

Case Study on tort of Defamation

(Relevant to AAT Examination Paper 6: Fundamentals of Business Law)

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There has been an increase in the number of defamation cases which have gone to court. In the two scenarios cases that follow, both of which are taken from recent court cases, we can see examples of legal issues in defamation and how one can approach them. Hopefully this will improve your technique in answering problem-solving type questions.

First to refresh your memory, in defamation:

1. The plaintiff has to prove
 - a. the statement is defamatory and it refers to him
 - b. there is publication of the statement
 - c. whether there should be special damages for slander.

2. The defendant can defend by showing the statement is
 - a. justified (defence of justification)
 - b. a fair comment
 - c. made on a privileged occasion which can be
 - i) absolute privilege
 - ii) qualified privilege
 - d. retracted and section 4 of the Defamation Ordinance is complied with, in the case of a newspaper defendant

But the plaintiff can defeat defences 2b and 2c(ii) by proving malice on the part of the defendant in making the statement.

3. The plaintiff can claim damages if he succeeds; there is more than one kind of damages.

CASE 1

A representative from an accounting firm (who graduated from the AAT 20 years before) told a prospective SME client: "I have read your company's books. Though your accountant is a CPA, he has not served you well. See, he took so long to finish the audit work. He has written off accounts receivable, messed up stock and your company had to pay more tax. From my experience in this field, I think his performance is less than professional."

Are the statements defamatory?

A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: see *Gatley on Libel and Slander* (10th ed) at para.2.1. A person's reputation is not confined to his general character and standing but extends to his trade, business or profession, and words will be defamatory if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional

activity.

Need to prove damage

Generally a slander case has to prove special damage. There is an exception in section 23 of the Defamation Ordinance:

"In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

This may save the CPA from proving special damage.

Is any defence available?

The fair comment defence is not available here. Check your book or notes to see why. If the case appears in examination you should explain it briefly.

Qualified privilege may be relevant here. There are two types of qualified privilege. In the first, the maker of the statement is under a legal, social or moral duty to make the statement and the recipient has a corresponding interest to receive it. In the second, the maker of the statement is acting pursuant to his interest and the recipient has a corresponding interest or duty in relating to the statement; or the maker is acting in a matter in which he has a common interest with the recipient.

In both cases, there must be reciprocity of interest. "Interest" is not construed in a technical sense here but in the broadest popular sense. This occurs when we say a man is interested in knowing a fact – not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news.

Do you think the circumstances the statements were made in fall into either type of qualified privilege? The answer is probably yes for the first type but it is arguable both ways for the second. You will have to explain further in your script.

Has there been any malice?

The rationale behind qualified privilege is that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. If a person's dominant motive is not to perform this duty or protect this interest, he is outside the ambit of that defence. He can however show to the court he genuinely believes (even if stubbornly) what he uttered. This would impact on what the court thinks his dominant motive was.

So you can see this is not an open and shut case as it first appears. You should form a view to the outcome and justify it by sufficient explanation.

(Note: in the fair comment defence there is a similar but not identical concept of malice.)

CASE 2

Defame Daily is a newspaper with a wide circulation. One day it ran a front page story 'Solicitor feared to have absconded with clients' funds'. There was also a photo of the front of an office bearing the name 'Money Ho & Co' next to the story. The newspaper published the article based on information given by a caller to its hotline but it did not verify the facts. Later it found it had made a mistake and immediately published an apology. The sole proprietor of the firm Money Ho was pregnant during this period. She was depressed and this led to a pre-term delivery. She sued for libel and the Defame Daily paid \$1m to the court "by way of amends".

Is the statement defamatory?

For a solicitor who has to deal with clients' money daily, honesty and integrity are prerequisite. One can think of very few defamatory statements more serious than these.

Is the statement actionable?

Libel is actionable *per se*, without proof of any special damage.

Defence

Can Defame Daily rely on section 4 of the Defamation Ordinance as its defence to libel? There are several criteria to consider here:

1. the libel was inserted in the newspaper without actual malice', which will not be the case if:
 - a. the article had been inserted without an honest belief in its truth, or
 - b. in knowing indifference to whether it be true or false, or
 - c. the person responsible had purposely abstained from making inquiries which would have revealed the truth, or
 - d. he had deliberately stopped short in his inquiries in order not to ascertain the truth
2. the libel was inserted in the newspaper without gross negligence; and
3. there was an apology before the commencement of the action or at the earliest opportunity afterwards
4. the newspaper has paid money into court by way of amends

From the facts given do you think Defame Daily can satisfy all the criteria? Why or why not?

Damages

Ho has probably suffered, mentally and physically, more than a usual libel victim because of her pregnancy. Is her damage too remote to be compensated? The thin egg shell skull rule provides the answer. You should be able to explain what the rule is. The rule applies to negligence as well as defamation.

What head of damages is Ho entitled to? The commonest head is ordinary damages. Less common types are aggravated and exemplary damages. The last type is special damages that compensate expenses incurred. In an examination you have to set out in more details of the type that you think is more appropriate.

1. Ordinary damages; the objectives are to:

- a. console the plaintiff for hurt and distress suffered
- b. repair the damage done to his reputation
- c. vindicate his reputation

In assessing the amount the court will consider:

(1) Gravity of the libel:

This particular libel cast doubt on integrity, which is the cornerstone of a lawyer's profession.

(2) Plaintiff's reputation:

Does she have a good reputation?

(3) Prominence and circulation of the article:

This newspaper had a wide circulation, and the articles was on the front page.

2. Aggravated damages:

a. Conduct of defendant :

Was an apology published, or was the defamatory statement repeated?

b. Conduct of case

c. State of mind: evidence of malevolence/spite?

3. Exemplary damages: was the defendant motivated by a cynical calculation that the publication was to his mercenary advantage?

4. Special damages: financially measurable damages (e.g. medical bill)

In regular class you should have learned the principles in awarding ordinary, aggravated and exemplary damages. In the examination, you will have to explain these if damages are an issue (they usually are if there is no valid defence) and form a view as to which type(s) of damages apply.