

Internet Defamation

The World Wide Web of Exposure



WHAT IS DEFAMATION?

- How the law protects an individual or corporation's reputation
- Classic definition:

“A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.”

- Working Definition:

Saying or writing something untrue and bad about someone else in public

“Saying”

“Writing”

“Untrue”

“Bad”

“About Someone”

“In Public”

- “Saying” = Slander

This can be a conversation, a meeting, a news conference, breakfast seminar etc.

- “Writing” = libel

Examples: Newspapers, magazines, billboards, the Web, nasty sticky on the staff room fridge

Historically, libelling someone has always been considered worse than slandering them. For libel, damages are legally presumed to have been suffered. The slandered must prove it.

- “Bad” = almost anything that can lower the opinion that reasonable people may have of someone

Examples: liar, cheater, lecher, welcher, thief, criminal, corrupt, lazy, immoral, promiscuous, perverted, biased

- “UNTRUE” -- the law protects only properly held reputations

Technically, the issue of truth arises as a defence. The law presumes the falsity of a “bad” statement but if the Defendant can prove that statement to have been substantially accurate, the Defendant succeeds

- “ABOUT SOMEONE” - the Plaintiff must be readily identifiable
 - Typically an easy threshold when someone is named. Problems often arise when the defamer speaks generally:
 - “all politicians are corrupt” is not defamation. Describing a specific politician as such probably is.
 - “all blondes are dumb” is not defamation. “That blonde in accounting is dumb” probably is.

- “All lawyers are greedy, lying, ambulance-chasing, pond scum” (assuming this is not true) is not defamation. However, saying “all lawyers at Dewey Cheatham & Howe” are greedy, lying ambulance-chasing, pond scum” probably is. Whereas, “some of the lawyers at Dewey Cheatham & Howe” are greedy, lying ambulance-chasing, pond scum” probably still isn’t.
- “Blaney’s charges too much” - definitely IS.

- “IN PUBLIC” = communication to anyone other than just the person being defamed
 - One can say or write anything -- no matter how untrue and bad -- if communicating only to that person.
 - BUT, saying it to just one other person (let alone a newspaper reporter or posting it on the Web) is sufficiently “public” to be defamation.
 - General Rule: the bigger the audience the bigger the damage award.

THE CLASSIC DEFENCES:

1. **Justification:** The Truth (shall set you free) - this is a complete defence no matter how terrible the thing said or how evil are the motives behind saying it.

But Remember: the Plaintiff doesn't have to show the statement is false. The Defendant has to show it was true. The tie goes to the Plaintiff.

- **2. Consent:** consent is a full defence but Courts look at this very strictly. The Defendant must prove he had the Plaintiff's consent to publish negative things about her.
- **3. QUALIFIED PRIVILEGE:** Where someone is under a duty to comment. Not only legal duties, but moral or societal duties too. One need not get it right but, for this defence to succeed, one must have appropriate motives. However, the Plaintiff has the burden of proving malice.
- **Examples:** assessing employees, reference checks, peer appraisals, legal reporting requirements, physicians' notes

- **4. ABSOLUTE PRIVILEGE:** From the point of view of defamation, you can say whatever you want in Parliamentary proceedings or in a court proceeding, or write whatever you want in a Statement of Claim.
 - There may be other consequences (e.g., parliamentary sanctions, substantial indemnity costs, aggravated damages), but not defamation.
 - Motive irrelevant.

- **5. FAIR COMMENT:** Expressing opinions on a matter of public interest.

- Five keys:
 1. Must relate to a “public” interest.
 2. Opinion distinguished from fact.
 3. Facts on which opinion are based must be true.
 4. The opinion must be honestly and reasonably held, and the comment must reasonably relate to the facts.
 5. Absence of malice.

For example, a TV news report exposé, or an op. ed. column.

DAMAGES

- GENERAL

- These compensate the loss of reputation, hurt feelings (for individuals only).
- “Uncapped”!

- SPECIAL

- Compensates lost income/revenue and income opportunities.

- AGGRAVATED

- Usually arise out of maintaining the truth of the statement.

- “PUNIES”

- Particularly bad scenarios.

INSURANCE IMPLICATIONS

- Policies:
- Media policies
 - newspapers, magazines, production companies
- CGL's/Homeowner (legal liability) Policies
 - Typically under the personal (not bodily) injury sections
- Some Professional E. & O. Policies
 - typically require that it be directly linked to the professional service being insured.

SOME NOTABLE CASES

- Oscar Wilde - 1890's
- Rasputin movie case
- Larry Flynt
- Tom Cruise
- Casey Hill - \$300,000 general damages in 1991
(when personal injury cap was under \$200,000)
- Mulroney (Airbus thing)

MISCELLANEOUS

- Innuendo -- intended inferences
- There is an Act: *Libel and Slander Act*
- Publishing: More than one person and in a series
- Innocent Disseminators -- partial defence

How is online defamation different?

1. Desired Remedies
2. Breadth of Exposure
3. New Defendants
4. Libel Tourism
5. New Defences?
6. Damages

1. Desired Remedies

2. Breadth of Exposure

- ❖ The Reply-All Email
 - ❖ Blogging
- ❖ Facebook and other social media sites
 - ❖ Tweeting

3. New Defendants

❖ Internet Service Providers

- ❖ Search Engines

- ❖ Website Hosts

- ❖ Employers

(Not so new, but now at greater risk.)

4. Libel Tourism

A plethora of options

- Provincial statutes differ. Common law differs. Damage awards differ.
- Defendant can *prima facie* be held liable wherever the statement was downloaded and read.

5. New Defences

Hyperlinking alone is not publication

- Hyperlinks will not in themselves implicate a website owner in publishing defamatory material found on the hyperlinked website.
- But what if the hyperlinking website endorses or adopts the defamatory content?

Fair comment
“Usual tone of a heated blogging debate”

Is it fair game on a message board
or Internet forum?

See: *Baglow v Smith*, 2011 ONSC 5131

Responsible Communication

- Can bloggers, “tweeters”, and other Internet users rely on this defence?
- If yes, what are the appropriate standards?

6. Damages

Court may consider:

- ❖ breadth of distribution of the publication;
(ie: number of followers/people who can access the information);
- ❖ the source of the information;
- ❖ whether statements remain on the Internet;
- ❖ whether there are countless repetitions and links to the material;
- ❖ the potential for long-term impact
(UK cases)

Representative Damage Awards

- Dawydiwuk v Insurance Corp of BC (BCCA) \$1,000
- Sarachman v Whitehead (ONSC) \$15,000
- Vigna v Levant (ONSC) \$25,000
- Alleslev-Krofchak v Valcon (ONCA) \$100,000
- Cornivea c. Canoe inc. (QSC) \$100,000
(incl. \$50k pun)
- Hunter-Dickenson Inc v Butler (BCSC) \$275,000
(incl. pun.)
- Leary et al v Handshoe (NSSC) \$425,000
- Courtney Love Twitter case \$430,000 US
- Astley v Verdun (ONSC) \$650,000

Thank you. Any questions?

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