

Comparative Analysis of Defamation Laws in England and USA

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Abstract: This paper explores the term Defamation and provides a comparative analysis of the defamation laws in England and USA. The similarity and important differences between the laws of the countries are highlighted. The object of the study is to examine the difference between libel and slander, and how the laws deal with the two components of defamation. It aims to critically analyze the legal jurisprudence developed on the issues.

Index Terms – elements, libel, slander, comparative analysis, important differences

I. Introduction

The law gives protection to a man's reputation, which is held as something even dearer than one's own life by some. Defamation in terms of law, is committing any act of imputation which amounts to defaming an individual and it is done so with necessary mens rea. Defamation is a creation of English law and the classical definition of the term, was given by Mr. Justice Cave in the case of Scott v. Sampson, as a "false statement about a man to his discredit".¹ Similarly, according to Salmond the wrong of defamation, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The act of defamation, which causes an injury to an individual's reputation, is considered both a crime and a civil wrong. The law of civil defamation, as like English and other common law countries, is uncodified in India and it is largely based upon case laws. The law of criminal defamation on the other hand is codified in the sections 499 to 502 of the Indian Penal Code.

Section 499 of the Indian Penal Code makes the act of defamation a criminal offence. It states that, "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, of defame that person."

II. Libel and Slander

The Indian Penal Code makes no distinction between the written and spoken definition and the term "defamation" includes both libel and slander. The common law of England distinguished between libel and slander in various aspects, but in India no such distinction has been made between libel and slander. Libel and slander are legal subcategories of defamation; however the damages recoverable in libel and slander are different.²

According to the English Common Law, Defamation may be committed in the following two ways:

1. **Slander:** It is spoken defamation and the means of imputation is speech. Various forms have been attributed to slander; it may be committed by representations or in other manners which are treated as equivalent to speech, like shake of the head, nod, winking, hissing, and many others.³ Slander is a false and defamatory statement by spoken words or gestures tending to injure the reputation of another. It is a civil wrong only; though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene or as being a solicitation to commit a crime or contempt of court.
2. **Libel:** It is written defamation which may assume various forms, like physical symbols, statues, effigies, picture, caricature, wax model, etc. The libelous statement must be in a printed form, e.g. writing, printing, pictures, cartoons, statue, waxwork effigy etc. Lopes J., in Monson V. Tussauds

¹ Scott v. Sampson, (1882) QBD 491

² S.K. Desai and Kumud Desai, Ramaswamy Iyer's The Law of Torts, Seventh Edition, 1975, Bombay.

³ David Price and Korieh Duodu, Defamation: Law, Procedure and Practise, Sweet and Maxwell, Third Edition, 2004, London.

points out that libels need not always be in writing. It may be conveyed in some other permanent form as a statue, a caricature, an effigy, chalk mark on a wall, sign or pictures.⁴ The libel differs from slander in its procedure, remedy and seriousness. In common law, a libel is a criminal offence as well as a civil wrong.

The distinction Slander and Libel can be expressed better in a tabular format:

No.	Slander	Libel
1	Slander defamation in transient form e.g. spoken words or gestures	Libel is defamation in some permanent form e.g. a written or printed form.
2	At Common Law, a slander is a Civil Wrong only.	At Common Law, a libel is a Criminal offence as well as Civil wrong. Under Indian Law both libel and slander are criminal offences.
3	At Common Law, a slander is actionable only when special damage can be proved to have been its natural consequences or when in	A libel is by itself an infringement of a right and no actual damage need to be proved in order to sustain an action in the Court of Law.
4	A slander does not conduce to a breach of peace. However, Indian legal system does not recognize this distinction.	A libel conduces to a breach of peace.
5	Slander may be uttering or words in the heat of moments and under a sudden provocation	Libel shows a greater deliberation and raises a suggestion of malice
6	In every case of publication of slander, the publisher acts consciously and voluntarily, and must necessarily guilty.	The actual publisher of libel may be an innocent person and therefore not liable.

III Comparative analysis of the laws of England and USA

England and the United States share a common legal tradition that has been shaped by principles dating back at least 800 years to the time of the Magna Carta. Even after the American colonies declared their independence from England in 1776, English law was still widely followed in the new nation unless it was inconsistent with American institutions or new ideas. As late as 1964, American libel law was essentially “identical” to English libel law because until the mid-twentieth century, defamation law in both countries was defined “mainly by the common law and decisions of the courts,” rather than by statutes, American constitutional principles, or the United Kingdom’s recognition of freedoms guaranteed by the European Convention on Human Rights (ECHR). However, during the past half-century, the paths of England and the United States have significantly diverged in the field of defamation. So great are the differences that in recent decades United States courts have refused to enforce English judgments arising from claims for libel and slander.⁵

English Law

The Defamation Acts of 1952 and 1996 are the important statutes in England that lay down the law related to defamation. Under English law, there is a distinction between libel and slander. Two reasons have been accorded. Firstly, libel not slander is punishable under Criminal law. In fact, slander is no offence. Thus,

⁴ W. V. H. Rogers, Winfield and Jolowicz on Tort, Sweet and Maxwell, Seventeenth Edition, 2006, London

⁵ On Libel And The Law, U.S. And U.K. Go Separate Ways". *NPR.Org*, 2018, Accessed 1 Apr 2018.

libel is always actionable per se. Secondly; in most cases of slander “special damage” must be shown. As far as law of torts is concerned, slander is actionable, only in exceptional cases on proof of special damage. Thus, in England slander is only a civil wrong. However, it is to be noted that civil action is more onerous than criminal action.⁶

The United States of America

In United States (US), defamation law is much less plaintiff friendly as compared to its European counterpart due to the enforcement of the First Amendment. (Freedom of religion, press, expression. Ratified 12/15/1791). The United States in 2010 passed a law commonly referred as the “SPEECH Act.” that law prohibits American courts from recognizing or enforcing foreign judgments for libel and slander obtained under laws that do not provide as much protection for speech and press as is afforded by the first amendment of the United States Constitution and by the laws of the state where enforcement is sought.⁷

Similarities between the laws

1. Substantially true” statements are not actionable.
2. A defamatory communication must have been published to a third person other than the plaintiff.
3. Whether an assertion is defamatory is determined from the perspective of a reasonable person.
4. Printers, distributors, and sellers of publications are not liable for defamation if they are unaware of a publication’s libelous content.
5. In limited circumstances, liability is imposed for failure to remove a defamatory statement posted by another.
6. Aggregate communications are governed by a single publication rule for purposes of the statute of limitations.
7. The originator of a defamatory utterance may be responsible for damages caused by foreseeable republication, and thus the sender of a defamatory letter may be liable for publishing its contents to a third person other than the addressee who foresee ably reads the letter.
8. Slanderous imputations of a serious criminal offense or incompetence in business, trade, or profession may be actionable without proof of special damages.⁸

IV Important Differences

One of the major differences between English and American defamation law relates to the governing provisions. In England, a unified body of common law and statutory principles governs all libel and slander cases. In contrast, in the United States, tort law is mainly state law, and therefore it differs to some extent throughout the fifty states and the District of Columbia. Consequently, it is sometimes easier to speak confidently about the substance of English law than to summarize the content of the corresponding American principles. There are important differences between English and American law relating to the burden of proof on truth or falsity; the need to establish culpability; the action ability of opinions; the significance of a statement’s relationship to a matter of public interest; the availability of jury trials; and the scope of remedies.⁹ In the following sections the important differences are explained:

A. Basic Choice of Values

English defamation law is in many respects pro-plaintiff, whereas American defamation law is largely pro-defendant. This is true because of a choice of values. In any society, the law governing defamation reflects “the assumptions of that society respecting the relative importance of an untarnished reputation, on the one hand, and an uninhibited press, on the other¹⁰.”

1. English Law is Pro Reputation, Pro Plaintiff

⁶ "Libel And Slander". *Law Society Gazette*, 2018, www.lawgazette.co.uk. Accessed 5 Apr 2018.

⁷ "Defamation Laws In The United States". Kelly / Warner Law | Defamation Law, Internet Law, Business Law, <http://kellywarnerlaw.com/us-defamation-laws/>. Accessed 6 Apr 2018.

⁸ "Libel Vs Slander - Difference And Comparison | Diffen". Diffen.Com, [www.diffen.com/difference/Libel vs Slander](http://www.diffen.com/difference/Libel%20vs%20Slander). Accessed 5 Apr 2018.

⁹ "Defamation Laws And Judicial Intervention: A Critical Study". Indian Law Institute, 2016, <http://ili.ac.in/pdf/paper10.pdf>. Accessed 3 Apr 2018.

¹⁰ Reynolds v. Times Newspapers Ltd., [2001] AC 127 (HL) 210

English defamation law places a priority on protecting the reputations of potential plaintiffs. That choice is today anchored in the text of the European Convention on Human Rights (ECHR) and in the United Kingdom's Human Rights Act.¹¹

2. American Law is Pro Speech, Pro Defendant

In contrast to England, the United States has decided—in a wide range of cases involving matters of public interest—that free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood.

B. False and Faulty

As indicated above, England and the United States agree that a plaintiff cannot prevail in a libel or slander action based on an expressed or implied statement that is true or substantially true. However, the two countries differ as to whether the plaintiff or defendant has the burden of proof regarding the truth or falsity of the defamatory statement, and whether the plaintiff must show that the defendant was at fault as to the falsity of the statement (i.e., acted knowingly, recklessly, or negligent).

1. Presumed Falsity versus Presumed Truth

In England, the falsity of a defamatory statement is presumed, and truth is a defence to be pleaded and proved by the defendant. In contrast, in the United States, there is generally no presumption that a defamatory statement is false. Rather, the plaintiff must prove the falsity of the charge. This makes it difficult for a plaintiff to prove libel or slander under American law.¹²

2. Strict Liability versus Fault as to falsity

English law is favourable to libel and slander plaintiffs not only because defamatory statements are presumed to be false, but because defendants are held strictly liable, if no affirmative defence is established. It is not necessary for a plaintiff to prove that the defendant knew that the defamatory statement was false or even acted recklessly or negligently with respect to truth or falsity.

From an American perspective, strict liability is rarely imposed in tort actions under American Law and the defendant should be strictly liable is normally not a viable option. The idea of imposing strict liability for oral or written statements is startling to Americans because such liability would pose a serious threat to the principles of free speech and free press that are enshrined in the first amendment to the United States Constitution. In regard to speech about matters of public concern, imposing strict liability would chill free expression and run counter to America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."¹³

3. Categorically bright lines versus balancing

Today, in the United States, defamation cases are divided into three categories, and the applicable category determines what level of fault as to falsity the plaintiff must prove. In the first category—actions by public officials or public figures suing with respect to matters of public concern, such as their conduct, fitness, or qualifications—the plaintiff must prove what is called "actual malice." In American law, "actual malice" is a special term which means that the plaintiff must show the defendant acted with knowledge of falsity of the defamatory statement or reckless disregard for whether it was true.¹⁴ In the second category of American cases—actions by private persons suing with respect to matters of public concern—the federal Constitution requires proof the defendant was at least negligent as to the falsity of the defamatory utterance. States are free to impose a higher

¹¹ Johnson, Vincent R. "Comparative Defamation Law: England And The United States". University Of Miami Law School, 2017, <https://repository.law.miami.edu/cgi/viewcontent/article>. Accessed 3 Apr 2018.

¹² Christie, George C. "Defamation Opinions And The Restatement (Second) Of Torts". Scholarship.Law.Duke.Edu, https://scholarship.law.duke.edu/cgi/viewcontent.faculty_scholarship. Accessed 3 Apr 2018.

¹³ Supra Note 17.

¹⁴ New York Times Co. v. Sullivan, 84 S. Ct. 710, 726 (1964)

standard for fault as to falsity, though courts only occasionally do so.¹⁵ Finally, in the third category of cases—actions involving any person suing with regard to a matter of purely private concern—the United States Supreme Court has not yet ruled on what level of fault as to falsity is constitutionally required. In the absence of guidance from the Supreme Court, many states require proof the defendant was negligent as to the falsity of the defamatory statement. The constitutional requirement that a defamation plaintiff prove actual malice or negligence as to falsity “has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff.”¹⁶

In contrast, English law has rejected the use of categories in defamation cases. As explained by the House of Lords, “a test expressed in terms of a category of cases, such as political speech, is at variance with the jurisprudence of the European Court of Human Rights which in cases of competing rights and interests requires a balancing exercise in the light of the concrete facts of each case.” From an American perspective, that type of search for perfect justice by a careful, fact-specific balancing in every suit undermines the certainty of the law. Because there are no bright lines, the media and other potential defendants are deprived of fair notice as to whether their statements will give rise to liability because everything depends on the facts and how they are later weighed.¹⁷

C. Statement of Opinions

England and the United States both struggle with the issue of whether statements of opinion can form the basis for a defamation action. Both countries recognize that some comments cloaked in the language of opinion are really statements of fact, or imply facts, and are therefore actionable if the asserted or implied facts are false. Both countries also recognize that some comments expressing opinions are not actionable. However, England and the United States differ in where they locate the relevant legal analysis, and how they define its operative terms.¹⁸

In the United States, the analysis is usually part of the plaintiff’s prima facie case, for in a tort action based on expression, the federal constitution requires the plaintiff to prove that the defendant published a false statement of fact. Thus, if there is an issue as to whether an opinion was really an assertion of fact, or implied false facts, the plaintiff bears the burden of proof, and the risk of non-persuasion.¹⁹

In contrast, in England, the issue is normally addressed in the context of an affirmative defence that allows the defendant to escape liability for certain statements of opinion. Thus, in England, the burden of proof and risk of non-persuasion fall on the defendant.²⁰

D. Matters of Public Interest

England and the United States differ greatly on the significance of a defamatory statement’s relationship to a matter of public interest. In England, that connection may constitute a complete defence to a claim for libel or slander. In the United States, in contrast, the connection between a defamatory statement and a matter of public interest rarely immunizes a defendant from liability. Instead, it requires a libel or slander plaintiff to satisfy more demanding requirement in order to prevail.²¹

1. The Reynolds Privilege

In 1999, in *Reynolds v. Times Newspapers*²², the House of Lords adopted “a qualified privilege for ‘responsible reporting’ on matters of public interest.” That qualified privilege for “responsible journalism” was an important exception to the strict liability principle of English libel law requiring that “a defamatory statement must be proved true to avoid liability. The Reynolds privilege was

¹⁵ *Poyser v. Peerless*, 775 N.E.2d 1101

¹⁶ *Supra* Note 18.

¹⁷ *Reynolds v. Times Newspapers Ltd*, [2000] H.R.L.R. (HL) 134

¹⁸ *Joseph v. Spiller*, [2011] 1 A.C. 852, at para. 17

¹⁹ *Cf. Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988)

²⁰ *Supra* Note 17

²¹ *Edwards v. National Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977)

²² *Reynolds v. Times Newspapers*, [1999] 4 All E.R. 609 (H.L.)

significant because if a journalist's publication of a statement turned out to be false, the publication was "nevertheless protected so long as [the journalist] had acted responsibly.

2. The 2013 Statutory Public Interest Defence

The meaning of "public interest" is not defined in the Defamation Act 2013, and has been left to judicial interpretation.²³

E. Liability of Website Operations

England and the United States have enacted legislation to address the question of who bears liability for web-based publications. In England, the Defamation Act 2013 creates two defences that insulate website operators from liability for certain statements posted on their sites. However, these defences are qualified by exceptions and offer less certain protection than the broadly stated immunities that are part of the American Communications Decency Act. As a result, English law on website operator liability is more pro-plaintiff than the parallel provisions in American law.

The Defamation Act of 2013 provides English website operators protection against liability arising from statements on their websites posted by third parties. In cases where the poster is not identifiable by the plaintiff, the effect of section 5 is to encourage website operators voluntarily to disclose the poster's identity and contact details. If the poster of the defamatory statement is identifiable, the website operator can safely leave up such a post, unless and until a court orders its removal, provided that the website operator is not responsible for the posted statement. However, such responsibility might arise where, for example, the website operator had incited the poster to make the posting or had otherwise colluded with the poster.²⁴

In the United States, under section 230 of the Communications Decency Act of 1996, no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This provision has been broadly interpreted as barring defamation and other claims against Internet services and website operators. With respect to actions for libel, section 230 confers broad immunity that is a complete barrier to liability because publication is an essential element of a cause of action. American courts have held that the immunity conferred by the Act is not lost simply because a website operator edits or deletes some of the information that has been posted. The immunity conferred by section 230 does not depend on whether the person who posted information on a website is identifiable. Indeed, the immunity is so broad that website operators have no legal incentive to remove a defamatory posting by a third party, although some do so for business reasons.²⁵

In summary, the American Communications Decency Act broadly insulates website operators from liability, and is essentially pro-defendant. In contrast, England law confers limited immunities on website operators, and to that extent is pro-plaintiff.²⁶

²³ "Defamation Act Of 2013". Legislation.Gov.Uk, 2018, <http://www.legislation.gov.uk>. Accessed 7 Apr 2018.

²⁴ Supra Note 17

²⁵ Communications Decency Act | United States [1996]". Encyclopedia Britannica, 2018, <https://www.britannica.com/topic/Communications-Decency-Act>. Accessed 1 Apr 2018.

²⁶ Supra Note 17.