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TAKING ACTION FOR DEFAMATION

With defamation if you think something is defamatory then it probably is.

But there is a myriad of legal defenses/partial defenses that can always be argued (i.e. truth/justification; qualified privilege; opinion based on fact etc). Defamation action can also be mitigated by making apologies or amends.

So if you start from the assumption that something is defamatory you then work backwards to see to what extent it is mitigated, firstly, by any legal defense/partial defenses, and secondly, by any remedial behavior. This is where you can have the wind taken out of your sails, so far as any compensation or damages is concerned.

I think one of the hardest things to do in law is to give advice on the merits of defamation action not whether something is defamatory *per se* (because it usually is), but whether you will ultimately succeed in any compensation/damages (and/or whether your legal fees will exceed whatever you might hope to recover which is the real worry concerning these kinds of actions).

Also you can't get a little bit pregnant, or you can't start a Court action, get six months into it, decide the legal fees are too much and you hate your lawyer and want to stop, because if you pull out then there may be a Costs Order against you (anywhere from \$500 \$10,000 depending upon how far it has gone, without actually going to trial).

By way of example: suppose famous actors *Tom Kadman and Nicole Christian** sue a London Newspaper which publishes an article that Tom Kadman is gay and their marriage is a sham.

(*Any likeness to real people is purely co-incidental).

This is a good case because:

1. The Plaintiff's Tom Kadman and Nicole Christian are wealthy and can afford to run the litigation to its conclusion.

The Defendant, the London Newspaper, made money by publishing the article. Its circulation increased very measurably by comparison with previous weeks so there is a clear commercial gain from publishing the article. You have a clear measure of damages or compensation, by reference to an economic gain. (That is not to say the injured feeling are not compensable, they are but it is much harder to measure that loss/damage/injury, and my worry would be that if this is your only claim for damages, the case might not be commercially viable).

2. The Defendant, the London Newspaper has deep pockets. They have the financial reserves to pay any judgment (or indeed, liability insurance).

My worry in these cases is firstly is the client going to run out of money halfway through the case and end up hating me? Unfortunately, "Litigation for fun & profit" is a rich person's past-time.

Secondly, is the case commercially viable legal loss/damage/injury, and my worry would be that if this is your only claim for damages, the case might not be commercially viable).

Other Ways to Manage

There are other ways to manage this sort of situation:

1. **Restraining Orders** a Misconduct Restraining Order (as opposed to violence) can often be used effectively as "poor man's" defamation case. The nature of the order would be stop telephoning, emailing, posting on social media. These can be problematic with enforcement, since police have the discretion as to whether to charge for breaching a restraining order or not.
2. **Equal Opportunities Commission** this is better where mediation might resolve the matter, and where the relationship might be worth preserving, such as discrimination/sexual advances/inappropriate conduct in the workplace, where you don't want to lose your job by speaking out against something. If these matters are referred to the State Administrative Tribunal, there can be small awards of compensation, but the worry is that legal fees can easily engulf all of this and then some. Best to mediate at EOC and not take it further.
3. **Concerns Notice** ("Nasty Letter" foreshadowing defamation action) The Defamation Act requires us to send a letter before issuing any Writs. It is a good idea, because often these are emotional disputes which can be resolved if an apology is given, or attempts to make amends are made. Many 'would be' defamation actions go no further than this, a threatening letter from a lawyer which is usually either ignored by the recipient (although they may desist from the conduct complained of, which achieves the intended result); or they respond by apology/making amends; or they respond by lawyer or otherwise telling you to 'put up or shut up' and issue a Writ.

I might suggest that Concerns Notices might be the best way to resolve these kinds of situations, simply because of the expense of taking defamation action any further. It happens frequently these days and often it makes people think twice about the consequences of what they might say, text, email or post on social media.