

Extended material

Chapter 22: Defences

The investigative journalist - practical tips on procedure

Will your witnesses be available to give evidence when the case comes to court, which may be years after the events described in the story? A journalist who intends to use the 'truth' defence must keep track of them, and note their changes of address.

Are they going to be willing to give evidence? Will they turn up at the trial? If they do, how convincing will their version of events sound when tested by expert cross-examination? In Jeffrey Archer's libel action against the *Star* in 1987 the jury preferred the leading Conservative politician's account to that of the prostitute – years later Archer was found to have lied in his evidence and convicted of perjury.

What is the standing of your witness? Juries are said to be likely to accept a police officer's word.

Numerous libel cases have been brought on behalf of police officers after newspapers have published allegations of bad conduct, such as brutality and harassment. Local editors may see it as their duty to publish such stories in the public interest, but they must be aware of the probability that a libel jury will accept a police officer's denial rather than the allegation of the source, who, in the nature of things, may be a person of low social standing, possibly with a criminal record.

Signed statements are important

Journalists working on a story which might be challenged in court should persuade each witness to make a signed statement at the time, and date it. The evidence could also be an audio-recording of a witness willing to testify against the claimant, or even a note of an interview which the journalist has written in his/her notebook and which has then been signed by the witness who gave it.

Better, it could be a statutory declaration from a witness - a more formal statement made before a magistrate, solicitor, or court officer, which carries greater weight in court.

Best, it could be an affidavit, more formal still and sworn on oath. Both affidavits and statutory declarations put the person making the statement at risk of being prosecuted for perjury if he/she is not telling the truth.

The Civil Evidence Act 1995 makes hearsay evidence acceptable in court subject to certain conditions. For practical purposes, where the statement comprises, or is contained in, a document, it must be signed to make it admissible.

Admissibility of photocopied documents

Suppose you are running a story about council workmen fiddling expenses which you got from a photocopy of a confidential council document.

If you can explain why the original is not available, that makes the copy available for evidence. But you would have to persuade the court that the document is authentic – for example, by evidence from someone within the council. The claimant would no doubt challenge its authenticity – although the claimant, if suggesting the document had been 'doctored', could also have to demonstrate that there was a genuine document which differed from that being used by the defence.

Make sure you keep the evidence

A media organisation's case is often weakened because a journalist has failed to observe the basic editorial discipline of keeping a notebook or recordings in good order to prove what someone has said. When journalists have to give evidence, a court will attach weight to a good shorthand note, properly dated.

Keeping a good note or having a recording as proof is particularly important if the 'public interest' defence, explained in *McNae's* chapter 22, is being used in a libel action - for example, to prove that the target of an investigation was given sufficient opportunity to comment.

Also make sure that you only put relevant material into your notebook. Do not fill it with scribbled notes about buying your grandmother's vegetables, meeting girlfriends or boyfriends, and so on, as this sort of material will simply help the claimant's assault on your professional standing if or when a case gets to court. One of the things a claimant is certain to do is to try to persuade a court that the journalist who researched the story is unreliable, does not keep a good or accurate note, and keeps material in such bad order that important information gets lost or goes missing. A messy notebook full of irrelevant material will help the claimant's lawyers do just that.

You should put the date on the page at the start of each day's work, make a note in the front cover of the notebook about when it starts and when you have finished it, and keep notebooks filed in chronological order to ensure that you can find them easily when needed.

Notes of every interview and phone call should be headed with the name, if necessary address and position, and if necessary the phone number of everyone to whom you speak in relation to a story.

Put a line under the notes when you have finished making them. Do not go back and re-edit notes after you have taken them, as a claimant will allege that this means you have added to them or inserted material in an attempt to back up your case.

Case study on accuracy

A report of a court case must be fair and accurate to be protected by either absolute or qualified privilege.

Case study: A news agency libelled a police officer in an inquest report. National News and Photographic Press Agency admitted at the High Court that its coverage of an inquest into the death of a runaway jewel thief was inaccurate. The agency settled a libel action brought by Pc Gorbakhsh Singh. Mr Justice Eady heard that the report was based on an inquest at Westminster Coroner's Court into the death of teenager Mischa Niering who died while attempting to escape from police on a motor scooter following a robbery at Tiffany's jewellers in Sloane Square, London. Pc Singh was one of the officers involved in the police operation, and gave evidence at the inquest which was reported on the National News website. The report was entitled 'Police driver tells inquest how he ran down jewel thief', and began with the sentence: 'A police officer has told how he ran down and killed a teenage jewel thief in a 50 mph chase through residential streets'. It went on to name Pc Singh as this officer. Solicitor Jeremy Clarke-Williams, for Pc Singh, told the High Court: 'This serious and damaging allegation was untrue.' Mr. Clarke-Williams said that a post mortem examination had concluded that Mr Niering was killed by the impact of his motor scooter with a stationary vehicle. 'It is also the case that Pc Singh was not the officer driving the car which was tailing Mr Niering's scooter during the police operation.' National News unreservedly withdrew any suggestion that Pc Singh was responsible for the teenager's death, and had agreed to publish an apology on its website and pay his legal costs, Mr Clarke-Williams added. Kevin Healy, solicitor for the agency, said it apologised unreservedly to Pc Singh (*Media Lawyer*, October 10, 2008)

Privilege at common law

The media can benefit from privilege at common law which applies in certain circumstances where the law protects defamatory statements even though they may turn out to be untrue.

Replies to attacks

There is qualified privilege at common law for a defamatory statement made by a person in reply to an attack upon his/her character or conduct. There would be no privilege for any response wider than necessary to meet the specific allegations which prompted the reply. A media organisation publishing - for example, in a quote or a letter - a person's lawful response to an attack upon by another on his/her character or conduct - would share in the privilege.

Reports of judicial and parliamentary proceedings

There is qualified privilege at common law for fair and accurate reports of judicial proceedings in this country and reports of the proceedings of Parliament, if held in public. If a journalist refers to court proceedings that are not contemporaneous, the report does not attract absolute privilege but the reporter may still be able to plead qualified privilege at common law, as well as statutory qualified privilege, for any defamatory statements in the report.

Schedule 1 to the Defamation Act 1996 – see McNae's 22.7 and on.

Statements having qualified privilege

This is the text of Parts 1 and 2 of Schedule 1 to the 1996 Act, paras 1–16, as amended by section the Defamation Act 2013.

Part 1: Statements privileged without explanation or contradiction

1. A fair and accurate report of proceedings in public of a legislature anywhere in the world.
2. A fair and accurate report of proceedings in public before a court anywhere in the world. [*para. 17 makes clear that this includes the European Court of Justice, the European Court of Human Rights, and any international criminal tribunal established by the United Nations or by an international agreement to which the UK is a party*]
3. A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world.
4. A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference. [*para. 17 limits these definitions to a conference attended by representatives of two or more governments or an organisation of which two or more governments are members, including any committee or other subordinate body of such an organisation*]
5. A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.
6. A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.
7. A fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world.
8. A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference. [*same definitions as for para. 4*]

Part 2: Statements privileged subject to explanation or contradiction

9. (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

- (a) a legislature or government anywhere in the world;
- (b) an authority anywhere in the world performing governmental functions;
- (c) an international organisation or international conference.

(2) In this paragraph 'governmental functions' includes police functions.

10. A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.

11. (1) A fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of—

- (a) a local authority or local authority committee;
- (aa) in the case of a local authority which are operating executive arrangements, the executive of that authority or a committee of that executive;

(b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority;

(c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision, by Her Majesty or by a Minister of the Crown, a member of the Scottish Executive, the Welsh Ministers or the Counsel General to the Welsh Assembly Government, or a Northern Ireland Department;

(d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision;

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision.

(1A) In the case of a local authority which are operating executive arrangements, a fair and accurate record of any decision made by any member of the executive where that record is required to be made and available for public inspection by virtue of section 22 of the Local Government Act 2000 or of any provision in regulations made under that section.

(2) In sub-paragraphs (1)(a), (1)(aa) and (1A) 'local authority' means—

(a) in relation to England and Wales, a principal council within the meaning of the Local Government Act 1972, any body falling within any paragraph of section 100J(1) of that Act or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(b) in relation to Scotland, a council constituted under section 2 of the Local Government etc (Scotland) Act 1994 or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(c) in relation to Northern Ireland, any authority or body to which sections 23 to 27 of the Local Government Act (Northern Ireland) 1972 apply; and

'local authority committee' means any committee of a local authority or of local authorities, and includes—

(a) any committee or sub-committee in relation to which sections 100A to 100D of the Local Government Act 1972 apply by virtue of section 100E of that Act (whether or not also by virtue of section 100J of that Act), and

(b) any committee or sub-committee in relation to which sections 50A to 50D of the Local Government (Scotland) Act 1973 apply by virtue of section 50E of that Act.

(2a) In sub-paragraphs (1) and (1A) 'executive' and 'executive arrangements' have the same meaning as in Part II of the Local Government Act 2000.

(3) A fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another member state.

11A. A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.

12. (1) A fair and accurate report of proceedings at any public meeting held anywhere in the world.

(2) In this paragraph a 'public meeting' means a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public interest, whether admission to the meeting is general or restricted.

13. (1) A fair and accurate report of proceedings at a general meeting of a UK public company.

(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph 'listed company' has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).'

14. A fair and accurate report of any finding or decision of any of the following descriptions of association formed anywhere in the world or of any committee or governing body of such an association –

(a) an association formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate on matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication;

(b) an association formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession, or the actions or conduct of those persons;

(c) an association formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;

(d) an association formed for the purpose of promoting charitable objects or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication.

- 14A. A fair and accurate—
- (a) report of proceedings of a scientific or academic conference held anywhere in the world, or
 - (b) copy of, extract from or summary of matter published by such a conference.
15. (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.
- (2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
16. In this Schedule—‘court’ includes—
- (a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;
 - (b) any international tribunal established by the Security Council of the United Nations or by an international agreement;
 - (c) any international tribunal deciding matters in dispute between States; ‘international conference’ means a conference attended by representatives of two or more governments; ‘international organisation’ means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation; ‘legislature’ includes a local legislature; and ‘member State’ includes any European dependent territory of a member State.

Arbitration in sport

It would appear that decisions and pronouncements of both the International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS), for which it is responsible are protected by qualified privilege under paragraph 4 of Schedule 1, as international organisations – both are based in Switzerland and their jurisdictions is accepted by all the world’s major sporting bodies.

Test whether your story has a defence

Before running any story which might cause trouble, which means virtually any story, you should run through a check to ensure that if challenged you have a defence which will stand up in court.

Journalists have been known to find themselves in libel cases over trivial or silly stories which one would not have suspected would cause problems.

The main defences for the news industry are ‘truth’ - that the story is true, and you can prove it to the satisfaction of a jury or judge; and ‘honest opinion’ - that the story is a commentator’s honestly held view on some issue of public importance or interest.

So when working on stories, it is helpful to ask yourself:

Have you done as much research as necessary? Are there any questions you have not answered, or have not asked, which might throw a new light on a story?

Are your sources reliable? Do they have motives for giving you the story which ought to make you question the accuracy of what they are saying?

Have you put any allegations to the person in question? Failing to do so is almost invariably asking for trouble. Is the story as clearly written as it should be? Journalists have found themselves with legal problems because of bad phrasing - and what the court will judge is what the reasonable man or woman would understand the article to mean, not what you intended it to mean, but did not quite manage to convey.

Have you checked all the facts for yourself? Repeating a libel by simply lifting information from another source without checking it will give a claimant a new cause of action, meaning he or she can sue you as well as the publisher of the original statement – and you will be as defenceless as the original publisher.

If your article is comment, or if it contains comment, is it clear that it is comment? Stating a comment as if it were a statement of fact will cause expensive problems.

Have you kept your notes, research material, and recordings of interviews in good order, together, and properly filed for easy access in case problems arise? Failure to produce notes and so on to support your case will be damaging, possibly fatal, to any attempt to mount a defence.

Make sure you keep the material for as long as necessary. The law permits a claimant to launch a defamation action up to a year after publication of the complained-of matter, and in some exceptional circumstances may be given leave by a court to sue after a longer period.

These might all seem like statements of the obvious but it is surprising how forgetting one or more of these points can lead to trouble.

Defence for website operators

Section 5 of the Defamation Act 2013 provides the operators of websites – including those run by newspapers and other media organisations – with a defence against a libel action over material posted by third parties, such as user-generated content.

Section 5 says it is a defence for the operator to show that it had not posted the statement on the website, but that this defence will fail if the claimant is able to show that he/she was unable to identify the person who posted the statement, had complained to the website operator over the statement, and that the operator had failed to respond to the notice of complaint in accordance with The Defamation (Operators of Websites) Regulations 2013 (SI 2013 No 3028), which came into effect at the same time as the Act itself.

The aim of the defence is to allow the website operator to put the complainant and poster in touch with each other so that they can sort the problem out between themselves.

But if the person who posted the material refuses to engage with this process – for example by refusing to give proper contact details and deal directly with the complainant – then the website operator is obliged to take the material in question down.

Website operators can also choose either to remove a statement immediately on receipt of a complaint, or allow it to remain posted – an operator taking either course of action can then seek to use any of the other defences against a defamation action.

A complainant triggers the process established by the regulations by notifying the website operator of the complaint about the statement – detailing where on the website the statement is posted, what it says and why it

is defames the complainant, explaining the meaning they claim it bears and the aspects they believe are factually inaccurate or are opinions not supported by fact (Regulation 2 and Section 5 (6) of the Act). Complainants must also confirm that they do not have sufficient information about the poster to be able to act directly against him or her.

Complainants must give their names and an e-mail address at which they can be contacted, but can ask the operator not to give this on to the person who posted the material in question.

If a complainant fails to provide all the information required, a website operator wishing to retain the section 5 defence must, within 48 hours of receiving the notice of complaint, let the complainant know, in writing, and detail what is required for a notice to be valid (Regulation 4). This 48-hour deadline excludes non-business days such as weekends.

The operator is not required to specify exactly what it considers is wrong with the complainant's notice – which avoids imposing any obligation on an operator to guide or advise a complainant.

An operator who receives a valid notice of complaint must contact the person who posted the statement within 48 hours (Paragraph 2 of the Schedule to the regulations), and tell the complainant that this has been done (paragraph 4).

But if the operator has no means of contacting the poster by e-mail or another means of private electronic messaging, it must remove the statement within 48 hours and tell the complainant that this has been done (paragraph 3 of the Schedule).

Paragraph 2 of the Schedule details the information the operator must give the poster to enable him or her to respond to the complaint.

The poster must respond by midnight at the end of the fifth day after the day on which the operator sent him or her the information.

The website operator must specify the calendar date on which the deadline expires and ask the poster to confirm within that time whether he or she wants the statement removed and, if not, to give the operator his/her name and postal address and confirm whether he or she agrees to the operator giving this information to the complainant.

Paragraphs 5, 6 and 7 of the Schedule deal respectively with situations where a poster fails to respond within the prescribed time period, or responds but does not give all the information sought, or agrees to removal of the statement.

In all these circumstances the operator must then remove the statement within 48 hours and tell the complainant that this has been done.

In addition, if a poster provides a name and postal address that a reasonable operator would consider to be obviously false, the operator must treat the response as not containing all the required information, and remove the statement.

An operator is taken to have complied with the relevant requirement if a statement is removed before an operator was required to do so (paragraph 1 of the schedule).

Paragraph 8 of the schedule says that if a poster wants the statement to stay on the website and provides the relevant contact details, the operator must tell the complainant within 48 hours that the statement has not been removed and, if the poster agrees, pass his or her contact details on to the complainant.

The operator must also tell a complainant if a poster does not agree to release his or her contact details. Compliance with these requirements gives the operator a defence under Section 5 unless it can be shown that it acted with malice in relation to the posting of the statement.

If a poster does not agree to his/her contact details to the complainant, it is for the complainant to consider what further action he may wish to take – for example by asking the High Court to order a website operator to release the information it has on the poster's identity.

Complainants receive further protection in cases when material is removed following a notice of complaint, but the poster then persists in re-posting the same or substantially the same material on the same website (Paragraph 9 of the schedule).

On the first such occasion the operator must follow the full process and seek the poster's views in order to keep the Section 5 defence.

But an operator told by a complainant that the poster has put the same or substantially the same statement on the website on two or more previous occasions must remove the statement within 48 hours of receiving the notice of complaint without contacting the poster again.

The section 5 defence is also available to the operators of moderated websites – section 5 (12) says: “The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.”

Critics have described the regulations governing the operation of the section 5 defence as cumbersome, bureaucratic and time-consuming.

One media law specialist, solicitor Tony Jaffa of Exeter-based law firm Foot Anstey has suggested that newspapers and media organisations could avoid having to struggle with the section 5 defence if they avoid pre-moderating user-generated content and instead simply remove it immediately they are notified of a problem.

They could then rely on Regulation 19 of the E-Commerce Regulations 2002, which say that a website operator has a defence if it does not pre-moderate or exercise editorial control over user-generated material, and takes material down immediately it is notified that it is alleged to be defamatory.

News organisations which pre-moderate their websites cannot rely on Regulation 19, or the defence of innocent publication in Section 1 of the 1996 Defamation Act, because they have exercised editorial control.

Practical advice on waivers

The defence of accord and satisfaction - explained in *McNae's*, 22.8 - does not depend upon the existence of any formal written agreement, but clearly a media organisation has a stronger case if it can produce a signed paper, known as a waiver

A waiver should be drawn up in the following terms (here in form suitable for newspapers):

'I confirm that the publication of an apology in the terms annexed in a position of reasonable prominence in the next available issue of the [name of paper] will be accepted in full and final satisfaction of any claim I may have in respect of the article headed [give headline] published in the issue of your newspaper for [date].'