



‘OPTICS’: LEGAL ISSUES IN BRANDS’ EXPOSURE TO CORPORATE DEFAMATION

THOUGHT LEADERSHIP BY

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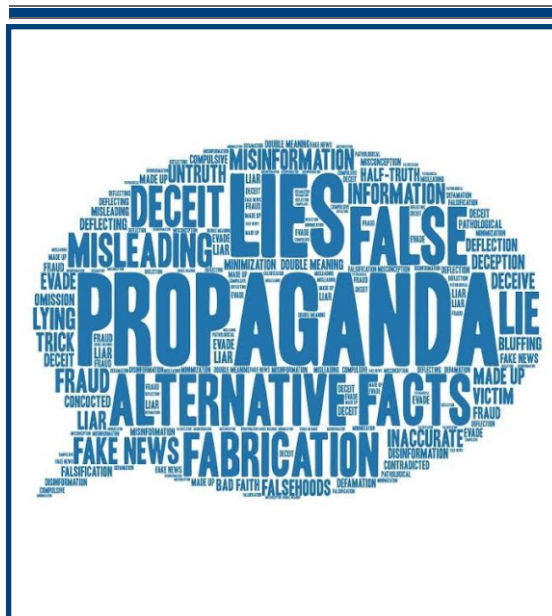
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THE TORT OF
DEFAMATION
PROTECTS
AN INDIVIDUAL/
CORPORATION'S
REPUTATION.

In today's world, particularly with the ubiquity of social media enabling wildfire-like, viral spread of fake news, it is often easy to laugh such off as “gist” or scoff at rumours particularly when they pertain to celebrities and public figures. But what happens when these “innocuous” rumours go beyond the realms of mere banter to halt business operations or potentially reduce the

customer base of an entity, thereby reducing income?

Defamation is the act of harming the reputation of another by making a false statement to a third person: it is a false written or oral statement that damages another's reputation. The tort of defamation protects an individual/corporation's reputation.¹



There are two forms of defamation: libel and slander. Libel is defamation in permanent form whereas slander is defamation in a non-permanent form. The distinction between them is becoming increasingly grey. It was once thought that slander is defamation in oral form, whereas slander is defamation in written form. However, with time, the distinguishing factor became the degree of permanence of the publication.

¹ *Black's Law Dictionary* (9th ed., 2009), p. 479. It is the “publication of a statement which tends to lower a person in the estimation of the right thinking members of the society generally or which tends to make them shun or avoid that person”: P.H Winfield, 'A Textbook of the Law of Tort', (5th ed., 1950), p. 242.

Slander can occur through the use of a hand gesture or verbal communication that is not recorded. Libel, on the other hand, is the written “publication” of a defamatory remark that has the tendency to injure another's reputation or character. Libel also includes a publication on radio, audio or video. Putting it aptly, *“Slander is the spoken or transitory form of defamation of character, a legal term that refers to a falsehood presented as true which could harm the reputation of a person or entity. Slander also encompasses body gestures as in the case of sign language. If defamation of character is placed in a fixed form, as in the case of a sign, published paper, film or recording, it is considered libel. In short, slander is temporarily uttered or gesticulated, libel is published or otherwise fixed.”*²

Corporate Defamation: Definition and Forms

Perhaps an even greater 'evil' is when the target of the defamation is an artificial entity. Although it cannot be hurt physically or emotionally, it can be adversely affected by publication of the defamatory words financially and otherwise. Corporate defamation is also termed as trade defamation or trade libel (depending on the medium): we will make some illustrations in order to enable a full grasp of the concept.

Imagine a situation where A tells B something negative about Company X's baby powder and B believing it to be true, goes on to share same with her group of friends either by word of mouth or by posting the news on her social media pages. B and her friends out

of caution decide to boycott Company X's baby powder and B's friends also inform their own friends, thus widening the cycle. What started as something seemingly harmless between two friends could now become the bane of the existence of a company and its products.

Ingredients of Defamation

In order for a defamation action to be successful, certain elements/ingredients must be shown. These elements include: (1) a defamatory statement (2) that refers to the claimant (3) it is published (4) it causes damage to the claimant (5) that the claimant is a type of person who can bring proceedings in defamation. These elements would be discussed in succeeding paragraphs.

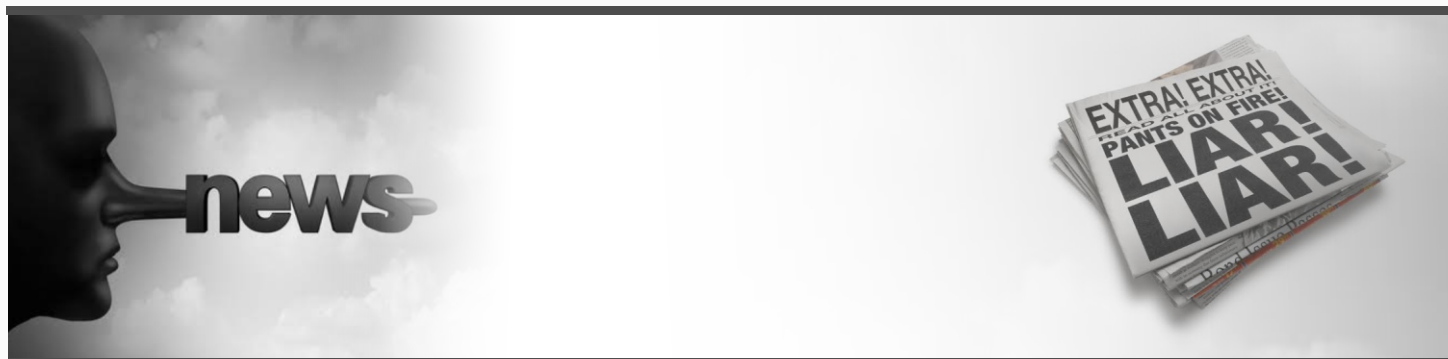
The exact definition of what constitutes a defamatory statement still remains unclear, however, statutory authorities have operated to give some form of clarity. In *Sim v Stretch*,³ Lord Atkin stated that “defamatory words must tend to lower the



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² Maeve Maddox, 'Is it Libel, or is it Slander?', Daily Writing Tips, 27.10.2007: <[https:// www.dailywritingtips.com/is-it-libel-or-is-it-slander/](https://www.dailywritingtips.com/is-it-libel-or-is-it-slander/)> (accessed 25.03.2019)

³ [1936] 2 All E.R. 1237 at p.1240



claimant in the estimation of right thinking members of society generally.”⁴ It has been long clarified that the defamatory words must lower the claimant's reputation in the estimation of not merely a particular section of the society. The critical question to ask in determining whether a statement is defamatory is: “Would this statement affect the public/societal perception of the entity?”

The second element of the tort of defamation is that the statement refers to the claimant. This element despite being seemingly easy to establish, may prove to be an arduous task, particularly when the defamatory statement is ridden with innuendos that do not mention the name of the company or its products (both, “targets”) - but is merely descriptive whilst 'pointing' to the 'targets'.

For instance, A may tell B about a company involved in the production of baby powder in

Ikeja. If Company X is the only baby powder-producing company in Ikeja, that would be easy to decipher. However, if there are other similar companies in Ikeja, it is arguable whether A intended to refer to Company X. It is settled in law that the claimant need not be named: the issue is whether the statement may be understood by reasonable people as referring to the claimant.⁵

The third element of the tort is publication. For an entity to be defamed, the defamatory words must have been communicated to at least one person other than the claimant.⁶ The publication could be oral or written. These days, with the advent of technology and digitalization, the internet and social media have also become popular grounds for publication of defamatory statements. Determination of whether publication has occurred is however dicey, particularly in the context of secondary

publication/contributory defamation.⁷

The fourth and perhaps most crucial of the elements is the proof that the defamatory statement caused the claimant damage. Damage is presumed in cases of libel and certain types of slander: libel is actionable per se whereas slander requires proof of special damage.⁸ This is because libel emanates from statements in permanent form whereas slander results from statements in non-permanent form. In cases of libel, adducing evidence to show that reputation has in fact been harmed is not a prerequisite for recovery of damages for injury to reputation.

The overriding principle here on slander is that *the special damage must not be too remote a consequence of the slander.*⁹ Given that a company cannot institute an action in defamation because its feelings were hurt - as it has no

4 In *Ujam v. Onyia & Anor* (2013) LPELR-22581 CA. In determining what should constitute a defamatory statement the CA held: “A defamatory statement may be defined as a statement which tends: a) To lower the claimant in the estimation of right thinking members of society generally, or b) To expose him to hatred, contempt or ridicule, or c) To cause other persons to shun or avoid him; or d) To discredit him in his office, trade or profession; or e) To injure his financial credit.”

5 W.E Peel & J. Goudkamp, 'Winfield & Jolowicz Tort' (19th ed., 2014), p.366

6 Ibid at p368

7 The subject of secondary publication would be discussed subsequently in this article.

8 In *Jones v. Jones* [1916] 2 A.C. 481, at 500 Lord Sumner summarized the position as follows: “Defamation, spoken or written, is always actionable if damage is proved, and even if it is not, the law will infer the damage needed to found the action (1) when the words are written or printed; (2) when the words spoken impute a crime punishable with imprisonment; (3) when they impute certain diseases naturally excluding the patient from social intercourse; (4) when the words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling.”

9 In *Lynch v Knight* [1861] 9 H. L. C 597, at 600, Lord Wensleydale stated succinctly that “To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words”

feelings - it must establish that it has lost something substantial to warrant its instituting the action or else the case would be an abuse of court process.¹⁰

Thus, a corporation can only succeed in an action for defamation if the injury results or is capable of resulting in pecuniary damage.¹¹ In *Duyile v. Ogunbayo & Sons Ltd*,¹² *Belgore JSC* stated that:

“Unlike human beings, a corporate body suing for defamation seeks only damages for pecuniary loss it can suffer and not for things only possible in personal feelings. It can sue for loss of profit, shortfall in turnover or anticipatory loss but not for natural grief and distress, and not for social disadvantage... A company can only be injured as to its earnings and not as to its feelings. It can be injured by libel and that injury must be related to its loss in money terms. Its loss of earnings, loss of profits and loss of goodwill are matters that libel can bring as misfortune for the company.”

The fifth and final element of the defamation is that *the claimant is a type of person who can bring proceedings in defamation*. The claimant must be shown to be one that has the *locus standi* to sue.

Effects of Corporate Defamation – Negative Revenue Curve

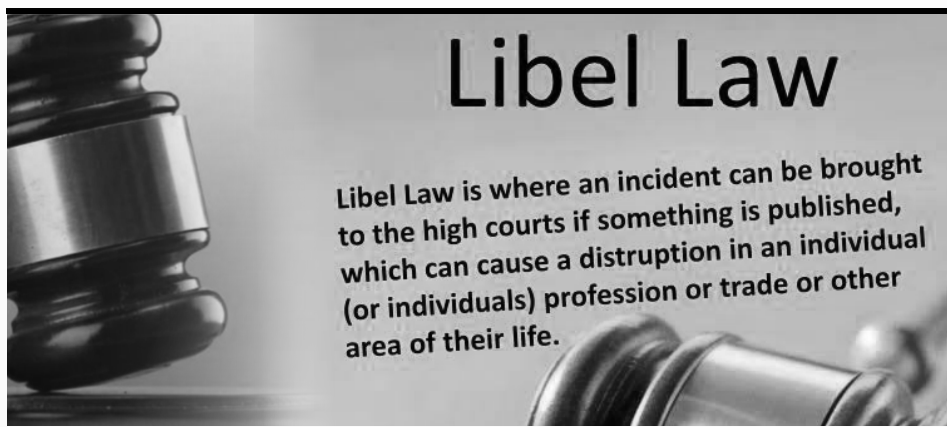
Although the effects of a simple un-truth about a company, its staff or its goods and services may seem infinitesimal, it may have drastic effects on the company and its profit margins. This is

particularly true in industries that thrive on reputation, such as financial services and the fast moving consumer goods (FMCG) subsectors.

One recent FMCG example involved the maker of a very popular noodles (and then probably Nigeria's only noodle brand). It was alleged that the noodles was injurious to human health having resulted in the death of a 25-year-old consumer in May 2004 with many more consumers in the hospital. As a result of these rumours, the National Agency for Food and Drug Administration and Control (NAFDAC), temporarily shut the company's factories. NAFDAC thereafter conducted laboratory tests on samples of the product collected from different sources and locations including from the processing plant. Afterwards, the media reported

that NAFDAC tests did reveal a level of risk in the brand but specifically blamed some batches of the product.

In the event, NAFDAC could not link the death of the consumer to the consumption of the noodles product, whilst medical reports said the deceased died from an enlarged heart condition. However, NAFDAC found that there was some risk, and albeit such cannot lead to death, NAFDAC ordered the manufacturer to recall the affected batches from the market, but otherwise declared the product safe for consumption. However, the damage had already been done and this incident was attributed to be a significant contributory factor to the upsurge of new brands of noodles in the Nigerian market.¹³



¹⁰ There has been arguments about whether: (a) artificial entities can be defamed; (b) they possess the requisite *locus standi* to institute an action, and if they can, to what extent they can recover damages. Judicial authorities however conclude that although a corporation, being a legal entity can sue for defamation, the defamation must not be as to matters which only human beings can be capable of, such as adultery. Where the damage suffered by the claimant due to the defamatory publication is minimal relative to the cost of the proceeding, the courts may be inclined to stay actions in defamation: *Jameel v Dow Jones & Co Inc* [2005] Q.B. 946

¹¹ *Edem & Anor. v. Orpheo Nig. Ltd* [2003] 13 NWLR (Pt. 838), 537

¹² [1988] 1 NWLR (Pt. 72), 601 at 611 paras (A-C)

¹³ The issue of defamation of corporate entities is not an entirely new menace. An incident involving a leading multinational FMCG company in the 1980s is a noteworthy example. Leaflets alleging the company is an agent of Satan surfaced throughout the New York metropolitan area. The leaflets reported stated that the company's logo represents the Devil and its profits are used to support the worship of Satan. Although it did not result in any legal action against any identified culprits, the rumour was said to have persisted with lingering effect in the minds of the general public, such that many customers were said to still be wary of using the company's products.

Legal Framework for Protection against Corporate Defamation

The hallmark of protection under the Nigerian legal system against corporate defamation is the common law tort of defamation. Due to the dearth or absence of specific Nigerian legislation to cater for these matters,¹⁴ heavy reliance is thus placed on the remedies afforded by the tort of defamation.

One problem that plaintiffs face when alleging defamation is that they must be able to prove that they suffered actual damage (usually financial losses) as a result of the defamation; this can be difficult to prove. Even if a company experiences a drop in stock prices, for example, following the release of a competitor's defamatory advertisement, the company would still have to provide evidence that the drop in stock prices was a direct result of the advertisement.

In *Schlumberger (Nig) Ltd & Anor v. Chilkied Security Services and Dog Farms Ltd*,¹⁵ Omage, JCA held “... though a defamatory statement may be said to be published when a person about whom publication is made may be injured in his feelings; a corporate body has no feelings, it cannot be

injured in its feelings... In the instant appeal, the injury claimed by the Plaintiff/Respondent is said to be in its business and feelings; if the feeling claimed is discountenanced; then the defamatory words will be seen to have injured the plaintiff in the sound of its reputation lost to its pocket. This occurred when the plaintiff averred that it lost its customers of no less than 21 companies.”

The major legislation that criminalizes publication of false statements in Nigeria (which is not only against public interest but may also be defamatory) is the **Criminal Code Act (CCA)**.¹⁶ **Section 59 CCA** provides:

(1) “Any person who publishes or reproduces any statement rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement, rumour or report is false shall be guilty of a misdemeanour and liable, on conviction, to imprisonment for three years.

(2) It shall be no defence to a charge under the last preceding subsection that he did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable

measures to verify the accuracy of such statement, rumour or report.”

In the same vein, **Section 373-381 CCA** addresses criminal aspects of civil defamation. For example, **Section 375 CCA** specifically provides:

“Subject to the provisions of this Chapter, any person who publishes any defamatory matter is guilty of a misdemeanor and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false, is liable to imprisonment for two years.”¹⁷

The provision thus strikes a distinction between *intentional and unintentional defamation*. **Section 376 CCA** goes further to prescribe seven years' imprisonment for persons who publish defamatory matter with intent to extort.

The major drawback of the **CCA** provisions however is that there is no recourse for a victim of the defamatory act. There is no provision relating to compensation or injunctive relief for the victim of such act. This therefore creates a lacuna that needs to be filled – legislation should provide for relief against civil defamation and emerging issues in the tort of defamation such as Internet Defamation.

¹⁴ Nigeria lacks specific legislation such as the **Communication Decency Act, 1996** (USA), the **Defamation Act, 2013** (UK) and UK's **Competition Act 1998**. However, some States have their own defamation laws such as **Defamation Law of Lagos State, Cap. D2, Laws of Lagos State, 2003; Defamation Law of Kaduna State, Cap. 44, Laws of Kaduna State, 1991.**

¹⁵ (2006) LPELR-12622(CA)

¹⁶ Cap. C38, LFN 2004.

¹⁷ **Section 392 Penal Code Law of Northern States, Cap. 89, Laws of Northern Nigeria 1963**, (the **CCA** equivalent in the North, also addresses civil defamation. It stated that whoever uses spoken words or words reproduced by mechanical means or “intended to be read or by signs or by visible representations makes or publishes any imputation concerning any person,” with the intention of knowingly harming or having reason to believe that the words will harm the reputation of that person is said to have defamed that person. The section further stipulates a punishment of imprisonment for up to two years for anyone found guilty of such conduct.

Although there is no specific legislation that provides protection against defamation, the Code of Ethics of many professional bodies and sectoral regulations may restrict players from making defamatory actions against their competitors.¹⁸ Accordingly, any breach would be regarded as professional misconduct which would attract requisite sanctions as applicable.

Third Party Liability for Defamation - Contributory Defamation?

The issue of third party liability for defamation is a sensitive one particularly with the emergence of applications, websites and a host of other digital tools that could serve as a medium for defamation. To put things in perspective, the question to ask is: “Would I still be held liable in defamation if I unwittingly repeat what I have heard about a product or an organisations practices to my loved one to protect them from the adverse effect of the information if true?” In the social media parlance, it



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would be: “Would my liability be the same if I merely inadvertently retweeted/reshared/reposted an information?”

Generally, an action in defamation actually lies against the person who made the defamatory matter. In some instances, liability goes beyond the actual person that uttered or created the defamatory matter to other persons who further published the defamatory matter. This is particularly so because each publication gives rise to a fresh cause of action.¹⁹

Another knotty issue is determining the liability of host websites where the public make their contents, and bloggers who might be sent defamatory content and actually go ahead to post same. Although there is no Nigerian statute providing for such situations, **section 5 UK Defamation Act 2013** gives some form of guide. It provides *inter-alia* that:

“(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website. (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website. (3) The defence is defeated if the claimant shows that - (a) it was not possible for the claimant to identify the person who posted the statement, (b) the claimant gave the operator a notice of complaint in relation to the statement, and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.”²⁰

The above provision invariably exonerates an innocent website operator on whose site a defamatory content is posted. However, where a blogger posts content sent to him, the above provision cannot come to his aid. This is because he has knowingly become a participant in

¹⁸ See for example, **Paragraph 3(d)(i) Nigerian Communications Commission Guidelines on Advertisements and Promotions 2009** which provides that “Advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences.” Similarly, **Regulation 2(i) Code of Ethics for Nigerian Journalists, 2014** provides: “A journalist should refrain from publishing inaccurate and misleading information. Where such information has been inadvertently published, prompt correction should be made. A journalist must hold the right of reply as a cardinal rule of practice.” **The Code of Ethics and Business Practices for Licensed Pension Operators, 2008** in its **Regulation 3** provides for Ethics and Competition. **Regulation 3.1.2** provides that “PFAs and PFCs shall not reveal information about other PFAs or PFCs without their permission and shall take reasonable precautions to avoid such information from being disclosed unintentionally.” **Regulation 3.2.4** also provides that “PFAs and PFCs shall not make public derogatory comments about their clients, or colleagues. PFAs and PFCs shall act responsibly and prudently in marketing. In particular, PFAs shall ensure that all advertising and promotional literature is fair and reasonable, does not contain misleading information and complies with all relevant guidelines, whether relating to their own PFA or their competitors.”

¹⁹ **Ogbonnaya v. Mbalewe [2005] 1 NWLR (Pt. 907), 252 CA.**

²⁰ Similarly, **Section 230 US Communication Decency Act 1996** provides that “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.”

the act of publication. It is his duty to verify such information before posting, given foreseeability of the potential damage that might result thereby. His liability is not different from the liability of an editor who goes ahead to republish a defamatory matter submitted by, or already published by another person.²¹

Many jurists and scholars have however opined that the true test of whether these sites and bloggers should be held liable is *the degree of control they wield over what gets posted and whether they possess sufficient knowledge of the defamation as to make them publishers.*²²

Recently, the popular *WhatsApp* application launched a nationwide campaign against the spread of false news. In their jingles as well as publications, they have advised users to verify information before sharing. They also recently introduced a new feature on the application where users can see when a user has merely forwarded a message he received to clearly show that he is not the author of such statement. These improvements might not be unconnected with the outcry from

the general public about how *WhatsApp* has now been used as a medium for disseminating false information. Users often get unsolicited false messages.

One of such is an allegation that a certain chocolate factory worker had been arrested for injecting HIV into the products. The message also calls for people to refrain from purchasing the product. This message has been circulated numerous times with the name of the product in question changing frequently.²³ It is unclear how much damage this did to the product but the message has obviously put customers in apprehension of the product; some customers who although do not believe the rumours still refrain from purchasing it as to them it is better to be safe than sorry.²⁴

Users have called for more innovative features across all social media platforms to curb the spread of false messages. On some of these platforms, one can report an offending post and the post would be forcefully taken down by the website operators and in some cases the account would be blocked completely. This has

however yet to be implemented on *WhatsApp*. On *Facebook*, its sister application, people can report fake news by clicking or tapping the upper right hand corner of a post and selecting "It's a Fake News story" and the offending text will be taken down.²⁵

On platforms where it is possible to pull down offending content, failure of the operators to take a content down when it has been reported may however make such operator incur liability as his refusal to take it down may be seen as contributing to the publication. In *Payam Tamiz v. Google Inc.*²⁶, the England and Wales CA held that Google may be deemed a "publisher" of (and held liable for) defamatory user-generated content appearing in blogs hosted by Google after being notified of the content's defamatory nature. In its judgment, the CA reasoned that once Google received Tamiz's claim letter notifying it of the alleged falsity of the blog posts about him, Google's failure to take down the material cast it in the role of a publisher by acquiescence.

²¹ See Ejide Godstime Chukwuemeka, 'Liability for online Defamation in Nigeria' <<http://www.barristerng.com/liability-online-defamation-nigeria-ejide-godstime-chukwuemeka/>> (accessed 19.03.2019)

²² Scott F. Uhler and Phillippe R. Weiss, 'Liability Issues and the Internet Part 3: Defamation, Invasion of Privacy, And Copyright', *Illinois Libraries-Summer 1996* Vol. 78 No.3, 117, *Illinois Periodicals Online (IPO)*: <<https://www.lib.niu.edu/1996/il9604207.html>> (accessed 19.03.2019).

²³ There always anecdotal variants of such stories: food from certain part of the country being poisoned, particular drinks leading to deaths and severe health effects requiring intensive medical care, etc.

²⁴ It was reported sometime in July 2018 that more than 20 people were killed in India in two months, after rumours were spread on smartphones via *WhatsApp* about child kidnappers, thieves and sexual predators. The message in these cases is always a false video, audio or text content that alleges that a child-trafficking gang is loose in the city. Some of the pictures used, as reported by the CNN, are of children in war-torn Syria or even from Rohingya refugee camps. Police reports showed that the rumours surfaced out of the blue in many regions, with no link to any actual reports of child kidnapping or trafficking. In a letter dated July 3 2018 to India's Information Technology ministry and reviewed by Reuters, *WhatsApp* said it is giving people control and information they need to stay safe as well as making changes to group chats to prevent the spread of unwanted information. Dona Cherian, 'Explainer: How False Messages led to Mob Killings in India', *Gulf News Asia*, 04.07. 2018 <<https://gulfnews.com/world/asia/india/explainer-how-false-whatsapp-messages-led-to-mob-killings-in-india-1.2246517>> (accessed 25.03.2019)

²⁵ Adam Mosseri, 'Addressing Hoaxes and Fake News', *Facebook Newsroom*, 15.12.2016: <<https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/>> (accessed 20.03.2019).

²⁶ [2013] EWCA Civ 68.

**Navigating the Waters of
Corporate Defamation: Available
Remedies and Defences**

When an action in defamation is instituted and has been sufficiently proven, the claimant becomes entitled to certain remedies. These remedies include Damages, both Special and General, as well as Injunctive Relief depending on the prayer that is sought.

In cases of libel, a claimant is entitled to general damages for the publication of the defamatory content without necessarily requiring proof of the damage as libel is actionable per se. For a company-claimant, there can be no general damage as the company cannot be injured in its feeling so the proof of actual damage is necessary; however, the company is entitled to special damage upon proof of the actual losses it has suffered such as loss of earnings or fall in its share price, etc.

A company-claimant is also entitled to injunctive relief preventing the publication of a defamatory material or removal of a defamatory content from a particular space. The court may

also in addition order the offending party to render a public apology and also retract the defamatory statement.

Conversely, when an action has been instituted against a defendant, there are several defences he could raise. In **Bekee & Ors v Bekee**,²⁷ the CA per Onyemenam, JCA stated *inter alia*: “Accordingly, anyone who is sued for defamation can raise any of the following defenses: That the alleged wrongdoer was not the publisher of the statement; That the statement did not refer to the alleged victim; That the statement's meaning was not defamatory; That the statement was true; That the statement was fair comment on a matter of public interest; That the argument was made in the heat of an argument”²⁸

Justification

On the defence of justification, in **Anyah v ANN Ltd**,²⁹ it was held that:

“The onus is on the defendant to show that the alleged libel is true... If the defendant brings evidence to prove the facts commented upon to be true or acknowledged to exist, the plaintiff should be entitled to produce evidence that they are neither

acknowledged nor true. But he cannot his part of proof, bringing forward part of his evidence in the first instance and more.”

What this defence means is that the defendant is admitting that although he published the offending content, the words published are true, and hence he is not guilty of defamation. The defence of justification is a complete bar to any relief sought by the claimant as *damnum absque injuria*.³⁰

Fair Comment

The defence of fair comment on the other hand, must be based on facts truly stated: it must be an honest expression of the writer's real opinion. In **Cappa Ltd v. Daily Times Of Nig Ltd**³¹ the CA, per Augie JCA held: “...that when a Defendant avers as his defence that the comment is a fair one, he is saying no more than that the story was based upon true facts, which were in existence when the comment was made.” She adopted the words of Aderemi, JCA (as he then was) in **Basorun v. Ogunlewe**.³² “This is so because before a comment can be said to be fair the truth of the facts upon which it is predicated must first be

²⁷ (2012) LPELR-21270 (CA)

²⁸ In **Onwurah & Ors v Nwumeh & Anor** (2016) LPELR-40304 (CA), per Ogunwumiju, JCA on the defences stated “There are a number of defences available to a claim of defamation which include justification, fair comment. Privilege which may be either absolute or qualified.”

²⁹ [1992] NWLR (Pt. 247), 319

³⁰ **Registered Trustees of AMORC v Awoniyi** [1991] 3 NWLR (Pt. 178), 245 at 257.

³¹ (2013) LPELR-22028 (CA)

³² [2000] 1 NWLR (Pt. 640), 235

“WHEN AN ACTION IN DEFAMATION IS INSTITUTED AND HAS BEEN SUFFICIENTLY PROVEN, THE CLAIMANT BECOMES ENTITLED TO CERTAIN REMEDIES”



review is defamatory, the question should be if the alleged statements are true and lack any form of malice. It should be noted that competitors sometimes use underhanded means to defame others by posting false reviews. Although this issue has not been the subject matter of litigation in the courts, drawing from the posture of the courts in the above decided cases, it is certain that such acts would be largely frowned upon.

established --- For the law does not permit a person to invent untrue facts or stories about a man and then comment upon them. In other words, the defence of fair comment will avail the Defendants if they can show that they had only, in good faith expressed their opinion based on facts truly stated on a matter of public interest”.

It is on the basis of this that arguments usually arise as to whether reviews about products or services of a business constitutes defamation. Sometimes, persons posing as customers/ clients of the business post reviews about the product/ services, as exemplified by about restaurant/hotel reviews, and goods on shopping sites like Jumia, Konga and Amazon. The reviews to a large extent affect patronage of the products. So the question may arise as to the extent of liability of reviewers for perceived

defamatory content as in a sense, the reviewers are only expressing an opinion on the products. This can only be answered when the exact ambit of fair comment is understood.

In clarifying what exactly constitutes fair comment, the CA in **Makinde & Ors. v Omaghomi**³³ held that “In order that a Defendant will be availed of defence of fair comment, the following conditions must be present:-

- (1) *It must be based on facts truly stated;*
- (2) *It must be honest expression of the writer's real opinion*
- (3) *It must not contain insinuations of corrupt or dishonourable motives on the person whose conduct or work is criticized save in so far as such imputation warranted by facts.”*

So, in determining whether the

Privilege

Another defence is the defence of *Privilege*. Privilege can be absolute or qualified. Qualified Privilege protects a publisher of a defamatory statement unless actual malice and knowledge of the falsity of the statement is shown. This may be claimed where the communication related to a matter of public interest or where it was necessary to protect one's private interest and was made to a person having an interest in the same matter. An occasion is privileged when the person who makes the documentation has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged.³⁴

³³ (2010) LPELR-4461 (CA)

³⁴ *Pullman v. Hill Ltd.* [1891] 1 QB

In *FBN Plc & Anor v. Aboko*³⁵ Aderemi, JCA (as he then was) stated as follows:

“From the above discourse, it seems to me that three elements of qualified privilege emerge and they are: ‘(1) The occasion for making it must be fit, (2) The matter must bear reference to the occasion, and (3) The words complained of must be published from right and honest motives.’ See *Horrocks v. Lowe* (1975) AC 135. I pause to say that any privilege that attaches to an occasion on which defamatory words are published by one person to another is the privilege of the publisher alone. The person to whom it is published needs no privilege, as he commits no tort. It follows that, a defence of qualified privilege, if it is not characterised by gross and unreasoning prejudice, is a complete defence.”

Conclusion

In the words of Richard Branson, “your brand name is only as good as your reputation”. This is particularly true in the times we live in - with consumerism being a major feature of the global capitalist market architecture; together with the advent of the internet and social media where information can be disseminated to the general (global) public within a click. It therefore behoves any business enterprise to pay close attention to its market reputation.

In order to mitigate the risks associated with corporate defamation, certain critical steps should be taken. One of such is *proactive customer interface to bridge information asymmetry*. Rumours can only thrive in the absence of the truth backed with supporting incontrovertible facts. Hence, companies should frequently intimate the general public on their activities and protocol. This can easily be done by creating social media pages and providing regular updates. This in turn bridges communication gap and provides comfort to customers, investors and stakeholders.³⁶ This also could be a tool for attracting potential customers/clientele.

However if such risks do eventually arise, *rapid and effective crisis management procedure should be employed. Defamatory content should be addressed head-on at the earliest opportunity and appropriate measures should be taken to bring the person(s) behind such to book*. Thus, putting forward a hands-on approach to addressing such content.

Another aspect is to constitute an internal monitoring team focused on what is being said about the enterprise in the public domain. In addition

to following news and popular media, they can also utilise tools such as opinion polls, customer experience assessments, amongst others. Another way is to use a service like Google Alerts to find out what is being said about the business and its *alter egos*. It is also possible to use this service to receive alerts anytime something is said about the business or its associated personalities as determined by specific search parameters.

Finally, the need for a Public Relations (PR) personnel/team as well as a legal advisory team to advise on the best approach cannot be overemphasized. The legal team shall also advise on reputation sensitive incidents and proffer strategies for advancing the best interests of the business enterprise in the circumstances, including enforcement actions. On its own part, the PR team shall be responsible for adopting the necessary communication strategy to control the situation

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³⁵ (2005) LPELR-7494(CA)

³⁶ (2010) LPELR-4461(CA)