

# Internet Defamation (Cyber Libel)

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# Good Reputation

# PART I: Introduction to Defamation Law

# Defamation: A Three Part Test

- In order to recover in an action for defamation, the plaintiff must show:
  - The words complained of were defamatory
  - The words referred to the defendant
  - The words were published to a third party

# I. Defamation Defined

- Universal Test: Would words used tend to lower the plaintiff in the estimation of right-thinking members of society generally?
  - Low threshold for a *prima facie* finding of defamation

# Libel vs. Slander

- Two kinds of defamation:
  - **Libel**: consists of any written or printed words or any visible or audible matter recorded in any form of a more or less permanent nature
  - **Slander**: consists of spoken words or other transitory forms of communication
- Everything printed or written, which tends to lower the plaintiff in the estimation of right-thinking members of society generally, and is published without lawful justification or excuse, is a libel, whatever the intention may have been.

# Defamatory Statements and Acts

- Against Public Persons
- a person's moral character in either a private or public capacity is entitled to the protection of the law from defamatory attacks
- examples:
  - to accuse a member of a government of having used his or her office to acquire personal benefits is libelous  
*Higgins v. Walkem* (S.C.C.).
  - a newspaper article reporting that the police seized documents from the plaintiff's office and that the plaintiff recently resigned his political office and is not available to comment is defamatory  
*Wells v. Daily News Ltd.* (Nfld. T.D.).

- Crime

- words imputing that a plaintiff *has committed* an offence which can subject him or her to imprisonment or punishment are actionable whether the alleged offence is a breach of criminal legislation or provincial penal enactments
  - the statement need not specify the exact offence, a general charge of criminality is sufficient



- Business/Profession

- words directed at a person who is following a calling are actionable if they impute lack of fitness or misconduct in the calling

- examples:

- a statement that a trading company has used political influence to procure legislation in its favour in derogation of what it knew to be the private rights of another is libelous

*Price v. Chicoutimi Pulp Co. (S.C.C.).*

- it is defamatory to suggest a person imposes on customers by charging exorbitant prices

*Ontario Copper Lightning Rod Co. v. Hewitt (Ont. H.C.).*

## II. Reference to the Plaintiff

- defamation may occur even if the statement does not mention the plaintiff's name
  - example: the use of a pseudonyms

## III. Publication

- the cause of action for libel per se is complete with the publication of the defamatory matter
- an Internet Service Provider (ISP) provider which operates a Usenet or a newsgroup server publishes a defamatory posting to any subscriber who accesses the pertinent newsgroup on its news server and sees the objectionable posting

## PART II: Defamation and the Internet

# Who May Be Liable?

- General Rule: every participant in the publication incurs liability, regardless of the degree of involvement; this includes not only those who take part in the composition, but also those responsible for its distribution and dissemination
  - Potential Targets for a defamation action: the ISP, website owner, those responsible for editing the content, and the original author

# Examples of Conduct That May Lead to Liability

- Hyperlinking
  - Definition: when an element in an electronic document links to another place in the same document or to an entirely different document
  - “Hyperlinking may, in some cases, amount to publication by the person creating the link. If it is apparent from the context in which the hyperlink is used that it is being used merely as a bibliographical or similarly limited reference to an original source, without in any way actively encouraging or recommending to the readers that they access that source...this would not amount to publication.”
    - *Crookes v. Wikimedia Foundation Inc.*, (B.C C.A.)
  - A finding of defamation in this situation may depend on the purpose for which the hyperlink is placed on the site

- Anonymity?
- A potential plaintiff may be able to determine an otherwise “anonymous” defamer by following two steps:
  - obtaining the defendant’s identifying information
  - establishing that the identifying information is accurate

# Obtaining the Defendants Identifying Information

- A potential plaintiff may be able to identify an anonymous defendant by determining the IP address of the computer where the defamatory message originated
  - IP Address Defined: a unique identifier number which is assigned to an internet user by their internet service provider and is capable of identifying which computer an email or website posting was sent from



# Norwich Order

- Once a plaintiff knows which IP address the message originated from, the plaintiff can bring a court application, seeking to compel the ISP to disclose which of its customers was assigned that particular IP address at the time and date that the defamatory message was posted
- *Personal Information and Protection and Electronic Document Act* (Alberta) allows that ISPs release their customers' private information in response to a court order

# Establishing the Defendant's Identifying Information

- Expert Witnesses

# PART III: Defences

# Defences

- Consent
  - May apply if a reasonable person would acknowledge the plaintiff consented to the publication of the comment about them
- Absolute Privilege
  - The law recognizes an absolute privilege for certain communications made by executive officers of state, parliamentary and legislative officials, and persons involved in judicial or quasi-judicial proceedings and offers full immunity from an action in defamation.
- Qualified Privilege
  - a communication is protected by a qualified privilege if it is fairly made on a privileged occasion by a person in the discharge of some public or private duty, or the purpose of protecting some private interest, provided it is made to a person who has a corresponding interest in receiving it
- However, mere membership in a common organization does not create a “corresponding interest”
  - *Lawrence v. Finch* (Ont. C.A.)

# Defences

- Justification
- Fair Comment
- Responsible Communication on Matters of Public Interest
- Innocent Dissemination

# Justification

- The defendant must disprove the presumption at law, in favour of the plaintiff, that the words complained of are false
- it is the imputation contained in the words that must be justified
- the defendant must prove that the facts which are stated and proved to be true warrant to the imputation in the sense that is the conclusion that ought to be drawn

# Fair Comment

- A fair comment on a matter that is of public interest or is subject to public criticism is not actionable, even if it is defamatory
- fundamental principle of freedom of expression
- The following criteria must be established by the defendant:
  - the words complained of are recognizable by a ordinary viewer as comment, although the comment may consist of, or include inferences from facts
  - the comment is based on true facts set out in the article or clearly indicated in it
    - it is no defence to show that a defendant honestly believed in the truth of the allegations of fact

# Fair Comment

- the comment is a matter of public interest
  - when the public at large is affected
- Example of matters found not to be of public interest
  - an article in a union newsletter referring to the plaintiff as a “small time lawyer/businessman/politician whose contribution to social justice for working people has yet to be recorded” and as someone who charged exorbitant fees”
- the comment is one which a person could honestly make on the facts proven and some authorities indicate must, be fair, in the sense that a fair minded person could believe it.



# Responsible Communication on Matters of Public Interest

- The following criteria must be established by the defendant:
  - the publication is a matter of public interest
  - the publisher was diligent in trying to verify the allegation having regard to:
    - the seriousness of the allegation
    - the public importance of the matter
    - the urgency of the matter
    - the status and reliability of the source
    - whether the plaintiff's side of the story was sought and accurately reported
    - whether the inclusion of the defamatory statement was justified
    - whether the defamatory statement's public interest lay in the fact that it was made rather than its truth (reportage)
    - other relevant circumstances
- defence is not limited to news media, but can also be used for newer forms of media, including bloggers on the internet

*Grant v. Torstar (S.C.C.)*

# Innocent Dissemination

- If the defendant can prove that he or she was a mere mechanical distributor of the information, then the defence may be used
- ISPs have invoked this defense in regards to defamatory material on a website within their control
- Courts have held that the relevant factors to determine whether this defence will succeed include:
  - whether the intermediary knew of the alleged libel
  - whether there were conditions present that would have led the ISP to suspect libel
  - whether the ISP was negligent in failing to be aware of libel

# Malice

- The defences of Fair Comment, Qualified Privilege, Responsible Communication on Matters of Public Interest, and Innocent Dissemination are defeated by a finding of malice

## PART IV: Additional Issues Raised

# Consequences Can Be Severe

- Large damage awards

# PART V: Conclusion



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