LITIGATION - CANADA

Libel in the age of the Internet: click with caution

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Introduction

In Ontario, the law of defamation is generally found in the common law and is based on the principle that individuals are entitled to a good reputation unimpaired by false and defamatory statements.(1) Accordingly, defamation includes any written or spoken statement and any picture or representation calculated to bring a person into hatred, contempt, ridicule or to lower his or her reputation in the eyes of 'right-thinking' people in society generally:

> "*in determining whether a statement is defamatory, the words are to be construed in context, according to the meaning they would be given by reasonable persons of ordinary intelligence, knowledge, and experience. The question is whether the impugned words might tend to expose the plaintiff to hatred, contempt, or ridicule or whether they lower the plaintiff in the estimation of reasonable persons who have common sense and who are reasonably thoughtful and well-informed but who do not have an overly fragile sensibility*."(2)

Libel is a sub-set of defamation and consists primarily of written publications or those which are "embodied in some permanent form and visible to the human eye".(3) As compared to oral defamation (slander): "if the action is a claim for libel as opposed to slander, then damages are at large and no special damage need be alleged or proved."(4)

Whereas the law of defamation is generally found exclusively in the common law, the law of libel is a unique exception in that it is codified in the Ontario Libel and Slander Act.(5) Under the act, libel consists of defamatory words in a newspaper or in a broadcast.(6)

Mandatory statutory notice period before commencing libel action

Before initiating a libel action, the Libel and Slander Act requires that:

> "*written notice of libel in a newspaper be given to a defendant within six weeks of the alleged libel coming to the notice of a plaintiff. The [Act] further provides that an action for libel in a newspaper must be commenced within three months of the alleged libel coming to a plaintiff's knowledge.*"(7)

Specifically, the act provides that:

> "*no action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.*"(8)

Section 5(1) of the act does not specify the form of notice required and the content of such notice depends on the set of facts.(9) Fundamentally, the purpose underlying the notice requirement is that:

> "*notice must identify the offending remarks sufficiently to enable the Defendant to know which they are, to investigate, and amend or issue an apology or otherwise mitigate damages.*"(10)

Failure to provide notice

As noted in *Frisina v Southam Press Ltd*,(11) failure to provide notice under Section 5(1) of the Libel and Slander Act is fatal to a cause of action:

> "*The section is* clearly mandatory – *written notice must be given within six weeks of the alleged libel coming to the plaintiff's knowledge or no action lies. The Court is* nowhere empowered*, on my reading of The Libel and Slander Act, to relieve against or* excuse non-compliance with the notice requirements*. Notice is a condition precedent to the bringing of the action and* want of notice constitutes a bar to the action."(12) (Emphasis added.)

The court has been unwavering in its interpretation of this provision. In 2016 Justice Stinson of the Ontario Superior Court of Justice reaffirmed that:

> "*the Court of Appeal for Ontario has made it clear that compliance with s. 5(1) of the Libel and Slander Act is a condition precedent to the commencement of an action for libel. Failure to do so constitutes an absolute bar.*"(13)

Libel defences

Similar to defamation – assuming notice was sufficiently provided – the same defences are available to a party defending a libel claim.(14) These defences include justification and qualified privilege.

Justification

The defence of justification requires the defendant to show the truth of all material statements of fact contained in the allegedly libellous material as the wrong is based on the falsity of the statement. This means that the defendant takes a position that, despite how defamatory the words are, they are true to the extent that the defendant's statements are legally justifiable.

Qualified privilege

The defence of qualified privilege is a conditional immunity that applies to particular communications for certain specified purposes. This privilege is said to arise:

> "*where the person who makes the communication has an interest*(15) *or a duty, legal, social, or moral, to make it to the person to whom it is made, and, in turn, the person to whom it is so made has a corresponding interest or duty to receive it.*"(16)

Privilege only attaches "to the extent that the communication was reasonably appropriate in the context of the circumstances at the time the information was given".(17) Qualified privilege relates to the occasion in which the statement is made(18) and the first step:

> "*is to determine whether the occasion is one on which qualified privilege applies. If it does, then the court must decide whether the defence of qualified privilege is defeated because the impugned words were published maliciously.*"(19)

Comment

In the age of the Internet, the spectre of liability for libel hangs over many online users. At the click of a button, a person can re-tweet, re-transmit and disseminate libellous material, in a seemingly endless chain of liability: "if one person writes a libel, another repeats it, and a third approves what is

written, they have all made the defamatory libel."(20) Courts are especially wary of internet libel and treat it as the most nefarious manifestation of defamation.(21)

For now, courts seem to have indicated a reining in of liability and also seem to have recognised the potential indeterminacy:

> "*weblogs, message boards and similar Internet platforms have become important vehicles for people to exchange ideas. Holding operators and administrators liable for defamatory content, simply for providing those vehicles, would damage freedom of expression and have a chilling effect.*"(22)

However, only one British Columbia case(23) has really explored third-party liability in this regard, as Sookman notes:

> "*the responsibility of Internet intermediaries such as Internet service providers for publishing defamatory statements made by subscribers or third parties over whom they have little or no control is more problematic.*"(24)

In *Carter* the court noted that the defence of innocent dissemination is open to those who play a passive, mechanical role in publishing libellous material. However, in *Baglow* the court reasoned that the defendants – message board operators – could be liable for publishing third-party defamatory posts since they could control the content on the defendant's site and were not mere bystanders.

Ultimately, the courts will have to delicately balance promoting a free exchange of ideas against protecting reputations from harm. The only thing that remains clear is that the uncertainty and lack of clarity should trouble all internet users and internet users should tread carefully online.

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Endnotes

(1) *MacRae v Santa*, 2006 CarswellOnt 5839 at para 21.

(2) *Guergis v Novak*, 2013 ONCA 449 at para 56.

(3) Raymond E Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd ed at Chapter 8.

(4) *Romano v D'Onofrio*, 2005 CarswellOnt 6725, [2005] OJ No 4969 (ONCA) at para 4.

(5) RSO 1990, c L12, a 'broadcast' means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations.

(6) *Ibid*, S 2.

(7) *Merling v Southam Inc*, 2000 CarswellOnt 122 at para 6.

(8) Act, *supra* note 5, S 5(1).

(9) *John v Ballingall*, 2016 ONSC 2245 at para 28.

(10) *Ibid* at para 29.

(11) 1980 CarswellOnt 408.

(12) *Ibid* at para 6.

(13) *Willis v Mathieu*, 2016 ONSC 2639 at para 5.

(14) Act, *supra* note 5, Subsection 22-25.

(15) "Interest however, should not be viewed technically or narrowly. The interest sought to be served may be personal, social, business, financial, or legal", *RTC Engineering Consultants Ltd v Ontario (Ministry of Solicitor General & Correctional Services – Office of Fire Marshall)*, 2002 CarswellOnt 851, [2002] OJ No 1001 (ONCA) at para 16 [*RTC Engineering*].

(16) Allen M Linden & Bruce Feldthusen, Canadian Law of Tort, 9th ed at 788, citing *Adam v Ward*, [1917] AC 309, adopted in *McLoughlin v Kutasy*, [1979] 2 SCR 311.

(17) *Brent v Nishikawa*, 2016 ONSC 4297 at para 16.

(18) *RTC Engineering*, *supra* note 15 at para 14.

(19) *Sarachman v Whitehead*, 2012 ONSC 6641 at para 33.

(20) *Rutman v Rabinowitz*, 2016 ONSC 5864 at para 141. See also *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 (SCC), at para 176.

(21) *Barrick Gold Corp v Lopehandia*, 2004 CanLII 12938 (ON CA).

(22) *Baglow v Smith*, 2015 ONSC 1175 at para 184.

(23) *Carter v BC Federation of Foster Parents Association*, 2004 BCSC 137; rev'd in part and affirmed in part 2005 BCCA 398.

(24) Barry Sookman, *Computer, Internet and Electronic Commerce Law*, Chapter 11 – Jurisdiction, Regulation and the Internet.
