

The Law of Defamation:

A Primer

Loretta P. Merritt

Marco P. Falco

416-777-5404 / 416-777-5421

Torkin Manes LLP CPD

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What is Defamation?

- A “false statement about a person to their discredit”
- The test of the defamatory nature of a statement = the statement’s tendency to “excite against a person the adverse opinions or feelings of other persons”
- An “attach upon the moral character of the plaintiff”
- Ontario courts have adopted a low threshold for a plaintiff to establish a *prima facie* cause of action in defamation

Who Can Be Defamed?

- Individuals and corporations can be defamed
- For corporations, the sting of the defamation must relate to the “business character” of the entity; i.e. false imputations of the insolvency

Libel and Slander

- Libel
 - Libel is any publication of defamatory material in permanent form and is generally embodied in some printed, written or physical form.

- Slander
 - Refers to defamatory statements conveyed by the spoken word

Construction and Interpretation

- The Plaintiff must show that words complained of are defamatory:
 - (a) by their natural and ordinary meaning; or
 - (b) by innuendo meaning

***Turmel v. CBC (Dragons' Den)*, [2011] O.J. No. 1816
(Sup. Ct.), per H.S. Arrell J.**

- Not every negative comment is defamatory
- Participant in the show Dragon's Den
- Signed agreement to participate in show
- Dragons did not like the participant's 15 minute pitch
- Only 57 seconds of pitch made it onto television
- Participant thought what was aired was defamatory
- Court found that the Dragons conclusion about the participants pitch was not libel or slander

Publication

- Publication has two components:
 1. An act that makes the defamatory information available to a third party in a comprehensible form; and
 2. The receipt of the information by a third party in such a way that it is understood
- Proof of Publication
- Single Publication Rule

Republication

- Every republication of a libel constitutes a separate tort and each publisher is answerable for his act.
- Situations where the original publisher of the libel may be held liable for damages:
 - the repetition is the natural and probable consequence of the original publication
 - the original publisher authorized or intended the republication of the libel
 - the person to whom the original publication was made had a duty or obligation to repeat the libel

***Crookes v. Newton*, [2011] S.C.J. No. 47 (SCC) (QL),
per Abella J.**

- Can a person or a company post a link to a website or an article that contains defamatory comments?

Defences

1. Justification
2. Absolute Privilege
3. Qualified Privilege
4. Fair Comment
5. Responsible Communication on Matters of Public Interest
6. Consent

Justification

- It is a complete defense to an action for libel or slander that the defamatory imputation is true

- Justification
 - 22. In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.
- *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 22.

Absolute Privilege

- Absolute privilege extends to publications made in
 - Judicial proceedings
 - Quasi-judicial proceedings
 - Parliamentary or legislative proceedings
 - Certain communications between executive and officers of state
 - Communications between solicitor and client

***Nuvius Bankcard Services, Inc. v. Dowty*, [2012] O.J. No. 3961 (Sup. Ct.), per E.M. Morgan J.**

- Issue = whether a draft statement of claim, which is alleged to be defamatory of the defendant, is covered by an absolute privilege

Qualified Privilege

- *Vanderkooy v. Vanderkooy*, [2013] O.J. No. 3781 (Sup. Ct.) (QL), per A.J. Goodman J.
 - Two girls alleged and told their family that their uncle sexually abused them when they were younger
 - The girls claimed to have misidentified the abuser and apologized to their uncle
 - The allegations resurfaced and were circulated to the family and non-family members in various email messages
 - The court found there to be no evidence of sexual abuse and found there to be defamation

Fair Comment

- Test for the fair comment defence:
 1. The comment must be on a matter of public interest;
 2. The comment must be based on fact;
 3. A reasonable person could honestly express such a comment on the basis of the proven facts;
 4. The defamatory remarks, while they may include inferences of fact, must be recognizable as comment;
 5. The defence of fair comment is not available if there is malice

***2964376 Canada Inc. (c.o.b. Ameublement Prestige Furniture) v. Bisailon*, [2012] O.J. No. 2348 (Sup. Ct.) (QL), per M. Métivier J.**

- Customers were dissatisfied with the quality of furniture and service they received
- The daughter of the customers sent an email to her friends and colleagues calling the furniture store untrustworthy and deceitful
- The email had defamatory content and did not meet the test for fair comment

Responsible Communication on Matters of Public Interest

- *Grant v. Torstar Corp*, [2009] 3 S.C.R. 640 (SCC) (QL), per McLachlin C.J.
 - Constitutional value of “free expression” protected
 - There are two elements to the defence:
 - The publication must be on a matter of public interest
 - The defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances

Consent

- Narrow defence to defamation
- Not raised often
- Fact of consent must be clearly established
- Available where:
 - the plaintiff has actively encouraged, solicited or induced the publication of the defamatory statements.
- May be express or implied, but cannot be passive

Limitation Periods

- General Limitation Period (Section 4 of the *Limitations Act*)
 - Two (2) years after claim discovered
 - No longer two (2) years after words spoken as under former *Limitations Act, 1990*
- *Libel and Slander Act*
 - 6. An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action.

- *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 6.

Notice of Action

- 5. (1) 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.

- *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 5 (1).

Remedies

- Damages at Large
- Special Damages
- Aggravated Damages
- Punitive Damages
- Mitigation

General Damages

- Where plaintiff to recover only actual damages

(2) The plaintiff shall recover only actual damages if it appears on the trial,

(a) that the alleged libel was published in good faith;

(b) that the alleged libel did not involve a criminal charge;

(c) that the publication of the alleged libel took place in mistake or misapprehension of the facts; and

(d) that a full and fair retraction of any matter therein alleged to be erroneous,

- (i) was published either in the next regular issue of the newspaper or in any regular issue thereof published within three days after the receipt of the notice mentioned in subsection (1) and was so published in as conspicuous a place and type as was the alleged libel, or
- (ii) was broadcast either within a reasonable time or within three days after the receipt of the notice mentioned in subsection (1) and was so broadcast as conspicuously as was the alleged libel.

– *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 5 (2).

- Newspaper libel, plea in mitigation of damages

9. (1) In an action for a libel in a newspaper, the defendant may plead in mitigation of damages that the libel was inserted therein without actual malice and without gross negligence and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper a full apology for the libel or, if the newspaper in which the libel appeared is one ordinarily published at intervals exceeding one week, that the defendant offered to publish the apology in any newspaper to be selected by the plaintiff.

- *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 9 (1).

General Damages

- Heads of damages
- Factors in the assessment of damages
 - The Plaintiff's position and standing in the community;
 - The nature and seriousness of the defamatory statements;
 - The mode and extent of publication;
 - The absence or refusal of any retraction or apology;
 - The whole conduct and motive of the defendant from publication through judgment; and
 - The possible effects of the statements upon the plaintiff's life
- Measure of damages relates to reputation
- The extent of publication is an important factor in the assessment of damages

Slander *Per Se*: the Exceptions to proving Special Damages

1. Imputation of the Commission of a Crime
2. Imputation of Disease
3. Imputation of Unchastity
4. Imputation of Unfitness to Practice One's Trade or Profession: section 16 of *Libel and Slander Act*

Special Damages

- Damages where not slander *per se*
- Damages limited to what might reasonably have been expected as result of speaking the words
 - Pecuniary loss
 - Rarely claimed
 - Difficult to prove
 - Often the plaintiff's only recovery lies in the award of general damages

Aggravated Damages

- Defendant's conduct before and after the publication of the libel and slander
- How the court assesses aggravated damages:
 - Plea of justification
 - Libel was repeated
 - Conduct that was calculated to deter the plaintiff from proceeding with a libel action
 - Prolonged hostile cross-examination of the plaintiff
 - General manner in which the defendant presents case
 - Apology or retraction of defamatory comments

***Manson v. John Doe No. 1*, [2013] O.J. No. 530 (Sup. Ct.) (QL), per R.F. Goldstein J.**

- An unknown blogger posted insulting comments about plaintiff online
- The posts were removed
- The blogger did not identify himself
- The statements were deemed to be defamatory
- The plaintiff's reputation was harmed
- Aggravated damages awarded: \$50,000

Punitive Damages

- Factors to be considered in determining the rational proportionality of an award of punitive damages include:
 - The blame-worthiness of the defendant's conduct
 - The degree of vulnerability of the plaintiff
 - The harm or potential harm directed specifically at the plaintiff
 - Need for deterrence
 - The other penalties that have been or are likely to be inflicted on the defendants, both civil and criminal, for the same misconduct
 - The advantage wrongfully gained by the defendants from the misconduct

Evidence in Mitigation of Damages

- Provocation
- Unintentional defamation
- Defendant not originating defamatory statement
- Damages recovered for publication of same or similar libel
- Evidence in mitigation of damages: section 10 of *Libel and Slander Act*
- Apology

Conclusion

- Evolution of the internet and social media
- Constantly changing

Loretta Merritt
Marco Falco

Torkin Manes LLP
151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7
www.torkinmanes.com