



Using the Law of Defamation

Untruthful comments about people living with HIV/AIDS (PLWHA) happen frequently and can be both humiliating and hurtful. The law of defamation is one way that PLWHA can protect themselves against these types of comments.

The Law of Defamation as a Shield

The law of defamation is remedial in nature. This means that while the law may not be able to stop a person from making untruthful statement/s in the first place, it may be able to provide a legal remedy once the statement/s has been made. In this way the law of defamation acts as a shield. While it doesn't prevent the hurtful and untruthful statements from occurring, it can be used to force a perpetrator to retract his/her statement and issue a public apology. In some circumstances financial compensation may also be available.

The Law of Defamation as a Sword

The law of defamation may also be able to act as a sword if it is used systematically and strategically against those who publicly tell lies about PLWHA (or those who publish lies about PLWHA in newspapers). Organizations like PIAF could undertake a campaign wherein every time a defamatory statement is made or published, PIAF issues a public warning and/or commences a lawsuit against the maker of the defamatory statement/s. The real or perceived threat of legal action may deter the perpetrator and/or others from making untruthful and hurtful comments about PLWHA in the future.

Source of the Law

Many Pacific Island Countries and Territories (PICTS) have a *Defamation Act* which sets out the law with respect to defamation. In some jurisdictions UK law is still in force. Sometimes defamation is a criminal offence. The common law rules of defamation will also apply even in countries which do not presently have a *Defamation Act*.

Some examples of countries with *Defamation Acts* include:

	Defamation - Civil	Defamation - Criminal
Fiji	Defamation Act [Cap 34]	
Kiribati	Defamation Act 1952 (UK)	Penal Code [Cap 67] ss. 184-191
Samoa	Defamation Act 1992-1993	

Vanuatu		Penal Code [Cap 135], s. 120
Cook Islands	Defamation Act 1983	
Niue		Niue Act 1966, s. 187
Tonga	Defamation Act [Cap 33], Amendments 1991, 1993 2000	
Papua New Guinea	Defamation Act 1962	
Tuvalu		Penal Code [Cap 8] ss. 184-191

What is Defamation?

Defamation is: “a statement by one person about another person which is likely to lower that person’s reputation in the opinion of ordinary decent people in the community”.

There are two different types of defamation:

Slander: is a *spoken* defamatory statement, like comments or stories about a person told at a meeting or party. Slander describes someone talking trash, spreading lies or repeating unfounded rumours about another person.

Libel: is a *written* defamatory statement, like an article in a newspaper; a letter from one person to another; or a poster containing defamatory statements.

How do you prove that a person has been defamed?

To be successful in a defamation action, you will have to prove that:

(a) The statement was *actually* defamatory

While some comments may be hurtful, they might not meet the legal standard of defamation. A statement will only be defamatory if:

It lowers a PLWHA’s personal or professional reputation, ridicules him/her, or leads others to shun or avoid him/her.

The key to defamation is whether the slanderous or libelous comment has actually damaged a PLWHA’s reputation. The Court will decide this question from the viewpoint of “an ordinary decent person living in the community”.

(b) The statement refers to the PLWHA

In order to be successful in a defamation action, you must prove that the libelous or slanderous statement/s was about a specific individual. It is not necessary that the person actually be named in the statement so long as he/she can be identified as the person being spoken or written about.

(c) The statement was publicly made

While the statement must be made to at least one person (other than the person about whom the statements are made) it is not necessary that the statement be made to the public at large.

(d) The plaintiff has suffered "special damage"

In many PICTS, in order to prove slander, you must show proof of special (specific) damages; for example if a PLWHA has lost his/her job as a result of the defamatory statements made. In some PICTS, it is not necessary to show proof of special damages for a slander law suit. You also do not need to prove special damages in libel actions.

What are some of the defences to a defamation claim?

There are different ways for that person or people to defend his/her alleged defamatory statements.

The three primary defences are:

- (1) Truth
- (2) Fair comment
- (3) Privilege

Defamation legislation in some PICTS also provides for partial defences of public apology and/or unintentional defamation.

(1) Truth: This is sometimes referred to as "justification". If the defendant can prove that the statements made were true or substantially true, then the statements may be considered justified.

- For example, if a person publicly reveals that a person has HIV/AIDS (without saying anything more) he or she will be able to defend his or her actions by arguing that the statement made was true.

(2) Fair comment: "Fair comment" is an honest expression of opinion on matters of public interest.

This is known as the fair comment defence used primarily by the media. It is a complete defence to defamation to show that a defamatory comment was an opinion which an honest person could make about the facts in question. To be

“fair”, an opinion must be based on facts that are either accurate or substantially accurate at the time the opinion is made.

What exactly amounts to a “matter of public interest” with respect to HIV/AIDS will be for a Court to decide.

- For example, if a newspaper publishes an article that says a person has HIV/AIDS (which is true) and then expresses an opinion about HIV/AIDS – i.e. that AIDS is dangerous or that PLWHA should be quarantined, the comments *may* be protected IF a court feels that this opinion is a matter of public interest.

(3) **Privilege:** Certain types of statements can attract either absolute or qualified privilege.

Absolute Privilege

Statements made under absolute privilege cannot be the subject of a defamation law suit. In most PICT jurisdictions, there are three different categories of statements which will attract absolute privilege:

i. Parliamentary proceedings

Statements made by a member of parliament within the chambers of parliament or in parliamentary proceedings.

ii. Court Proceedings

Statements made in the ordinary course of proceedings before any tribunal or court. This includes statements by judges, lawyers, witnesses or the parties.

iii. Official Communications

Statements made by an officer of the state to another officer of the state in the course of his or her official duties. Statements made under the authority of the government may also be protected by absolute privilege.

Qualified Privilege

Qualified privilege protects statements that are usually made pursuant to a legal, moral or ethical duty. They are “qualified” in the sense that they cannot be made maliciously or with an ulterior purpose in mind.

Examples of statements attracting qualified privilege include:

- Giving a truthful reference about an employee;
- Supplying information to the police;

- Complaining about the conduct of public officials such as police officers; and
- Fair and accurate reports of court proceedings.

What kinds of remedies are available in a defamation action?

If you are successful in your claim, you could receive:

- *Damages* (money) to compensate you for your pain and suffering. Damages may also be awarded to punish the person who defamed you but this is very rare. Punitive damages will only be awarded if the Court feels that the defendant's behaviour was particularly outrageous;
- An *injunction* stopping the person who defamed you from making the same or similar comments in the future; and/or
- A *formal apology* and/or withdrawal of the defamatory statement/s.

It may also be possible and/or preferable to resolve a defamation law suit through an out of court settlement or through a customary resolution process.

For more information contact:



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