

THE POWER OF WORDS

A COMPARISON BETWEEN
ENGLISH AND JEWISH LAW

By His Honour Martyn Zeidman KC





EXCITEMENT AND TENSION

It happens all the time. When the jury return, there is overwhelming tension. After all, there are only two options: Guilty or Not Guilty. (I often abbreviate it, even more concisely, to a simple G or NG.) How can a single letter make such a difference? In a murder trial, the verdict yields the distinction between immediate freedom and life imprisonment. It is a real reminder that words have a profound effect.

WORDS CAN HURT

How many of us have been comforted by the kind comments of a spouse, or other angel, lifting our spirits? And it cuts both ways. We have the capacity to use words to bring about real pain and suffering - whether by what we say or by the tone in which we say it. We know that 'sticks and stones may break your bones' but if we really want to cause long term emotional upset, then words are the weapon of choice. It is not hard to cause the upset and the more one practises, the easier it becomes. Whether done intentionally (often not) or just carelessly, the effect on the victim is often the same. A broiges in a family can last for generations. In so many cases, the offending party seeks to justify their comments by asserting that they are only speaking the truth - as if that makes it alright. The offender will often assert that he was just joking - the implication being that the offended party only has himself to blame - if he had a sense of humour, he would have found it funny and no offence would have been taken.

ASSUMPTIONS OF GUILT

It is so easy to reach a harsh judgment about another person. There is a real danger in being too judgmental. At least in court, there are rules to be observed - legal principles to minimise the risk of unfairness. There are laws that restrict the admissibility of certain evidence, for example, hearsay, or bad character evidence. Witnesses are probed to test the truth and accuracy of what they are saying. The accused is given a chance to give his own account. But judgments made out of court have no such safeguard. There may be numerous factors of which we are just unaware.

It can be instructive to pose the following devastating question. In what country are people judged in secret, without even knowing that they are being assessed; where they don't even know the nature of the charge that they are facing; or the identity of the accuser; where they have no right to legal representation, no legal aid and where they will have no opportunity of entering any defence? Before sentence is passed, there is no right to offer mitigation and there is no right of appeal. What Stalinist, totalitarian regime could we be describing?

And then the horror: the realisation that we can all be guilty of this conduct in our every-day lives, in our private conversations or even in shul.

Given the temptation to speak improperly, it comes as no surprise that Jewish Law seeks to minimise this wrong-doing and imposes upon us stringent rules as to speech. The prohibitions are matters of extreme gravity involving Biblical Prohibitions. On Yom Kippur we list the sins for which we seek forgiveness and discover that many (if not most) relate to our mis-use of speech.



This is all very different from the way in which Defamation is seen in English Law. The law of the land imposes the minimum necessary for the functioning of that society. It does not make us good - it just discourages us from falling below certain standards with the threat of a sanction. But defamation is not a crime. It follows that, however bad the disparaging remark, I cannot be arrested for it; the police have no interest in the matter and it falls outside the criminal law. Defamation is known as a 'tort', it is a civil-wrong and the aggrieved party ('the claimant') merely has the right (if he so wishes) to bring a claim in the civil courts, typically seeking damages. [Free Advice: if contemplating such an action, note that legal aid is not available, the proceedings are expensive, professional advice is necessary and cases often end in financial disaster.]

SEE THE DIFFERENCE

This short article does not identify all the distinctions between secular law and Halacha but the following examples seek to demonstrate some of the significant differences.

Example 1:

In the absence of any other person, Mr Davis (D for Defendant) tells Mr Cohen (C for Claimant) that Mr Cohen is 'a really stupid bore'. Can Mr Cohen sue?

English Law: Absolutely not! This is perfectly lawful. Even if Mr Davis called Mr Cohen a murderer, no action could be brought. The fundamental principle of defamation is that it needs to be published to a third party. What I say to a person directly, in the absence of any other person, cannot be defamation. This rule applies however hurtful or insulting the comment may be and irrespective as to whether the accusation is true or false. In short, subject to very few exceptions, Mr Davis may say whatever he likes to Mr Cohen and Mr Davis commits no legal wrong. Of course, it would be different if he threatened to kill him, or something of that kind.

Jewish Law: Most certainly an infringement of a serious provision. The Torah in Vayikrah (Leviticus) 25:17 makes it a serious offence to use words for the purpose of causing pain: it falls within the prohibition of 'Ona'at Devarim'.

Example 2:

Same as before but this time the words are said in the presence of another person(s).

English Law: Once again, no cause of action. The law draws a sharp distinction between insulting words, as compared with statements of fact which reduce seriously

the claimant's reputation. So, 'a really stupid bore' gets you nowhere. In one case the defendant called the claimant 'an ugly bitch'. Again, no action. Yes offensive but outside the law of defamation.

Jewish Law: As before, a serious infringement of a Torah prohibition.

Example 3:

Mr Davis sends a text to Mr Levy alleging that Mr Cohen is a convicted fraudster.

English Law: Potentially this would be defamatory but if Mr Davis can prove the truth of the statement, then he has a defence and the action will fail. Truth is a complete defence.

Jewish Law: Whether true or not, this would be prohibited as 'lashon hara' (bad, prohibited speech). If the statement were also untrue, then it would be worse (known as motsei shem ra) but the Halacha is clear - truth is no defence. It is 'lashon hara' and is absolutely prohibited.

ARE THERE ANY EXCEPTIONS?

Yes, there are exceptional cases where it might be proper to warn Mr Levy that Mr Cohen is dishonest. Each case would need separate, careful consideration by a Rav. Suppose, for example, that Mr Davis has had business dealings with Mr Cohen and found him to be very untruthful. Mr Levy is not privy to this information and is about to go into partnership with Mr Cohen. Mr Levy seeks Mr Davis' advice as to the trustworthiness of Mr Cohen. In exceptional cases of this kind the Rabbinic advice might enable the information to be shared with Mr Levy. It would be done to save Mr Levy from a potentially disastrous business relationship. There would be an acceptable purpose (a 'toelet') permitting,

(or perhaps even requiring) the disclosure. That said, Mr Davis would still need to ensure that he avoids exaggeration and that he acts in good faith.

Example 4:

Mr Davis says the most terrible thing about Mr Cohen, alleging that he has committed many acts of cruelty but he says all this after Mr Cohen has died. Can Mr Cohen's estate bring an action in defamation?

English Law: The answer is No. You cannot, in law, defame a dead person. There have been a number of cases where newspapers have alleged that a deceased person has committed the most dreadful of offences. But alas, no action in defamation can be brought if the subject of the comment is no longer alive.

Jewish Law: The prohibitions on speech apply whether the person is alive or dead.

I DARE YOU TO REPEAT IT

This note does not, of course, deal with all the details. In terms of English Law, there are many other defences that have not been discussed in this article. For example, defamation proceedings have to be brought within a certain period of time; the rules do not apply in a courtroom or in Parliament - hence the frequent challenge for an MP to repeat the words 'outside the House'. There are special rules enabling honest opinion, or publication on a matter of public interest, and the Defamation Act 2013 makes some significant changes to the modern law.

TONGUE AND TONE

In Rabbi Pliskin's book 'The Power of Words' (highly recommended) he cites a sweet incident involving the great Rabbi Yehudah Hanosi. It is taken from the Midrash (Vayikrah Rabbah 33:1). The Rav hosted a feast for his students and generously provided them with portions of tongue. During the meal, he noticed that the students chose first the most tender cuts and left the tougher bits. He used this as an illustration: Just as we prefer the softer pieces of the tongue for the purpose of eating, similarly, when speaking, we should be careful - where possible - to choose softer words; and to leave the hard ones behind.

SUMMARY

Our obligation as Jews requires us to go much further than the English Law of Defamation. Our power of speech is a privilege that can be easily abused. It is significant that our tongue is guarded by two barriers - the teeth, followed by the lips. We need this protection. Ours is a religion, that concerns itself not just with what we put into our mouth but also what comes out of it. Of course, it is easy to set out the rules but much harder to apply them in our everyday and complicated lives. We know that we will sometimes just get it wrong. But our aspiration is to choose words that are good and permissible, honest, modest, kind and courteous, avoiding arrogance, aggression and falsehood. We can only try.



Judge Zeidman was called to the Bar in 1974. He became a QC in 1998 and a Circuit Judge in 2001. He has sat part-time in the Court of Appeal Criminal Division since 2013 and has tried murder and other serious criminal cases both at the Old Bailey and Snaresbrook Crown Court, where he was the Resident/Head Judge. He retired from full-time sitting in May 2022 and continues to sit part-time in the criminal courts.



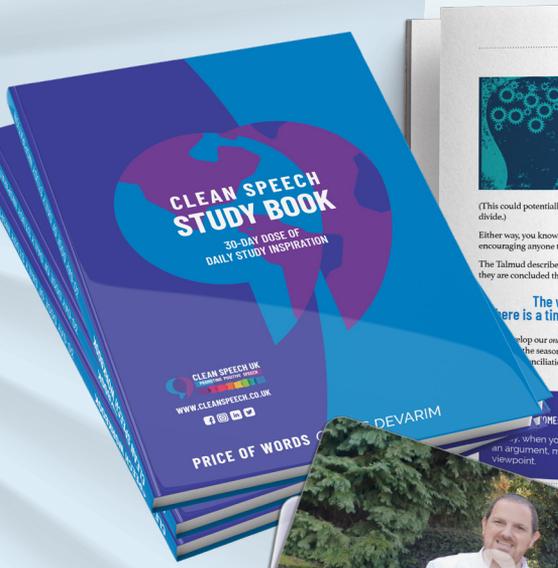
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