises that every individual is entitled to an opinion, even if that opinion may prove to be wrong. The requirements are that the statement must be based on true facts (that a reasonable person can honestly make in an unbiased manner), and only if the statement relates to a matter of public interest.²⁰ It might be pertinent to note that statements posted under the “comments” section of social media are generally treated as statements of opinion,²¹ and so it would be wise for social media users to be careful with what they post online.

17. Finally, the defence of innocent dissemination applies to third parties who distribute defamatory material. For this to succeed, it must be shown that you did not and could

¹⁸ Defamation Act (Chapter 75, Rev Ed 2014) (“Defamation Act”), s 7.

¹⁹ *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004.

²⁰ Defamation Act, s 9. See also *Chan Cheng v Central Christian Church* [1998] 3 SLR(R) 236.

²¹ *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52, [141].

not have known that the publication was defamatory. Unfortunately, as a general rule, the defence will not cover the sharing or retweeting of a defamatory social media post, since most persons who re-share such posts would know of the contents of what they are reposting. Nevertheless, as mentioned above, you might be able to show that any defamation was innocent, and so make an offer of amends. The takeaway is that you should always read any content carefully before sharing it on social media.

III. Conclusion

18. The widespread nature of social media has undoubtedly made it a lot easier for one to be liable for making a defamatory statement, and it is therefore important that you take the necessary precautions to guard against this. Some general tips to avoid making any defamatory statements would be to keep away from controversial topics, to convey your meaning in precise terms, and to ensure the information that you post is factually and reliably true, while avoiding any post when you are angry or emotional. Further, if you think you have made a statement that unwittingly defames another, you may wish to take the post down or edit it further. If accused of defamation, you can apologise and correct the statement immediately. This does not mean you should always back down – if you are justified in what you have said, the law will back you up instead.

19. If you are unsuccessful in establishing any defences, the worst-case scenario would be having to pay monetary compensation, otherwise known as damages. The amount of compensation awarded will likely depend on the gravity of the statement and the effect that it had on the victim.²² For instance, if you have made a Youtube video criticising a member of the public, the number of views may be taken into consideration when assessing the quantum of damages. All hope is however not lost – in reality, it may not always be feasible for a victim to sue for defamation as the costs of a lawsuit may often greatly outweigh the monetary compensation. Moreover, as stated above, if you have offered an apology to the victim at the earlier opportunity, you could always apply to court to reduce the quantum of damages payable.²³

²² Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2015), [13.123].

²³ Defamation Act, s 10(1).

20. Aside from damages, a victim may wish to seek an injunction against the defamer.²⁴ There are two types of injunctions – prohibitory and mandatory injunctions. The former would prohibit the defamer from posting further defamatory statements, while the latter would force the defamer to retract any offending statements. Both injunctions can be pleaded together. Nevertheless, in other instances where the quantum of compensation is likely to be low, there may be other appropriate remedies. The victim may, for instance, seek relief by way of a protection order. This would be a cheaper option if the defamatory statements pertain to relatively trivial matters.

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²⁴ Protection from Harassment Act (Chapter 256A, Rev Ed 2015).