

## Defamation

Libel vs. Slander, the Elements

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## Defamation's Historical Roots

As set out by Lord Atkin in *Sim v. Stretch* [1936] 2 All ER 1237, at 1240, a defamatory statement is one which tends to lower a person, "in the estimation of right-thinking members of society." It is not that the statement be made to the person in regard, it must be communicated to another. Tort law protects one's interest in preserving his/her reputation. In Canada, the law of defamation permits actions for Libel and Slander against those who seek to damage the another's reputation.<sup>(10)</sup> In *Hill v. Church of Scientology*[1995] 2 S.C.R. 1130, Cory J. reviewed the origins of defamation law:

The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R. E. Brown writes in *The Law of Defamation in Canada* (2nd ed. 1994), at p. 1-4:

"(N)o system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation." Some form of legal or social constraints on defamatory publications "are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism."

From the advent of the popular press in the nineteenth century, courts have increasingly grown concerned with protecting reputations from the threat of mass communications, the Internet much like the printing press once was is the next technological peril.

## Libel vs. Slander

A long recognized distinction for actionable defamation in the Common Law has existed between the written(libel) and the spoken(slander) word. Libel occurs when a defamatory statement is made in such mediums as writings, signs, pictures, statues, films and even conduct with defamatory implications. If the statement is in a transitory form, such as a hand gesture or the spoken word, it does not amount to libel and is; therefore, slander. A defamatory statement that is broadcast on radio or television will be libel, even though it is spoken.<sup>(11)</sup>

As the Law Society of Upper Canada notes, there has been reason in the past to make the distinction between libel and slander. Today, if one can prove that one has been libelled, and there is no defence for the loss of reputation, the law assumes damages and fixes an amount as compensation. The plaintiff does not have to prove damages for actual financial loss. However, in cases of slander, the plaintiff must prove actual financial loss before damages can be awarded. Slandorous statements are unlike written statements which are permanent and; therefore, do not have as great an impact.<sup>(12)</sup> In many Canadian Provinces libel and slander have been combined and the distinctions have become moot.

## Tort Elements

Liability for defamation is pertinent to numerous Internet contexts. The internet user would be found liable for defamatory material they produced directly eg. by posting a web page containing defamatory remarks, or by the actions of its employees or agents. Examples in the Internet context are abundant and liability for defamatory statements contained within a web site for the hosting Internet Service Provider(ISP) will be examined. The ISP allows the computer owner to communicate with a multitude of other computers which form the Internet via the telephone - and recently cable, wireless cable and satellite - lines.

For a finding of liability for the tort of defamation in Canadian realspace and then as applied to Cyberspace, three elements must be proven. First, the plaintiff must demonstrate that the defamatory charge was published; this does not mean that the defamation must have been printed and distributed, rather it is sufficient that the statements have been communicated to a person other than the plaintiff. Second, the plaintiff must establish that the defamation expressly, or by reasonable implication, referred to him/herself. Third, the materials must have been false and, in the eyes of a reasonable person, discrediting to the plaintiff.<sup>(13)</sup>

As noted by Dietrich, it is not necessary for the plaintiff to prove that the defendant intended to defame. Nor must it be proven that the defendant did lower the plaintiff's reputation in the minds of persons accessing the materials and that the plaintiff actually suffered any damages from the defamatory materials.<sup>(14)</sup> The onus lies with the defendant. As the threshold for what is defamatory is low, the majority of the courts time is spent assessing whether the defendant has one of the defences available.

In Cyberspace, much like realspace, the courts will assume that the materials were intended to defame the plaintiff and that the plaintiff has suffered damages. However, looking at Canada under the example of the *Ontario Libel and Slander Act* the requirement to prove damages in slander cases has been removed in certain situations. These include cases which call into question the reputation of a person in relation to their office, profession, calling, trade or business.<sup>(15)</sup> If it could be proven that B refused to enter into a contract with A as a result of a slanderous statement made by C, under Canadian law, A would be compensated for the loss of contract and reputation. A would; however, have to prove it was C's intention to attack his/her business reputation. Otherwise, damages would be awarded outright. The *Ontario Libel and Slander Act* does not completely remove the requirement to prove damage, in all slander cases.<sup>(16)</sup>

10. Wright, Linden, Klar, Canadian Tort Law, (Toronto : Butterworths, 1990) at 19-1.

11. Wright, Linden, Klar, *supra* note 10 at 19-11.

12. [http://www.lsuc.on.ca/public/other\\_libelslander\\_en.shtml](http://www.lsuc.on.ca/public/other_libelslander_en.shtml)

13. Pierre Trudel, Internet Content Liability Study - Civil Liability and the Internet, 12/03/97, available at <http://strategis.ic.gc.ca/SSG/it03235e.html>

14. Dale A. J. Dietrich, Legal Issues Affecting Canadian Based Electronic Commerce Undertakings, IT Industry Series on Intellectual Property Centre For Property Studies University of New Brunswick (May 7, 1998), available at <http://www.SmithLyons.ca/it/ecom>.

15. [http://www.lsuc.on.ca/public/other\\_libelslander\\_en.shtml](http://www.lsuc.on.ca/public/other_libelslander_en.shtml)

16. [http://www.lsuc.on.ca/public/other\\_libelslander\\_en.shtml](http://www.lsuc.on.ca/public/other_libelslander_en.shtml)

[http://thomsonrogers.com/sites/default/files/docs/library/Reputation\\_Management.pdf](http://thomsonrogers.com/sites/default/files/docs/library/Reputation_Management.pdf)

Turning to the defence of fair comment, the law recognizes that open and public discussion and comment on public issues is the very foundation of a free and responsible government. This is the source of the defence of fair comment. What is protected under this defence is commentary on matters of public concern. "Comment", for the purposes of the defence, is an expression of opinion about underlying facts (as opposed to a statement of the facts themselves). To successfully establish this defence, a defendant must prove that the words were:

- i) comment;
- ii) based upon facts that are true;
- iii) made honestly and fairly;
- iv) without malice (see the description of malice above); and
- v) on a matter of public interest.

From <http://www.blakes.com/DBIC/guide/Dispute/html/defamation.html>

## **4. Defamation**

Defamation is a notoriously complex tort. This provides only an outline of the common law tort of defamation as it exists in the common law provinces of Canada. Quebec's law of defamation is similar but has a few significant variations, and is not addressed below.

### **4.1 Elements**

To establish a cause of action for defamation, a plaintiff must prove that the defendant has made a defamatory statement to a third party regarding him or her. A defamatory statement is any statement that would lower the reputation of the plaintiff in his or her community in the estimation of "reasonable" persons.

Defamation is a strict liability tort – once the plaintiff has established that defamatory words were published, the onus shifts to the defendant to prove that the words complained of are defensible. The usual defences to a defamation claim are that the words claimed to be defamatory were:

- True (justification);
- Fair comment; or
- Published on an occasion of privilege.

### **4.2 Defence of Justification**

Truth, or justification, is an absolute defence to a defamation claim. A plaintiff has no right to have his or her character or reputation free of an imputation that is true.

Unlike the United States, where the impact of the First Amendment places the onus on the plaintiff to prove that what has been written is false, in Canada the onus is on the defendant to prove that the words complained of are substantially true. Similarly, Canadian common law does not afford any special recognition to "public figures", other than in the context of meeting

a "public interest" test for the defences discussed below, i.e., Canada does not have a *New York Times v. Sullivan* defence.

#### 4.3 Fair Comment

The defence of fair comment protects honestly held expressions of opinion on matters of public interest, based on facts. Although some Canadian courts have suggested that the comment must be fair, the better view is that the opinion can be obstinate or prejudiced, as long as it is an opinion that can be honestly held by any person on the proven facts. It is not necessary for the speaker to honestly hold the opinion expressed.

Where the defence of fair comment is established, it can only be defeated if the plaintiff acted maliciously, in the sense that the dominant motive for the publication was not to comment on a matter of public interest, i.e., comment made to injure the subject of comment.

#### 4.4 Privilege

Provincial statutes provide a defence of privilege to various forms of reports, for example, the statutory privilege for fair and accurate reports on court proceedings. In addition to court proceedings, legislation also protects fair and accurate reports on public meetings and communications, and decisions by bodies that represent governmental authority in Canada. In some cases, the privilege is absolute. In others, it applies as long as the defendant does not act with malice.

In addition to statutory privileges, the common law recognizes a qualified privilege that protects defamatory statements where the defendant had a legal, moral or social duty in making the statement and the recipient of the information had a corresponding interest in receiving the information. Qualified privilege has been recognized in numerous situations, including communications regarding employment (for example, reference letters), family communications, union communications, business to business communications, communications about litigation and medical communications. The question in each case is whether or not there is an interest in publishing and a corresponding interest in receiving the information.

A relatively recent development in Canadian (and English) libel law is the recognition of qualified privilege to protect news reports on matters of public interest where those news reports were prepared and published responsibly and relate to a matter of public interest. The defence has recently been recognized by the Supreme Court of Canada in the landmark decision *Grant v. Torstar*. The defence, which the Supreme Court has labelled as "responsible communication on a matter of public interest" will be available where: 1) the publication is on a matter of public interest; and 2) the publication was responsible, in that the defendant was diligent in trying to verify the allegations having regard to all the relevant circumstances. Where these two elements are present, a defence will be available, even if what is published is false.

#### 4.5 Jurisdiction

Due to the absence of the First Amendment and the impact of *New York Times v. Sullivan* in the United States, Canada is a more "plaintiff-friendly" jurisdiction. Consequently, U.S.-based defendants have sometimes attempted to bring claims in Canada. This tactic has increased with the advent of the Internet. Jurisdiction over Internet-defamation cases in Canada is unclear. So far, lower courts have been receptive to allowing U.S.-based defendants to be sued in Canada, even when they have little or no connection to this jurisdiction, but the matter is before appellate courts. American courts have been reluctant to enforce Canadian libel judgments having regard to the fact that Canada does not have protections to free speech similar to those provided by the First Amendment. Accordingly, even if a libel judgment is obtained in Canada against a U.S.-based defendant, it may be very difficult to enforce this judgment in the United

States.

#### 4.6 Damages

In defamation cases, damages are presumed. Canadian awards are much smaller than awards in the United States. The largest award in a Canadian case was for C\$1.6-million, half of which was for "punitive" damages, intended to punish the defendants for their highly malicious conduct.

Most Canadian damage awards for libel are under C\$100,000. The advent of the Internet may, however, push damage awards upwards, as at least one appellate-level court has found that damage awards for defamation over the Internet should be higher than those awarded for print publication.

### Criminal Threats

## INTIMIDATE

Means to intentionally say or do something which would cause a person of ordinary sensibilities to be fearful of bodily harm. It is not necessary to prove that the victim was actually frightened, and neither is it necessary to prove that the behavior of the person was so violent that it was likely to cause terror, panic or hysteria.

**Intimidation** (also called **cowing**) is intentional behavior "which would cause a person of ordinary sensibilities" fear of injury or harm. It's not necessary to prove that the behavior was so violent as to cause terror or that the victim was actually frightened.<sup>11</sup>

#### Criminal Code of Canada

##### Intimidation

**423.** (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property;

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

#### What is considered assault?

Generally, assault is where one person does something which is forceful or which threatens force to another person without their consent or permission. There is no requirement for actual physical harm or injury. For example, if you have been seriously threatened with force, or if force has been used against you, the person who committed these acts can still be charged with assault.

Harassing Behaviour - some definitions of harassing behaviour includes (but is not exhaustive):

- rude, degrading offensive remarks (verbal or written)
- provocation, pressure, coercion, intent to frighten, intimidate or threaten
- gestures - intent to intimidate, discredit – in order to destabilize
- o spreading rumours, use of ridicule, humiliation, comment private lives
- o shout, verbal abuse, sexual harassment

Harassment also includes behaviour in the form of repeated and hostile conduct, verbal comments, actions or gestures based on a protected ground or which are known or should reasonably be known to be unwelcome, and which negatively affects a personnel's dignity or psychological and/or physical integrity, and results in a harmful work environment.

Bullying and harassment are both major causes of ill health (both physical and mental health), stressful to experience and vastly affect your personal well-being. Whether this is happening at work or with your Neighbour From Hell, they are severely impacting issues on your personal life and will affect you holistically (e.g. in every area of your life and work).

If you are experiencing harassment and bullying you could be also suffering from a lack of sleep or raised blood pressure. You may also have a feeling of over-anxiety and/or depression, your self-confidence and self-respect may suffer and your concentration could be poorer than usual.

In the worst cases where someone is suffering with harassment, increased intakes of alcohol and/or drugs may provide some temporary relaxation and escape from the effects of bullying and harassing behaviour.

## Extensive Definition

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Intimidation is intentional behavior "which would cause a person of ordinary sensibilities" fear of injury or harm. It's not necessary to prove that the behavior was so violent as to cause terror or that the victim was actually frightened. "The calculated use of violence or the threat of violence to attain goals political, religious, or ideological in nature...through intimidation, coercion, or instilling fear" can be defined as terrorism.

Threatening behaviours are supposed to be a maladaptive outgrowth of normal competitive urge for interrelational dominance generally seen in animals. In case of human beings, threatening behaviours may be more completely modulated by social forces, or may be more mercilessly plotted by individual egotism. "To use a 'threat of force' or to 'intimidate' or 'interfere with' means to say or do something which, under the same circumstances, would cause another person of ordinary sensibilities to be fearful of bodily harm if he or she did not comply."

Like all behavioral traits it exists in greater or lesser manifestation in each individual person over time, but may be a more significant "compensatory behavior" for some as opposed to others. Behavioral theorists often see threatening behaviours as a consequence of being threatened by others, including parents, authority figures, playmates and siblings. "Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force."

Intimidation may be employed consciously or unconsciously, and a percentage of people who employ it consciously may do so as the result of selfishly rationalized notions of its appropriation, utility or self-

empowerment. Intimidation related to prejudice and discrimination may include conduct "which annoys, threatens, intimidates, alarms, or puts a person in fear of their safety...because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct."

Intimidation may be manifested in such manner as physical contacts, glowering countenance, emotional manipulation, verbal abuse, purposeful embarrassment and/or actual physical assault. "Behavior may include, but is not limited to, epithets, derogatory comments or slurs and lewd propositions, assault, impeding or blocking movement, offensive touching or any physical interference with normal work or movement, and visual insults, such as derogatory posters or cartoons."

Criminal threatening is the crime of intentionally or knowingly putting another person in fear of imminent bodily injury. "Threat of harm generally involves a perception of injury...physical or mental damage...act or instance of injury, or a material and tangible detriment or loss to a person." "A terroristic threat is a crime generally involving a threat to commit violence communicated with the intent to terrorize another."

There is no legal definition in English law as to what behaviour constitutes "Intimidation", so it is up to the courts to decide on a case by case basis. However, if somebody threatens violence against somebody, then this may be a criminal offence.

In most U.S. jurisdictions, the crime remains a misdemeanor unless a deadly weapon is involved or actual violence is committed, in which case it is usually considered a felony.

Criminal threatening can be the result of verbal threats of violence, physical conduct (such as hand gestures or raised fists), actual physical contact, or even simply the placing of a sign, an object or graffiti on the property of another person with the purpose of coercing or terrorizing.

Criminal threatening is also defined by arson, vandalism, the delivery of noxious biological or chemical substances (or any substance that appears to be a toxic substance), or any other crime against the property of another person with the purpose of coercing or terrorizing any person in reckless disregard for causing fear, terror or inconvenience. Coercion is the use of "pressure, threats, or intimidation" to compel or "force somebody to do something" or "make something to happen."

"Terrorizing" generally means to cause alarm, fright, or dread in another person or inducing apprehension of violence from a hostile or threatening event, person or object. "It is not requisite, in order to constitute this crime, that personal violence should be committed."

264. (1) **Criminal harassment** - No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonable, in all circumstances, to fear for their safety or the safety of anyone known to them.

(2) **Prohibited conduct** - The conduct mentioned in subsection (1) consists of repeatedly following from place to place the other person or anyone known to them;

(a) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;



- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on a business or happens to be;  
or  
(d) engaging in threatening conduct directed at the other person or any member of their family.
- Harassment in Ontario – laws and notes

Canadian Human Rights Commission - [http://www.chrc-ccdp.ca/publications/anti\\_harassment\\_part5-eng.asp](http://www.chrc-ccdp.ca/publications/anti_harassment_part5-eng.asp) Covers policies but there is no legislation to support it – simply the policies of individual workplaces and the OHSA which is quite vague. "Disrespectful behaviour, known as "personal" harassment, is also covered in this policy. While it also involves unwelcome behaviour that demeans or embarrasses an employee, the behaviour is not based on one of the protected grounds named above.

Harassment can take place between co-workers, between a manager and employee, between people of the opposite sex or of the same sex, between an employee and a client, or between an employee and a job applicant.

Harassment is any behaviour that demeans, humiliates, or embarrasses a person, and that a reasonable person should have known would be unwelcome. It includes actions, comments, or displays. It may be a single incident or continue over time.

Any unwelcome behaviour that demeans, humiliates, or offends a person, or puts sexual conditions on a person's job, is harassment."

## Criminal libel

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### Definition

#### **R. v. Stevens, 1995 CanLII 5594 (MB CA)**

Lord Scarman put it even more succinctly (at pp. 494-5):

It is, however, not every libel that warrants a criminal prosecution. To warrant prosecution the libel must be sufficiently serious to require the intervention of the Crown in the public interest.

... it is the gravity of the libel which matters. The libel must be more than of a trivial character: it must be such as to provoke anger or cause resentment. In my judgment, the references in the case law to reputation, outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential feature of a criminal libel remains — as in the past—the publication of a grave, not trivial, libel.

Defamation sites

<http://www.duhaime.org/LegalResources/Civillitigation/LawArticle-1217/The-Defamation-Claim-Exacting-Drafting.aspx>

and

<http://www.canlii.org/eliisa/highlight.do?text=slander&language=en&searchTitle=Ontario+-+Superior+Court+of+Justice&path=/en/on/onsc/doc/2003/2003canlii5254/2003canlii5254.html> - please see the following



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## De Haas v. Mooney, 2003 CanLII 5254 (ON SC)

Date: 2003-02-17

Docket: 02-CV-234574CM

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**COURT FILE NO.: 02-CV-234574CM**

**DATE: 2003/02/17**

### ONTARIO

#### SUPERIOR COURT OF JUSTICE

**BETWEEN:**

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)

Michael De Haas and Heathdale Management Inc.

)

Michael Simaan, for the Plaintiffs, Responding Parties

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)

)

Plaintiffs )

)

- and -

)

Mark J. Mooney and Mark J. Mooney &  
Associates Limited

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)

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)

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)

Defendants )

)

)

) **HEARD:** January 22, 2003

**H. Sachs J.**

**Introduction**

[1] This action arises out of a business dispute. In their Statement of Claim the Plaintiffs have alleged three causes of action against the Defendants: i) a claim for slander; ii) a claim for intentional interference with economic relations; and iii) a claim for inducing breach of contract.

[2] After being served with the Statement of Claim, the Defendants made a Demand for Particulars. A response was provided that the Defendants felt was deficient. Further demands were made by way of correspondence. Two subsequent replies were received from the Plaintiffs containing more particulars. The Defendants brought this motion to strike the Statement of Claim on the basis that the particulars provided still failed to meet the legal requirements for pleading the causes of action asserted in the Claim.

[3] Just prior to the argument of the motion the Plaintiffs filed an Amended Statement of Claim that they submitted met the objections put forward by the Defendants to their original Statement of Claim. The Defendants argued that the amended pleading still did not disclose a reasonable cause of action, contained paragraphs that were scandalous, frivolous or vexatious and offended the requirement that a pleading must contain a minimum level of fact disclosure. They relied on Rules 21.01(1)(b), 25.06(1) and 25.11(b) of the *Rules of Civil Procedure* in support of their motion that the Plaintiffs' pleading be struck. They also submitted that if the pleading was struck, there should be no right to amend as the Plaintiffs had already had sufficient opportunity to put forward a proper pleading.

**Defamation**

[4] Paragraphs 19 to 27[1] of the Amended Statement of Claim contain the allegations of slander that the Plaintiffs are making against the Defendants. In attacking those allegations as deficient the Defendants have pointed to the law that applies to the pleading of a claim of slander.

[5] Brown, in his text *The Law of Defamation*[2] summarizes the standards that must be met by a litigant bringing an action for slander.

In an action for defamation, "it is essential to know the very words on which the plaintiff founds his claim." This is particularly true in an action for slander. The defamatory words are the very facts upon which the entire action is founded. The statement "must contain sufficient information to put the defendant on his guard as to the case he will have to meet at trial." A court will not permit a plaintiff to leave an adversary "shrouded in mystery" as to what his or her action is all about.

Ordinarily, it is not sufficient to give the tenor, substance or purport of the libel or slander, or an approximation of the words, or words to a certain "effect", or any other words of a similar import. Nor can the plaintiff rely on some vague general statement of the defamatory words, or his or her interpretation of what they mean, otherwise the defendant would be deprived of the right to have the court, rather than the plaintiff, determine whether they are capable of a defamation imputation. The plaintiff must "plead in haec verba the actual words published." The exact words must be set out with reasonable certainty, clarity, particularity and precision. Without the words, there is nothing to construe as defamatory....

The purpose of such a requirement is to enable the defendant to plead to the allegations contained in the claim.[3]

[6] Furthermore, as summarized in *Swan v. Craig*[4], the following principles also govern the pleadings in a defamation action:

Pleadings in a defamation action are more important than in any other form of action. The defendant is entitled to particulars of where and when the slander was alleged to have been uttered. The defendants are further entitled to know who allegedly uttered the slander, what was said and to whom. Furthermore, the court will not allow the plaintiff to proceed to use discovery as a fishing expedition to seek out a cause of action. Therefore, it is inappropriate for a plaintiff, rather than provide the requisite particulars in his pleading, to plead that the particulars are within the defendants' knowledge.

[7] In *Magnotta Winery Ltd. v. Ziraldo*[5] Lane J. made it clear that there were a limited set of circumstances in which a court could permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words uttered by the plaintiff. In order to proceed under those circumstances the plaintiff must show :

- (a) that he or she has pleaded all of the particulars available to him or her with the exercise of reasonable diligence;
- (b) that he or she is proceeding in good faith with a prima facie case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
- (c) that the coherent body of fact of which he or she does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also

that the emanation contained defamatory material of a defined character of and concerning the plaintiff;

- (d) that the exact words are not in his or her knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his or her disposal.

[8] There is another legal principle that is also applicable to this motion. No action will lie for defamation if the action is based on statements made by people such as judges, advocates, parties and witnesses during the course of "an inquiry as to the administration of the law." [6] There is an absolute privilege that attaches to these statements, a privilege that "extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings...and perhaps even to statements made to investigators in the preparation of a prosecution." [7]

[9] With these principles in mind I will now turn to the pleading in question. For the purposes of this motion I allowed the Plaintiffs to rely on the Amended Statement of Claim.

[10] Paragraph 19 alleges that the Defendant engaged in a "smear campaign". This paragraph alleges a generalized defamation without any particulars whatsoever. For this reason it should be struck. Its presence in the pleading cannot be justified by the suggestion that it serves as an introduction to paragraph 20, in which particulars are given as to particular instances of slander. Paragraph 20 speaks for itself. To the extent that paragraph 19 is designed to heighten the impact of paragraph 20 it does so in a way that offends the rules of pleading by not being a material fact and by being an assertion that could be characterized as "scandalous" within the meaning of Rule 25.11(b).

[11] Paragraph 20(a) alleges that "on a date prior to August 12, 2000", the Defendant "advised a limousine driver by the name of Joseph" that the Plaintiff was insane. This paragraph must also be struck, as it does not sufficiently identify when and to whom the alleged words were spoken.

[12] Paragraphs 20(b), (c) and (d) do comply with the rules of pleading a defamation action. However, paragraph 20(e), as drafted, contains a claim for slander based on a statement made by the Defendant in a court proceeding. Therefore, it discloses no cause of action as such statements are subject to an absolute privilege. The contention of the Plaintiffs before me was that they are not suing for the statement made in court, but rather for the slandorous statements that the Defendant, Mr. Mooney, admitted in court that he had made to other people about the Plaintiff. This is not how the pleading is drafted. Further, if the Plaintiffs amend their pleading to clarify their claim as against the Defendants, in order to have that redrafted claim survive another motion by the Defendants to strike their claim on the basis of insufficient particularity, they will have to file evidence to show that they fit within the limited circumstances set out by Lane J. in *Magnotta Winery*. [8]

[13] The second paragraph 20 in the Amended Statement of Claim contains an allegation that as a result of the "rumours" the Defendant spread about the individual Plaintiff, the corporate Plaintiff experienced a decline in its bookings. According to the pleading, certain named clients "did not want to become involved with Mr. De Haas." The clients named in this paragraph are different than the clients to whom the Defendant is alleged to have made slandorous statements as particularized in the previous paragraph. Thus, unless the connection is made between the torts claimed in the first paragraph 20 and the damages alleged in the second paragraph 20, the second paragraph 20 is irrelevant and should be struck.

[14] The next paragraph that the Defendants objected to in the amended pleading is paragraph 22. That paragraph alleges that the Defendants contacted the police about the Plaintiff and made statements about the Plaintiff to the police that caused the individual Plaintiff to be charged with criminal harassment and threatening. The paragraph also makes the statement that the individual Defendant launched "a baseless criminal investigation in order to further discredit" the Plaintiff. The Defendants submit that this paragraph should be struck as the statements made to the police by the Defendant are subject to an absolute privilege and the statement that the Defendant launched a criminal investigation cannot stand since it is the police who launch criminal investigations, not individual citizens.

[15] Statements that are made to public authorities in connection with matters over which those authorities have jurisdiction are subject to a qualified privilege. This would include statements made to the police in the investigation of a crime. A qualified privilege is one that can be defeated by malice.<sup>[9]</sup> Thus, as drafted, the impugned paragraph does not disclose a cause of action in that it makes reference to statements made during an occasion that is subject to a qualified privilege and does not assert malice. It also fails to sufficiently particularize the statements that the Defendant is alleged to have made to the police. As such the paragraph should be struck.

[16] Paragraph 23 of the amended pleading alleges that the charges laid as a result of the police investigation that was commenced against the Plaintiff were tried and dismissed. It also refers to the court's finding in that trial that the individual Defendant's evidence was not to be believed. This paragraph is struck, as it is irrelevant to the causes of action being asserted.

[17] Paragraph 24 again makes reference to certain statements made by the individual Defendant during the course of the criminal trial. It is struck for the same reasons as paragraph 20(e).

#### **Intentional Interference with Economic Relations**

[18] In addition to pleading defamation, the Plaintiffs have pled the cause of action of intentional interference with economic relations.

[19] There are three essential elements that a Plaintiff must prove to succeed in a claim for intentional interference with economic relations. They are:

- (i) an intention to injure the plaintiff;
- (ii) interference with another's method of gaining his or her living or business by illegal means;
- (iii) economic loss caused thereby.[10]

[20] Paragraph 25 of the amended pleading does assert an intention to injure the Plaintiffs' business. Paragraphs 20(b), (c) and (d) do assert that the Defendant contacted the Plaintiffs' clients and made allegedly **slandorous** statements to them, thereby containing the second essential element of the tort in question. With respect to economic loss, this element is asserted in paragraph 20(the second paragraph 20) and paragraph 25. Paragraph 20 has been struck for the reasons outlined above. Paragraph 25 does allege financial loss and if assumed to be true satisfies the third criterion of the tort. The pleading with respect to this tort will not be struck. However, the Defendants are entitled to receive from the Plaintiffs particulars with respect to the economic or financial loss that they allege they suffered as result of the Defendants' actions.

#### **Inducing Breach of Contract**

[21] In paragraph 1(c) of their Amended Statement of Claim the Plaintiffs claim damages in the amount of \$1,000,000.00 for the torts of intentional interference with economic relations and inducement of breach of contract. With respect to the tort of inducing breach of contract, there are five requisite elements that must be proved in order for such a claim to succeed. They are;

- (i) the existence of an enforceable contract;
- (ii) the knowledge on the part of the Defendant of the existence of the plaintiff's contract;
- (iii) an intentional act on the part of the Defendant to cause a breach of the contract;
- (iv) wrongful interference on the part of the Defendant;
- (v) resulting damage to the plaintiff.[11]

[22] In this case the Plaintiffs have not pleaded the existence of an enforceable contract or knowledge on the part of the Defendants of the existence of the Plaintiffs' contract. Thus, those portions of the pleading that make reference to the tort of inducing breach of contract must be struck.

#### **Conclusion**

[23] An order will go striking the following paragraphs of the Amended Statement of Claim:

- (i) paragraph 1( c) to the extent that it refers to the tort of inducing breach of contract;

- (ii) paragraph 19;
- (iii) paragraph 20(a) ;
- (iv) paragraph 20(e);
- (v) paragraph 20 (the second paragraph 20);
- (vi) paragraph 22;
- (vii) paragraph 23; and
- (viii) paragraph 24.

[24] The Plaintiffs are entitled to file an amended pleading within 20 days from the release of this endorsement. If the Plaintiffs do not file an amended pleading or an amended pleading that contains particulars of the financial loss claimed in paragraph 25, then the Plaintiffs shall provide the Defendants with those particulars within the same period of time (20 days). The parties may address me in writing on the question of costs within 10 days of the release of this endorsement.

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MADAM JUSTICE HARRIET SACHS

**Released: February 17, 2003**

**COURT FILE NO.: 02-CV-234574CM  
DATE:2003/02/17**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Michael DeHaas and Heathdale  
Management Inc.

Plaintiffs

- and -

Mark J. Mooney and Mark J. Mooney &  
Associates Limited

Defendants

**REASONS FOR DECISION**

**SACHS J.**

**Released: February 17, 2003**

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[1] It should be noted that the pleading concerned contains two paragraphs 20.

[2] 2<sup>nd</sup> edition, 1994, at paras. 19-15 and 19-16.

[3] cites omitted.

[4] [2000] O.J.No.1377 (Ont. S.C.J.) per Pitt J. at para. 11.

[5] 1995, 25 O.R. (3d) 575.

[6] *Munster v. Lamb* (1883), 11 Q.B.D. 588 at 600-01(C.A.).

[7] *Dooley v. C.N. Weber Ltd.* 1994 CanLII 7300 (ON SC), (1994) 19 O.R. (3d) 779, [1994] O.J. No. 2328 (Ont. Ct.Gen. Div.) per Reilly J. at page 5.

[8] *Supra*, note 5.

[9] C.E.D. (Ontario), 3d Edition, Volume 8A, paras. 339, 362 and 374.

[10] *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* [1998] O.J. No. 4499 (Ont. C.A.) at page 3.



[11] *Chaplin v. V-Logix Systems Inc.* [1998] O.J. No. 1775 (Ont. Gen. Div.) per Aitken J. at para 8; *Ontario Store Fixtures Inc. v. Mmmuffins reflex*, (1989), 70 O.R. (2d) 42 (Ont. H.C.J.) per MacFarland J. at 44.

Federation of Law Societies of Canada

## **Libel and Slander**

[11] The necessary elements in pleading this tort are:

- (a) the allegation that words were published or spoken;
- (b) the words were published or spoken by a named defendant;
- (c) the words referred to the plaintiff to the knowledge of a third party;
- (d) the exact words spoken or published are to be plead, if known, or ascertainable;
- (e) the words are defamatory on their face or have defamatory effect in a particular context.

[http://www.expertlaw.com/library/personal\\_injury/defamation.html](http://www.expertlaw.com/library/personal_injury/defamation.html) - info follows

# **Defamation, Libel and Slander Law**

By Aaron Larson

Law Offices of Aaron Larson

August, 2003

## **Contents**

- What Are Defamation, Libel and Slander
- What Defenses Are Available to People Accuse of Defamation?
- Public Figures
- Why Commencing a Defamation Action Is Not Always a Good Idea

It is not unusual for attorneys to receive inquiries about defamation actions from people who are in conflicts with neighbors or other members of their communities, and have become the subjects of vicious lies. The area of law most implicated by that type of conduct is "defamation of character", a cause of action which is generally defined to include "libel" and slander".

## **What Are Defamation, Libel and Slander?**

Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. Slander involves the making of defamatory statements by a transitory (non-fixed) representation, usually an oral (spoken) representation. Libel involves the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper.

Typically, the elements of a cause of action for defamation include:

1. A false and defamatory statement concerning another;
2. The unprivileged publication of the statement to a third party (that is, somebody other than the person defamed by the statement);
3. If the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher; and
4. Damage to the plaintiff.

In the context of defamation law, a statement is "published" when it is made to the third party. That term does not mean that the statement has to be in print.

Damages are typically to the reputation of the plaintiff, but depending upon the laws of the jurisdiction it may be enough to establish mental anguish.

Most jurisdictions also recognize "per se" defamation, where the allegations are presumed to cause damage to the plaintiff. Typically, the following may constitute defamation per se:

- Attacks on a person's professional character or standing;
- Allegations that an unmarried person is unchaste;
- Allegations that a person is infected with a sexually transmitted disease;
- Allegations that the person has committed a crime of moral turpitude;

While actions for defamation have their roots in common law, most jurisdictions have now enacted statutes which modify the common law. They may change the elements of the cause of action, limit when an action may be filed, or modify the defenses to an action for defamation. Some may even require that the defendant be given an opportunity to apologize before the plaintiff can seek non-economic damages.

## What Defenses Are Available To People Accused of Defamation?

The most important defense to an action for defamation is "truth", which is an absolute defense to an action for defamation.

Another defense to defamation actions is "privilege". For example, statements made by witnesses in court, arguments made in court by lawyers, statements by legislators on the floor of the legislature, or by judges while sitting on the bench, are ordinarily privileged, and cannot support a cause of action for defamation, no matter how false or outrageous.

A defense recognized in most jurisdictions is "opinion". If the person makes a statement of opinion as opposed to fact, the statement may not support a cause of action for defamation. Whether a statement is viewed as an expression of fact or opinion can depend upon context - that is, whether or not the person making the statement would be perceived by the community as being in a position to know whether or not it is true. If your employer calls you a pathological liar, it is far less likely to be regarded as opinion than if such a statement is made by somebody you just met. Some jurisdictions have eliminated the distinction between fact and opinion, and instead hold that any statement that suggests a factual basis can support a cause of action for defamation.

A defense similar to opinion is "fair comment on a matter of public interest". If the mayor of a town is involved in a corruption scandal, expressing the opinion that you believe the allegations are true is not likely to support a cause of action for defamation.

A defendant may also attempt to illustrate that the plaintiff had a poor reputation in the community, in order to diminish any claim for damages resulting from the defamatory statements.

A defendant who transmitted a message without awareness of its content may raise the defense of "innocent dissemination". For example, the post office is not liable for delivering a letter which has defamatory content, as it is not aware of the contents of the letter.

An uncommon defense is that the plaintiff consented to the dissemination of the statement.

## Public Figures

Under the First Amendment of the United States Constitution, as set forth by the U.S. Supreme Court in the 1964 Case, New York Times v. Sullivan, where a public figure attempts to bring an action for defamation, the public figure must prove an additional element: That the statement was made with "actual malice". In translation, that means that the person making the statement knew the statement to be false, or issued the statement with reckless disregard as to its truth. For example, Ariel Sharon sued Time Magazine over allegations of his conduct relating to the massacres at the Sabra and Shatila refugee camps. Although the jury concluded that the Time story included false allegations, they found that Time had not acted with "actual malice" and did not award any damages.

The concept of the "public figure" is broader than celebrities and politicians. A person can become an "involuntary public figure" as the result of publicity, even though that person did not want or invite the public attention. For example, people accused of high profile crimes may be unable to pursue actions for defamation even after their innocence is established, on the basis that the notoriety associated with the case and the accusations against them turned them into involuntary public figures.

A person can also become a "limited public figure" by engaging in actions which generate publicity within a narrow area of interest. For example, a woman named Terry Rakolta was offended by the Fox Television show, *Married With Children*, and wrote letters to the show's advertisers to try to get them to stop their support for the show. As a result of her actions, Ms. Rakolta became the target of jokes in a wide variety of settings. As these jokes remained within the confines of her public conduct, typically making fun of her as being prudish or censorious, they were protected by Ms. Rakolta's status as a "limited public figure".

## Why Commencing A Defamation Action Is Not Always A Good Idea

While people who are targeted by lies may well be angry enough to file a lawsuit, there are some very good reasons why actions for defamation may not be a good idea.

The publicity that results from a defamation lawsuit can create a greater audience for the false statements than they previously enjoyed. For example, if a newspaper or news show picks up the story of the lawsuit, false accusations that were previously known to only a small number of people may suddenly become known to the entire community, nation, or even to the world. As the media is much more apt to cover a lawsuit than to cover its ultimate resolution, the net effect may be that large numbers of people hear the false allegations, but never learn how the litigation was resolved.

Another big issue is that defamation cases tend to be difficult to win, and damage awards tend to be small. As a result, it is unusual for attorneys to be willing to take defamation cases on a contingent fee basis, and the fees expended in litigating even a successful defamation action can exceed the total recovery.

Another significant concern is that, even where the statements made by the defendant are entirely false, it may not be possible for a plaintiff to prove all of the elements of defamation. Most people will respond to news that a plaintiff lost a defamation lawsuit by concluding that the allegations were true.

In other words, the plaintiff in a defamation action may be required to expend a considerable amount of money to bring the action, may experience significant negative publicity which repeats the false accusations, and if unsuccessful in the litigation may cement into the public consciousness the belief that the defamatory accusations were true. While many plaintiffs will be able to successfully prosecute defamation actions, the possible downside should be considered when deciding whether or not such litigation should be attempted.

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CHARITY LAW BULLETIN No.  
125

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Editor: Terrance S. Carter

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# **A PRIMER ON THE LAW OF DEFAMATION IN ONTARIO**

By Suzanne E. White, B.A., LL.B.

## **A. INTRODUCTION**

While the Canadian *Charter of Rights and Freedoms*<sup>1</sup> guarantees the right of freedom of expression, this right has always been of a limited nature. One of those limitations can be found in Ontario legislation through the *Libel and Slander Act* (the "Act")<sup>2</sup>, which prohibits the dissemination of defamatory comments, specifically, spoken or written words that discredit an individual in the estimation of right-thinking members of society generally.

Every province and territory in Canada has enacted similar legislation to protect the victims of either spoken or written communication that can disparage that person's reputation. In this electronic age, communication is packaged in a variety of formats allowing individuals, organizations, government agencies, non-governmental agencies and charitable and not-for-profit organizations the ability to communicate their positions on a plethora of topics, and therefore increasing the opportunity for statements to be misunderstood, and objected to.

The purpose of this *Charity Law Bulletin* is to provide a brief overview of the framework of the Act in the province of Ontario specifically, as well as an overview of important court decisions that have been made pursuant to the Act.

Finally, this *Charity Law Bulletin* will point out some of the pitfalls that charitable and not-for-profit organizations should avoid when expressing opinions and beliefs through the organization's work, and as well as the protections afforded to the same organizations.

## **B. AN OVERVIEW OF THE LAW OF DEFAMATION IN ONTARIO**

Defamation is defined in *Black's Law Dictionary*<sup>3</sup> as:

The act of harming the reputation of another by making a false statement to a third person...A false written or oral statement that damages another's reputation.<sup>4</sup>

More specifically, a defamatory statement is defined as:

A statement that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike.<sup>5</sup>

Defamation is comprised of two subcategories between libel and slander, which are discussed below.

### **1. Libel**

The first portion of the Act deals with libel. Section 2 of the Act states that "defamatory words in a

newspaper or in a broadcast shall be deemed to be published and to constitute libel". Given the nature of editorial and opinion pieces, many defamation actions for libel are focused on newspaper articles which are alleged to have disparaged, directly or indirectly, the subject of the article. In short, libel refers to *written* defamatory statements.

## 2. Slander

Slander is the second subcategory of defamation, and encompasses the broadcasting of *spoken* defamatory words. At common law, oral statements relating to the following four categories of slanderous words are automatically considered to have proven that a loss has been sustained:

- a) statements that discredit the plaintiff in relation to his or her work (business, profession, etc.)
- b) statements that impute to the plaintiff the commission of a criminal offence;
- c) statements that impute to the plaintiff a "loathsome or contagious disease"; and
- d) statements that impute "unchastity to a woman".

Section 16 of the *Act* describes the way in which a plaintiff must prove an action in slander, specifically with respect to Category a) above:

In an action for slander for words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication thereof, it is not necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of the plaintiff's office, profession, calling, trade or business, and the plaintiff may recover damages without averment or proof of special damages.

Section 16 is very important in situations in particular where a person has suffered business losses and cannot clearly quantify the loss of the dollar amount that their business has suffered due to allegedly slanderous statements. As such, by virtue of the fact that the statements were made, the proposed plaintiff can make out a case without having to suffer from a reverse burden of proving the damages that they suffered. All other oral statements made that do not fall in the above four categories require the proposed plaintiff to prove that they sustained a loss.

Section 17 of the *Act* deals with slander of title, goods and other malicious falsehoods. Slander of title and of goods relates to where slanderous comments are made about an individual or corporation's property that they own or where they sell. Again, in these sorts of situations a plaintiff does not have to allege or prove special damages:

- a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
- b) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication, and the plaintiff may recover damages without averment or proof of special damage.

## 3. Proving a Claim in Libel and/or Slander

In order to initiate a claim of libel or slander in an action for defamation, the allegations must prove the

following:

- i) The statements must be made to a third party. Where a statement has been made and no one has read it aside from the individual, organization or corporation about which the statement has been made, the statement cannot be considered libellous;
- ii) The statements must be made specifically about individual, corporation or organization in question. It must be reasonably inferred that the statement that was published could reasonably be inferred to be discussing to or referring to that individual, corporation or organization.
- iii) Finally, the statement made must be considered defamatory, i.e. the statement must be false and disparages the reputation of the individual, corporation or organization.

#### 4. Limitation Periods

Where an individual, corporation or organization decides to bring a court action for alleged defamatory statements, there are important limitation periods that must be noted. Failure to do so can create a situation in which the proposed plaintiff in the proceedings loses their ability to bring their action simply because of a procedural error rather than for lack of a worth-while claim. Section 5 of the *Act* states that a plaintiff cannot bring an action for libel in a newspaper or a broadcast unless within six weeks after the alleged libellous statement has come to the plaintiff's knowledge, the plaintiff has given written notice to the defendant that they have become aware of this statement and that a statement of claim will follow.<sup>6</sup> Furthermore, at section 6 of the *Act*, a court action for libel must be commenced within three months after the alleged libellous statement comes to the plaintiff's knowledge.

Actions in libel and slander that do not relate to newspapers must be brought pursuant to the *Limitations Act, 2002*,<sup>7</sup> which states that there is a two year limitation period from the date upon which the proposed plaintiff became aware of the alleged libellous or slanderous statements upon which to bring a court proceeding. It is important to note that there are many situations where an individual, corporation or organization is not aware of the libellous or slanderous statements until well after those statements have been published. As such, both the *Act* and the *Limitations Act, 2002* provide protection to proposed plaintiffs in that the time limitation starts running once the plaintiff becomes aware of the published or broadcast statements rather than from the date when those statements were actually made.

#### 5. Defences to Actions in Libel and Slander

There are four main defences to an action for libel or slander, which are as follows:

##### a) Truth

The first defence is the defence of truth, meaning that if a statement made is attacked as being defamatory, the defence can be made that the statement was truthful and therefore there was nothing false about the statement, meaning therefore, that the statement was not defamatory.

#### b) Fair Comment

The second defence to an allegation of libellous statement is that the statements made were made as a fair comment. The defence of fair comment would be considered by the Court in situations where, by looking at the statement made, the facts and the situation, a conclusion can be made that the statements made were in actuality a fair commentary on the situation at hand and that the comments were fair and were not malicious.

#### c) Qualified Privilege

The defence of qualified privilege arises normally in situations where based on public policy, even where a person makes a statement that is considered defamatory, the individual, corporation or organization publishing these statements will escape any liability if it can be proven that the public good could be furthered in open debate.

#### d) Absolute Privilege

Situations where the defence of absolute privilege would apply would be comments made by civil servants, members of parliament, members of provincial parliament, federal government, ministers and the like who make comments that may be defamatory, but were made in the furtherance of investigations, fact finding missions, and reporting for the benefit of public policy.

### **C. RECENT DEFAMATION COURT DECISIONS**

There are three important defamation decisions that have been made in Ontario that clearly indicate that the courts will not be hesitant to award large damages awards, particularly in situations where someone's professional reputation is destroyed. In *Hill v. Church of Scientology of Toronto et al*,<sup>8</sup> Hill, who was a criminal prosecutor, brought an action against the Church of Scientology of Toronto, defendants in a criminal matter in which Hill was prosecuting. The Church of Scientology accused Hill of aiding and abetting other Crown Counsel in improper conduct regarding the sealing of documents and misleading a judge. The Ontario Court of Appeal found that the church's allegations against Hill were unfounded and were made through the church's legal counsel. Mr. Hill was awarded \$300,000.00 in general damages, in addition to \$500,000.00 in aggravated damages and \$800,000.00 in punitive damages.

Two decisions in favour of plaintiffs bringing actions in defamation against the Canadian Broadcasting Corporation (the "CBC") clearly indicate that even a Crown corporation is not exempt from taking responsibility for the material it disseminates. In *Leenen v. Canadian Broadcasting Corporation*<sup>9</sup> and *Myers v. Canadian Broadcasting Corporation*<sup>10</sup> in relation to a television program which portrayed a number of cardiologists in a negative light as using controversial heart medication. The program was alleged to have portrayed the plaintiff cardiologists as uncaring individuals who were using the drugs without any concern of the potential negative effect of the drug on their patients. In *Leenen*, \$400,000.00 in general damages were awarded, as well as \$350,000.00 in aggravated damages and \$200,000.00 in punitive damages. In the related *Myers* action, brought by another cardiologist, the plaintiff was awarded \$200,000.00 in general damages, and aggravated damages in the amount of \$150,000.00. The *Leenen* and *Myers* decisions also

underline that broadcasters of defamatory materials created by others are also exposed to liability.

#### **D. IMPLICATIONS FOR CHARITIES AND NOT FOR PROFIT ORGANIZATIONS**

##### **1. Avoiding Defamation Claims**

The law of defamation across Canada and particularly under the *Libel and Slander Act* in Ontario is of particular importance to many, if not most charitable and not-for-profit organizations for a number of reasons. Most charitable and not-for-profit organizations, even the smallest entities, do have some sort of written communication that they send out to their members, volunteers, donors, supporters and other interested parties to publicize upcoming events, as well as their position on particular issues. Other tools used in disseminating information about the mandate of the organization and its objects and activities, often include the following:

- Online discussion groups
- E-mail newsletters
- Seminars
- Conferences
- Books
- Handbooks
- E-mails
- Flyers
- Appearances on college/university campuses, community radio, press conferences
- Taped sermons
- Websites
- Presentations
- Workshops
- Journal articles
- Study materials
- Workbooks
- Online posting boards
- Press releases
- Taped speeches
- Church bulletin

Given the vast array of options that charitable and not-for-profit organizations have to disseminate information and to publish their particular views, it is clear that these organizations must take steps to ensure that whatever publications or method of broadcasting they use does not fall offside of the *Act*.

It is advisable for all charitable and not for profit organizations to note that any potentially defamatory statements could also attract human rights complaints through the mechanisms provided by *Human Rights Code* (Ontario) (the "*Code*")<sup>11</sup> and the *Canadian Human Rights Act*,<sup>12</sup> in situations where a potentially defamatory statement could also be construed as a violation of the *Code* or the *Canadian Human Rights Act* provisions that protect a number of enumerated groups stipulated within those pieces of legislation at the provincial and federal levels. Readers are also encouraged to review *Charity Law Bulletin* No. 65 entitled "Employment Advertising by Charities and Not-For-Profits: Issues in Human Rights Law", available <http://www.carters.ca/pub/bulletin/charity/2005/chylb65-05.pdf> prepared by the writer and Mervyn F. White, which provides a specific overview of the way in which charities and not-for-profit organizations can protect themselves from human rights complaints when preparing and publishing advertisements for their specific employment needs.

##### **2. Addressing Defamatory Comments against the Organization**

It is also important to consider what a charitable or not for profit organization should do in the event of litigation whether it is a proposed plaintiff in an action for defamation for either libel or slander, or if it is a



proposed defendant being accused of publishing or broadcasting libellous or slanderous statements. In situations where a charitable or not-for-profit organization believes that there is a possible action for damages for either libel or slander, the organization must consider a few issues before proceeding.

a) In situations where the statement has not been circulated to a number of people or to a number of organizations, the organization must consider the possibility that by moving forward with a court action, the statements made by the potential defendant will now become a matter of public record. In situations involving large and/or well-known charitable or not-for-profit organizations, the general media may very well report on these proceedings, and thereby circulating on a larger scale the very comments that the organization wishes to quash.

b) Secondly, an action in defamation for either libel or slander can be, as with any other litigation, very expensive, time consuming and can consume the resources of an organization and distract it from its original objects.

c) Finally, the fact that a charitable or not for profit organization could be exposed to an action in defamation for libel or slander based on the comments made by one of its spokespersons underlines the critical importance of ensuring that any and all communications by an organization is carefully reviewed and is approved upon by the Board of Directors, or by a qualified senior staff-person when the Board has delegated that authority. It is worth repeating that at any time an organization is unsure whether or not a particular piece of material or whether an oral presentation could be considered defamatory, it would be essential to obtain the advice of legal counsel trained in this specialty.

#### **E. DEFAMATION AND THE INTERNET**

The law of defamation with respect to the internet is growing into a subcategory in and of itself, as the internet provides virtually unlimited means by which potentially defamatory material can be disseminated literally across the globe within seconds and with the potential of reaching millions of people. Moreover, the speed and breadth of the internet has increased the number of potential plaintiffs in a proposed defamation action, as the number of persons that could potentially view potentially offensive material and object to it is likely much greater than readers of print materials only.

#### **F. CONCLUSION**

The *Libel and Slander Act* is a powerful legislative tool to protect the victims of unscrupulous statements made by individuals that can injure or discredit that person or organization's reputation. In situations involving charitable and not-for-profit organizations, it is imperative that these organizations avoid as much as possible making or broadcasting statements that could expose the organization to liability due to the comments made that might possibly discredit another. In addition, it is important for organizations to be aware of comments that are made about the organization which could destroy its goodwill, and accordingly, take positive steps to minimize dissemination of those statements.

#### **ENDNOTES**

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<sup>1</sup> Part I, The *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

<sup>2</sup> R.S.O. 1990, c. L12.

<sup>3</sup> Brian A. Garner, ed., 8th ed. (St. Paul: The West Group, 1999).

<sup>4</sup> *Ibid.* at 448.

<sup>5</sup> *Ibid.* at 449.

<sup>6</sup> *Supra* note 1 at s. 5(1).

<sup>7</sup> S.O. 2002, c. 24, Sch. B.

<sup>8</sup> [1994] O.J. No. 961 (Ont. C.A.) [hereinafter *Hill v. Scientology*].

<sup>9</sup> [2001] O.J. No. 2229 (Ont. C.A.) [ hereinafter *Leenen*].

<sup>10</sup> [2001] O.J. No. 2228 (Ont. C.A.) [hereinafter *Myers*].

<sup>11</sup> R.S.O. 1990, c. H.19.

<sup>12</sup> R.S.C. 1985, c. H-6.

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by Toronto Internet Lawyer [Gil Zvulony](#)

Defamation?

**Defamation** (sometimes referred to as **defamation of character**) is a statement to a third party about an identifiable individual that is false and damaging to the person's feelings, pocket book, or reputation.

The test to determine whether a statement is damaging to one's reputation is whether or not the statement would lower the opinion of the person in the minds of others or cause a person to be shunned or avoided or exposed to hatred, contempt or ridicule.

The test is an objective test and not a subjective one. In other words, it is not relevant if the victim thinks that the words are damaging, rather the relevant inquiry is what the average person would think.

In Ontario, in most cases, it is not necessary to prove that the defamatory statements were made maliciously.

Courts will first look at the natural and ordinary meaning of the words. The intention of the publisher is not examined when looking at the meaning of the words. In appropriate cases, secondary meanings or innuendos will be examined by the court.

In determining if a statement is defamatory, the context of the statement is important. Words that are defamatory in one situation will not necessarily be defamatory in another situation. Calling a doctor a "quack" would be defamatory while calling a professional clown a "quack" would generally not be defamation.

The plaintiff must prove that the defamatory statement is about him or her and that the statement was published.

**Libel** is a defamatory statement that is published or broadcast.

**Slander** is a defamatory statement that is spoken or of a more transitory nature such as a gesture or signs.

## Defamation?

- a. Statements that are damaging and true are not defamation. For example, a newspaper story about how a person was charged with an embarrassing crime can be very damaging to a person's reputation, however if such a story is true, then it cannot be defamation. Similarly, "outing" a person who identifies himself or herself as a homosexual may not be defamatory, if the story is true.
- b. False statements that are not damaging are not defamation. For example a statement that Prime Minister Harper has blonde hair and blue eyes, although false, is not damaging. Therefore, not every mistake in a publication will constitute defamation. The statement must be damaging as well as false.
- c. A false and damaging statement about a large group of unidentifiable persons is not defamation. Defamation must relate to an identifiable person or persons. For example saying something false and damaging about "the directors of" a particular corporation is likely to be defamatory because the individuals are easily identifiable. However, saying something false and damaging about, for example, "the Canadian People" is not defamation because individual persons are not identifiable. In some cases, although not defamatory, false and damaging statements about certain groups could contravene human rights legislation.
- d. Defamation of a dead person.

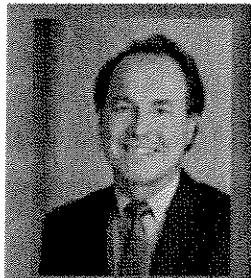
## Cyber-Libel?

Cyber-libel is when someone has posted or emailed something that is untrue and damaging about you on the internet. The internet has created the easy ability for almost anybody to communicate with almost anyone. This ability has a dark side – the average person's reputation or a small business's hard-earned goodwill can be harmed in a serious way.

Unfortunately, cyber-libel is becoming more common. In the past, only famous people had libel and slander issues. Today, it is the common person who must deal with this issue. For example, a disgruntled consumer, an angry ex-spouse, a

competitor, or a peddler of gossip can now "vent" their frustrations about their victim cheaply, easily, and seemingly anonymously. A Google search of the victim's name usually reveals the poisonous words for anyone that is interested.

The harm to reputation and character is real. A malicious customer review by a competitor could destroy a small business. A false accusation of adultery on a social networking site could destroy a marriage. An allegation that someone is a "crook" could be read by a potential employer or business partner.



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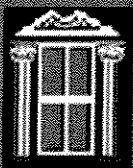
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### Defamation Overview

This brief overview is designed to get you started in your assessment of whether, as a possible plaintiff, you have a potential libel or slander claim or, alternatively, whether, as a possible defendant, you have a legitimate area of defamation concern and to assist others to avoid publishing defamatory material.

Recognize in reading this overview that this is a complex area of law. For example, one of the leading Canadian textbooks on defamation is four volumes long. If, as a result of reviewing this overview, you believe that you have a defamation claim or concern, you should contact me or another defamation lawyer without delay. There are some short time periods that may apply to the prosecution or defence of claims especially if they involve defamatory communications in a newspaper, broadcast or web-based publication.

#### ***What is Defamation?***

Defamation is any written or spoken communication and any picture or representation calculated to bring a person into hatred, contempt, or ridicule, or to lower his or her reputation in the eyes of "right-thinking" people in society generally. It includes statements that injure persons in their occupation or profession. Canadian law generally gives every person, in public as well as private life, the right to his or her good name and the right to enjoy a reputation unsullied by disparaging or defamatory statements made without lawful justification.

There is no entirely satisfactory definition of defamation. Words imputing moral fault or character defect are defamatory. However, mere insults or "vulgar abuse" are not actionable if a reasonable hearer would understand them as such. This defence is harder to make out with respect to a book than, say, a street-corner shouting match.

Words imputing lack of skill, qualification, knowledge, capacity, judgment, or efficiency in a profession or business are defamatory. However, not every untruth is defamatory. There must be an element of disparagement. To say that a lawyer has no ear for music would not be defamatory while to say it of a musician would be.

In order to succeed in a defamation action, a plaintiff must show that the words are published about *the plaintiff* and that they actually defame *the plaintiff*. The test in every case is whether the words would be understood by reasonable people to refer to the plaintiff. If reasonable people would recognize the plaintiff, it does not matter that he or she is referred to by initials or asterisks, by a fictitious name, or by some physical peculiarity or the like. Indeed, the plaintiff need not be named at all. Nor is it necessary that everyone who reads the words recognize the plaintiff. The plaintiff need only show that the defamatory words were published to at least some ordinary, sensible readers whose knowledge of special facts would reasonably lead them to believe that the words were about the plaintiff.

### ***What is the Difference Between Libel and Slander?***

A written defamatory statement is a libel. The same statement when only spoken is a slander. In order to sue successfully for slander, a plaintiff must usually point to actual damage suffered, such as loss of employment. However, there are exceptions to this general rule. Spoken imputations that a plaintiff is suffering from contagious disease or has committed a criminal offence are actionable without proof of actual damage. Similarly, spoken words imputing dishonesty or incompetence in a trade, profession, or business are actionable *per se*. By contrast, the law "presumes damage" in all cases of libel and no specific loss has to be proved. In still other cases, some slanders may be taken to be libels: in Ontario and some other provinces, for instance, broadcasts are libels.

### ***What are the Main Defences to a Libel or Slander?***

In general, a person is entitled to print defamatory material if he or she can show justification, fair comment, absolute privilege, or qualified privilege. These are the major defences to libel actions. Each is summarized below.

#### ***Justification***

The defence of "justification" requires the defendant to show the truth of all material statements of fact contained in the libelous material. The word "justification" should not be taken in its ordinary sense of a person being morally or ethically warranted in making various assertions. In law it means that the defendant takes a position that, however defamatory the words are, they are true and the defendant intends to prove it. It has been said that no withdrawal, apology, or mitigation of damages is compatible with this defence, and further, that it must be fully proved.

The theory behind this defence is that the plaintiff has no right to

damages for losing a reputation to which he or she is not entitled. Although there will be times when a person wishes to rely on the defence of justification, the course can be perilous because if justification is alleged but not proved completely, damages may be increased. In this connection, it is important to remember that statements are only true if they can be *proved* to be true.

### ***Fair Comment***

Fair Comment is a defence when the words complained of are recognizably expressions of opinion rather than of fact. Fair criticism on a matter of public interest is not libel. However, the underlying facts must be proved to be true in order to protect the comment. The comment is then protected as long as it is an opinion that an honest person knowing those proven facts could hold.

To establish a fair comment defence, the commentator must state or point to the facts upon which the comment is based in such a way as to identify the matter upon which he or she comments, so that the reader may judge the soundness of the opinion. For example, a full statement of a series of acts by A followed by a statement that such conduct is disgraceful is clearly an opinion based on those facts. A bare statement that A has been guilty of disgraceful conduct is itself a statement of fact and the only defence would be justification of that fact.

The defence of fair comment applies only to comments on subject matter of public interest. The law does not extend this defence to public comment made upon some purely private occurrence. However, everyone who takes part in public life invites a certain degree of criticism of his or her conduct and work. All matters of public administration and the public conduct of those who take part in them, therefore, are open to comment. The same is true of other matters that invite public attention, such as entertainment, publications, architecture, and so forth.

In 2008, the Supreme Court reinvigorated this defence by dismissing a defamation action against Vancouver radio personality Rafe Mair for an on-air editorial on a rancorous public debate concerning tolerance of homosexuality.

### ***Absolute Privilege***

On certain occasions, public policy requires that a person be free from liability for publishing defamatory words even though the words cannot be proved to be true or defended as fair comment. No action will lie for words spoken or published on such occasions even though the defendant published the words with full knowledge of their falsity and with the express intention of injuring the plaintiff. These are said to be occasions of "absolute privilege". The recognized occasions have been narrowly defined by the courts and they have been unwilling to extend their number. In general, an absolute privilege attaches to the following statements: i. statements made in the course of judicial proceedings; ii. statements



made in the course of quasi-judicial proceedings; iii. statements contained in documents made in judicial or quasi-judicial proceedings; iv. statements made by one state officer to another in the course of his or her official duty; v. statements made in the course of parliamentary proceedings; vi. statements contained in reports published by order of the Parliament of Canada or a provincial legislature; and, vii. fair and accurate contemporaneous reports in a newspaper of proceedings publicly heard before courts exercising judicial authority (by statute and in most provinces).

The defendant must prove all the facts required to bring the words complained of within the absolute privilege. These privileges apply to the original occasion of publication.

### ***Qualified Privilege***

On occasions of qualified privilege, a person may make defamatory and untrue statements about another without incurring liability if certain conditions are met. The speaker must be acting under some legal, moral, or social duty in stating what he or she believes to be true about another person to a listener who has a corresponding duty or interest in receiving the communication. Such a speaker is protected if he or she makes the statement honestly and without any indirect or improper motive. The privilege is qualified because the protection that the law affords is not absolute, but depends upon the honesty of purpose with which the defamatory statement is made. Proof by the plaintiff that the defendant published the words with actual malice will defeat the defence. Since this defence is founded upon considerations of public policy, it involves a consideration of what is necessary for the general welfare of society, and new occasions for its application will necessarily arise with continually changing conditions.

### ***Damages***

Damages in a libel action may include:

- a) special damages, where an actual monetary loss attributable to the libel is proved, such as the loss of a contract or a job;
- b) general damages to compensate for the harm done to the plaintiffs standing in the community and the hurt feelings and humiliation accompanying the defamation; and
- c) punitive damages, which are in the nature of a punishment of the defendant, marking the courts outrage at the defendants conduct.

Special damages must be proved with the same particularity as any commercial financial loss. Although the precise loss may have to be estimated, the object is to restore to the plaintiff the value of the lost contract or other commercial advantage as nearly as possible.

General damages are not susceptible to that kind of accounting analysis and proof. They compensate for subjective and intangible losses and must be estimated at large by the judge or jury bearing in mind the seriousness of the libel, the scale of its publication, the presence or absence of a retraction or apology, the effect upon the plaintiff, the type of audience to which the publication was made (clients, patients, professional colleagues), the presence or absence of any provocation by the plaintiff, arrogant or highhanded conduct by the defendant, whether the defendant could reasonably expect the defamatory remarks to be reported by the media or, alternatively, the defendant's honest belief in what was published, and whether the plaintiff has already recovered damages from others for the same libel.

Two 1995 decisions of the Supreme Court of Canada point to a significant escalation in the damages recoverable for defamation claims and warn appellate courts in Canada to proceed with restraint and caution before interfering with trial court assessments of damages in libel actions. In *Scientology*, the jury found the defendants jointly liable for general damages in the amount of \$300,000.00, and Scientology alone liable for aggravated damages of \$500,000.00 and punitive damages of \$800,000.00. In upholding these damage awards, the Supreme Court stated that appellate courts should be reluctant to meddle with the assessment of damages in libel cases. Two months after the release of its reasons in *Scientology*, the Supreme Court delivered its judgment in *Botiuk*. In September, 1995 the court unanimously ruled that Toronto lawyer Yaroslav Botiuk (Botiuk) was maliciously libelled in 1978 when he was falsely accused of misappropriating money that belonged to the Ukrainian-Canadian Committee. The trial judge had awarded him \$140,000.00 in general and aggravated damages and special damages of \$325,000.00 for loss of income. Pre-judgment interest was awarded for a 12½ year period. The Ontario Court of Appeal reduced the overall damage sum to \$200,000.00 and reduced the term of pre-judgment interest to 10 years. The Supreme Court restored the trial judge's damage awards and the pre-judgment interest entitlement. With interest and costs, Botiuk stood to collect approximately \$2,000,000.00.

### ***Internet Defamation***

Publication of defamatory statements over the Internet may also cause an escalation in damage awards. This is because the Internet would broaden the audience that may view the defamatory remarks. As a judge on the Ontario Court of Appeal noted in 2004 in *Barrick Gold Corp.*, communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed." The judge later stated that "Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations ... The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases." In part because of the scope of the Internet's audience, the Ontario Court of Appeal in *Barrick* increased the damages



against the defendant from \$15,000 for general damages and no punitive damages to \$75,000 in general damages and \$50,000 in punitive damages. It appears that the worldwide scope of the Internet will lead judges to make more generous damage awards.

### ***Conclusion***

The above discussion is necessarily simplified. It is wise in any case that is at all doubtful to consult counsel for advice about whether publication may be made with impunity. Further, if any demand, notice, or other apparently official document is served or delivered, purportedly under one of the provincial statutes, which requests publication of any explanation, contradiction or apology, legal advice should be sought at once from a Canadian lawyer. In many cases, short time limits exist within which such action must be taken to obtain the benefit of statutory protection.

The above summary is taken in part from a publication by Osler, Hoskin & Harcourt, LLP entitled *Introduction to the Canadian Law of Defamation* which I co-authored.

