Mapping Defamation Defences

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Abstract

Tort defences are generally neglected. Given the considerable role they play in the law of defamation, this is probably the one cause of action where this neglect matters most. Defamation recognise a dozen or so defences: at first sight the list looks like a hotchpotch of unrelated doctrines. This paper is an attempt to see whether they can be reduced to a few guiding principles. Taking as its starting point the definition of the cause of action as an injury to the defendant’s deserved reputation, it seeks to organise defences in three classes: (i) defences which are concerned with the absence of injury to the claimant; (ii) defences which are concerned with the claimant’s reasonable belief that he would not cause any such injury; (iii) defences which relieve the defendant of liability despite the lack of such belief. De lege lata, individual defences can be easily slotted in these three groups. More importantly, de lege ferenda, these provide an intelligible structure to the law. The first cluster really denies the requirement of harm. The second imposes a broad culpa/negligence standard that otherwise dominates the law of tort and would seem to be at least prima facie applicable to defamation as well. The third group needs particular scrutiny as a departure from that standard. The argument is that part of this group really is concerned with the rule of repetition, which needs to be qualified by the recognition of a defence of warranted republication. The remainder should be abolished, being a hangover from the old requirement of malice, which historically underpinned the tort of slander but from which the law has rightly moved on.