

With the proliferation of social media – Facebook, blogs, tweets, online comments – the publication of defamatory statements has become much easier and more pervasive in our society. Principals are often faced with numerous comments made on social media which are negative, unfair and may affect their reputation. Recourses are available in situations where the comments meet the definition of defamation. Unfortunately, there are a number of defences available which will prevent liability from being imposed, even if the statement are not true, as long as the defendant is not motivated by malice.

Libel vs Slander

In Ontario, the *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 14 prohibits the dissemination of defamatory comments. Libel refers to the publication of a defamatory statement in a newspaper or broadcast and slander refers to oral defamatory statements.

What is a defamatory statement?

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”.¹

If a plaintiff in a defamation action establishes that the comments are defamatory, that they refer to the plaintiff and were communicated to at least one person, he or she has established defamation².

Defences

As stated above, a number of defences are available to a defendant in a defamation claim.

1. Truth

If the defamatory remarks are accurate, the action will be dismissed even if the comments are published or made with the intent to harm the person defamed.

2. Fair comment

Individuals are entitled to comment and express their opinions on matters of public interest. As noted by the Supreme Court of Canada in *WIC Radio Ltd v. Simpson*³, the defence of fair comment has evolved and developed in a manner consistent with the values underlying the freedom of expression but also with the values underlying the dignity and reputation of each individual. The court’s task is to reconcile these opposing values. In order to establish the defence of fair comment, the defendant must satisfy the following four elements:

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;

¹ Black’s Law Dictionary, Brian A. Garner, ed., 8th ed. (St. Paul: The West Group, 1999).

² *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII),

³ 2008 SCC 40

(c) the comment, though it can include inferences of fact, must be recognizable as comment;

(d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?⁴

Once the defendant proves all four elements of the test, the burden shifts back to the plaintiff. If the plaintiff can establish malice, the defence can be defeated.

3. Qualified privilege

This defence is available when the defendant has a duty or interest to communicate information and the recipient has a corresponding legitimate interest to receive the information. Courts have consistently found that “members of a community have an interest in the integrity of the education system and the fitness to teach of those working within that system.”⁵ As such, parents and other members of the community can raise with the proper authorities their honestly held concerns and are entitled to the protection of qualified privilege. However, if it is proven that they are motivated by vindictiveness or self-interest as opposed to a genuine interest in the integrity of the education system, the court may deny the defence on the basis of a finding of malice.

4. Absolute privilege

Absolute privilege is a complete defence against a defamation claim with respect to statements made in the context of legislative or judicial proceedings, which include proceeding before administrative tribunals such as the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board. This defence cannot be defeated by malice.

5. Responsible communication on a matter of public interest

This is a relatively new defence available to defendants in defamation claims allowing anyone who publishes something of public interest to be protected from a defamation claim as long as they have been responsible in researching and reporting on the matter. This may include giving the plaintiff the opportunity to answer to any allegations before they are published.

Time Limits

Once libel comes to the attention of the person defamed, he or she has six weeks to serve the defendant with a notice in writing that an action will be commenced. An action for libel must then be commenced within three months after the libel has come to the attention of the person defamed.

The limitation period for slander is two years from the time when the claim is discovered.

⁴ Ibid.

⁵ Gibbs v. Jalbert, 1996 CanLII 3069 (BC CA) at para. 21

Damages

In an action for defamation, damages are presumed because harm to reputation is presumed from the fact of publication⁶. Courts have held that awarding plaintiffs general damages in defamation cases may serve three functions:

- 1) Consolation for the distress suffered from the publication or dissemination of the defamatory statements;
- 2) Repair the harm to reputation;
- 3) Vindication of reputation.⁷

In assessing the quantum of general damages, courts consider the following factors:

- a) The plaintiff's position and standing;
- b) The nature and seriousness of the defamatory statements;
- c) The mode and extent of the publication;
- d) The absence or refusal to retract the statement or apologize for it;
- e) The conduct and motive of the defendant;
- f) The presence of aggravating or mitigating circumstances⁸

In the context of publication over the internet, the courts have held that "these factors must be examined in the light of the ubiquity, universality and utility of that medium"⁹.

Courts have awarded a wide range of general damages over the years and the amounts vary greatly depending on the facts of the case. In a 2015 decision rendered by the Manitoba Court of Queen's Bench, the Court awarded each plaintiff \$20,000 in general damages. This was an undefended action brought by teachers and a school division for comments posted by a former student on a blog which alleged that one teacher was a "hypocrite, and a bully and a... criminal", that another was a "racist" and implied "teacher instructed cheating". In that case, the individual did not remove the blog posts and there was evidence that they become more vile and abusive following the claim. The Court also awarded each plaintiff \$10,000 in punitive damages as the defendant's conduct was particularly high-handed and oppressive increasing the plaintiffs' humiliation and anxiety¹⁰.

Protecting your rights

The first step in dealing with defamatory comments is to serve a cease and desist letter detailing the circumstances, the comments and why they are defamatory. The letter should inform the individual or group that you intend to pursue legal action if the problem is not corrected and the statements not retracted within a specific period of time. If the letter is ignored or the individual continues to make defamatory statements, an action may then be filed with the Court.

⁶ Awan v. Levant, 2014 ONSC 6890 (CanLII), [2014] O.J. No. 5697 (QL) at para 191

⁷ Mina Mar Group Inc. v. Divine, [2011] O.J. No. 785, 2011 ONSC 1172 (CanLII), at paras. 11-13

⁸ Grant v. Torstar Corp., 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640

⁹ Awan, supra, at para 193

¹⁰ Lord Selkirk School Division et al. v. Warnock, 2015 MBQB 195 (CanLII)