

# Unit 2: Laws related to Online Defamation

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#### 1.1 LEARNING OBJECTIVES

After going through this chapter, you should be able to understand:

- The meaning of Defamation
- Ingredients of defamation
- Online Defamation: An Indian Perspective

#### 1.2 INTRODUCTION

Defamation is defined as “an intentional false communication, either published or publicly spoken, that injures another’s reputation or good name.” Defamation includes the common law

torts of libel (involving written or printed statements) and slander (involving oral statements). Significantly, both libel, as well as slander, could be committed via Internet medium.<sup>157</sup>

### **1.3 INGREDIENTS OF DEFAMATION**

Defamation is an intrinsically personal wrong. The gist of defamation is actual or presumed damage to reputation flowing from publication.<sup>158</sup> In other words, defamation flows from publication (or communication) of information. In traditional libel cases “publication” is generally referred<sup>159</sup> to as “the date on which the libelous work was placed on sale or became generally available to the public”. It has the following ingredients:

- a) Publication of a statement;
- b) The statement makes reference to the plaintiff;
- c) Statement is communicated to some person or persons other than the plaintiff himself;
- d) Statement reaches the plaintiff; and
- e) Statement causes actual or presumed damage to the plaintiff.

The question is, does one encounter similar ‘ingredients’ when defamation occurs in Internet medium? Here, the only difference is that the tort of defamation occurs when the defamatory imputation is published in electronic form, everything else remains the same.

### **1.4 IT ALL BEGINS WITH PUBLICATION**

Publication is defined as “the action of making publicly known”. In the context of the Internet, the term publication includes dissemination, transmission and storage of information or data in electronic form.

In order to construe a relationship between defamation and publication in the Internet medium, one may have to answer the following questions:

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<sup>157</sup> Biegel, Stuart, *Beyond our Control – Confronting the limits of our Legal System in the Age of Cyberspace*, MIT Press, London, [2003] at p 82

<sup>158</sup> M, Collins, *The Law of Defamation and the Internet*, Oxford University Press, [2001] p 24.02

<sup>159</sup> *Kenneth Love v William Morrow & Co.*, 193 AD 2d 583; 597 NYS 2d 424 2d Dep’t. [1993]

- 1) When a “publication” takes place (which involves “time of occurrence”);
- 2) How a “publication” takes place (which involves the “mode of publication”);
- 3) Where the publication takes place (which involves issues such as “jurisdiction”);
- 4) Who would be held responsible for the publication of the allegedly defamatory statements (ISP or the website promotor)?

### 1.5 WHEN?

Publication occurs when the contents of the publication, oral, spoken or written are seen and heard, and comprehended by the reader or hearer. From the point of view of the plaintiff, the process of publication is complete, when the communication reaches hi.

For example, In *Godfrey vs Demon Internet Ltd.*,<sup>160</sup> the defendant ISP carried the newsgroup ‘soc.culture.thai’ and stored postings within that hierarchy for about a fortnight during which time the posting was available to be read by its customers. On 13 January 1997 someone unknown made a posting in the US in the newsgroup. This posting was squalid, obscene and defamatory of the plaintiff who was resident in England. On 17 January 1997 the plaintiff sent a letter by fax to the defendants, requesting them to remove the posting from their Usenet news server. The defendants could have obliterated the posting after receiving the plaintiff’s request, but it remained available until its expiry on or about 27 January 1997. The plaintiff claimed damages for libel in respect of the posting after 17 January 1997 – the time when he affirmed to the ISP that the communication had indeed reached him.

Morland J. ruled:

“In my judgment, the defendant, whenever it transmits and whenever there is transmitted from the storage of its news server a defamatory posting, publish that posting to any subscriber to its ISP who accesses the newsgroup containing that posting. Thus every time one of the defendant’s customers accesses ‘soc.culture.thai’ and sees that posting defamatory of the plaintiff, there is a publication to that customer”.

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<sup>160</sup> *Godfrey v Demon Internet Ltd*, 4 All ER 342 (HC)

## 1.6 HOW?

How the publication has occurred, i.e., in what form (mode) publication has happened? It is an important issue in the techno-legal driven environment. It looks into the mode of publication (or transmission) – whether audio, video, textual or multimedia. Internet publishing is in ‘electronic form’. Instances of defamation in ‘electronic form’ include generating, sending or receiving ‘defamatory’ e-mails, online bulletin board messages, chat room messages, music downloads, audio files, screaming videos, digital photographs etc. on the Internet.

## 1.7 WHERE?

Where the publication has occurred is not easy to define as a defamatory statement can be “published” anywhere in the world where there is access to the Internet. Here, the issue is whether due process of law would be served by hauling a defendant into a particular jurisdiction simply because he has posted information that can be accessed anywhere in the world.

In the context of Internet it is not necessary for the plaintiff in all cases to prove directly that the defamatory statement was brought to the actual knowledge of anyone (some person or persons other than the plaintiff himself), publication is only established if the plaintiff makes it a matter of reasonable inference that the publication was accessible in the said jurisdiction. In contrast, with the Internet, it is not at all probable that every website will be accessed in every jurisdiction where it can theoretically be accessed. So, as a matter of reasonable inference, it cannot be assumed that any site put on the Internet and theoretically accessible from anywhere is accessed everywhere. Where then can the publication be assumed to have taken place.

In *R vs Graham Waddon*,<sup>161</sup> the defendant was charged with numerous counts of publishing obscene articles contrary to section 2(1) of UK’s Obscene Publications Act, 1959. The defendant had created pornographic images, which were illegal under the UK’s Obscene Publications Act. He ran a series of sites based in the US, hosting them on a US-based Internet service provider. These images were accessible to anyone in the world via the Internet who became a subscriber

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<sup>161</sup> *R v Graham Waddon* Southwark (Crown Court, 30-6-1999)

by giving credit card details. He was charging UK customers 25 pounds a month for access. The subscriber was given a password and could log onto the various websites to obtain the images. It was submitted on behalf of the defendant that, because the Internet publication had necessarily occurred abroad, therefore the instant court did not have jurisdiction.

Hardy, Christopher J. held:

“Publishing an article under Section 1(3)(b) of the 1959 Act included data stored electronically and transmitted. To transmit meant to send from one place or person to another. In the instant case, an act of publication took place when the data was transmitted by the defendant or his agent to the service provider, and the publication or transmission was in effect still taking place when the data was received. Both the sending and receiving took place within the jurisdiction of the court and it was irrelevant that the transmission may have left the jurisdiction in between the sending and receiving”.

In other words, the court exercised its jurisdiction, even when the pornographic material was held on a US-based server. The court argument has been that since the material was uploaded (by Waddon) and downloaded (by the police) in the UK, it could be classified as being “published” in the UK.

In *Dow Jones & Company Inc vs Gutnick*,<sup>162</sup> on the other hand, the High Court of Australia approved the trial court’s assertion of jurisdiction over Dow Jones & Co., based on its online publication of an allegedly defamatory article. The article appeared in Barron’s Online, the online version of Dow Jones’s print publication Barron’s, which was available to subscribers of wsj.com. Joseph Gutnick, a resident of the Australian state of Victoria, brought a defamation action against Dow Jones in a Victoria court. Dow Jones argued that the court should decline jurisdiction under the doctrine of forum non-conveniens, which would be applicable if the Victoria court was a “clearly inappropriate forum”. Dow Jones argued that Barron’s Online was published in New Jersey, the location of the servers hosting the wsj.com website. From this, it would follow that the substantive law to be applied in deciding the case in New Jersey law, which would make the Victorian court a inappropriate forum. Thus the decision hinged on where the article was deemed to be published.

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<sup>162</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 (Austl)

The court held, contrary to Dow Jones's contention, that publication of a defamatory statement is "a bilateral act in which the publisher makes it available and a third party has it available for his or her comprehension". Therefore, the article was published, with respect to Gutnick's cause of action, not when Dow Jones placed it on its web server, but only when subscribers in Victoria accessed it. The site recorded about 550,000 hits, less than 0.01 percent of them from people with Australian credit cards. It was not ascertainable how many of these users were Victorian but it was agreed that "several hundred" downloads had taken place in Victoria. For these reasons, the court held that the defamation occurred in Victoria and that Victorian law-governed: "It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed". Since jurisdiction in Victoria was proper, and Victorian law would be applied, the Victorian court was not a "clearly inappropriate forum," and there was no basis for declining jurisdiction.

The court responded to Dow Jones's policy arguments with the observations: (1) a plaintiff can win damages only in a location where he has a reputation, which limits the choice of forum; (2) a judgment for damages is enforceable only in locations where the defendant has reachable assets; and (3) publishers can easily determine in advance which law will apply in defamation cases: the specter which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.

The Court concluded for centuries that the law in defamation cases has been that publication takes place when and where the contents of the publication, oral or spoken, are seen and heard (i.e., made manifest to) and comprehended by the reader or hearer. Having decided that a person is defamed at the place where publication is made, the Court found that the dissemination of the material on the Internet and the downloading of that information in Victoria meant that publication had been made there.

<b>1.8 WHO?</b>
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Who would be held responsible for the publication of the allegedly defamatory statements – the ISP or the website promoter? An Internet service provider represents an interactive network service. It may provide access to the Internet (a network of networks) only or offer a range of additional services. Depending upon its functional attributes, an Internet service provider may act as an ‘information distributor (carrier)’ or ‘information publisher’.

An information distributor merely acts as a carrier of information (third party content) transmitting ‘electronic message’ from one place to another, without examining its content. The function of an information publisher is to not only publish and transmit the information but also take reasonable care in relation to the said publication.<sup>163</sup>

It is thus important to look into the cases, where the court has identified ISPs (or bulletin board operators) as either ‘information distributor’ or ‘information publisher’. In *Cubby, Inc vs CompuServe, Inc.*,<sup>164</sup> where CompuServe is an online company providing access to over 150 special interest forums comprised of electronic bulletin boards, interactive online conferences, and topical databases. A newsletter called Rumorville was made available via the bulletin board. The plaintiff sued CompuServe for libel after allegedly defamatory statements were disseminated through the newsletter against it. Cubby argued that the court should consider CompuServe to be a “publisher” of the allegedly defamatory statements, and thus hold it liable for the statement.

### 1.9 ONLINE DEFAMATION: AN INDIAN PERSPECTIVE

In India, issue of defamation has so far been dealt under the provisions (Sections 499-502) of the Indian Penal Code, 1860. The Code makes no distinction between slander and a libel. It defines “defamation” as:

Section 499 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<sup>165</sup> in the case hereinafter excepted, to defame that person.

<sup>163</sup> S K Verma and Raman Mittal (Ed.), Legal Dimensions of Cyberspace, Indian Law Institute, New Delhi, [2004], p 233

<sup>164</sup> *Cubby, Inc v CompuServe, Inc* 776 F Supp 135 (SDNY) [1991]

<sup>165</sup> There are 10 exceptions (defences), that may be set up against a charge of defamation

The three ingredients<sup>166</sup> are:

- 1) Making or publishing any imputation concerning any person
- 2) Such imputation must have been made by
  - a) Words, either spoken or intended to be read; or
  - b) Signs; or
  - c) Visible representations
- 3) Such imputation must have been made with the intention of harming or with knowledge or reason to believe that it will harm the reputation of the person concerning whom it is made.

The Code also highlights that defamatory statements need to be published (or communicated). The Supreme Court held in *Bennett Coleman & Co. vs Union of India*,<sup>167</sup> that “publication means dissemination and circulation”. That is, communicating defamatory statements only to the person defamed is not publication.

It is important to note that an essential difference between the Indian and the English law is that the former recognizes ‘words spoken’ as a mode of defamation, and the latter does not. It was held by the Supreme Court in *Balraj Khanna vs Moti Ram*:<sup>168</sup>

“It will be highly desirable no doubt if the actual words stated to have been used by an accused and which are all to be defamatory are reproduced by the complainant. The actual words used or the statements made may be reproduced verbatim by the complainant if the words are few and the statement is very brief. But in cases where the words are spoken are too many or the statements made are too long, it will be the height of technicality to insist that the actual words and the entire statements should be produced verbatim”.

The Code by highlighting that defamation could also happen by means of ‘signs’ or ‘visible representations’, has included every possible form of defamation, including defamation in ‘electronic form’ as well. Instances of defamation in ‘electronic form’ includes generating, sending or receiving ‘defamatory’ emails, messages, chat room messages, music downloads, audio files, streaming videos, digital photographs, tweets etc. on the Internet. Even sending

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<sup>166</sup> Ratanlal and Dhurajlal, The Indian Penal Code, 28<sup>th</sup> Edn, P 686

<sup>167</sup> *Bennett Coleman & Co v Union of India* [1972] 2 SCC 788

<sup>168</sup> *Balraj Khanna v Moti Ram* AIR [1971] SC 1389



‘defamatory’ SMS, MMS, messages, photographs and videos on mobile phones would be considered instances of defamation in electronic form. In other words, the Code is sufficient in itself to tackle any online defamation matter. However, in *Manik Taneja vs State of Karnataka*,<sup>169</sup> it was held by the Supreme Court that:

“Facebook is a public forum; it facilitates the expression of public opinion. Posting of one’s grievances against Government machinery, even on Government Facebook page does not by itself amount to criminal conduct”.

Further, the Supreme Court in *Subramanian Swamy vs Union of India*,<sup>170</sup> while examining the constitutional validity of Section 499 & 500 IPC has opined that “The decision in *Shreya Singhal case* is placed reliance upon to highlight that a restriction has to be narrowly tailored, but criminal defamation is not a narrowly tailored concept”.

#### 1.10 LET’S SUM UP

In this chapter, we have studied the meaning and ingredients of defamation and the demarcation between defamation and online defamation. We also discussed how, when, and where online defamation commences. Finally, we ended the discussed with the Indian Perspective of Online defamation.

#### 1.11 FURTHER READING

- Defamation on the Internet – a duty free zone after all? Uta Kohl, (2000) 22 Sydney L Rev 119, pp 126-27.
- Valdaya, Ankit, Legal Consequences of Online Defamation in India (January 28, 2014).
- Susan Singleton, Simon Halberstam, Business, The Internet And the Law, 1999, Tolley Publishers, U.K.
- Martin Samson, Online Defamation/Libel/Communications Decency Act - Internet Library of Law and Court Decisions

<sup>169</sup> *Manik Taneja v State of Karnataka* [2015] 7 SCC 423

<sup>170</sup> *Subramanian Swamy v Union of India* [2016] 7 SCC 221

<b>1.12 CHECK YOUR PROGRESS: POSSIBLE ANSWERS</b>
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**1) What is the meaning of defamation?**

Defamation is defined as “an intentional false communication, either published or publicly spoken, that injures another’s reputation or good name.”

**2) What are the ingredients of defamation?**

It has the following ingredients:

- a) Publication of a statement;
- b) Statement makes reference to the plaintiff;
- c) Statement is communicated to some person or persons other than the plaintiff himself;
- d) Statement reaches the plaintiff; and
- e) Statement causes actual or presumed damage to the plaintiff.

**3) What are the questions that need to be posed in order to find out the relationship between defamation and publication?**

- When a “publication” takes place (which involves “time of occurrence”);
- How a “publication” takes place (which involves the “mode of publication”);
- Where the publication takes place (which involves issues such as “jurisdiction”);
- Who would be held responsible for the publication of the allegedly defamatory statements (ISP or the website promotor)?

**4) What are the ingredients of defamation as per IPC?**

The three ingredients are:

- a) Making or publishing any imputation concerning any person
- b) Such imputation must have been made by
- Words, either spoken or intended to be read; or

- Signs; or
  - Visible representations
- c) Such imputation must have been made with the intention of harming or with knowledge or reason to believe that it will harm the reputation of the person concerning whom it is made.

<b>1.13 ACTIVITY</b>
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Explain briefly the meaning and ingredients of defamation and how it is different from online defamation. Also, describe the same with relevant case laws as per the Indian perspective? (800-1000 words)