A Publisher's Responsibility and Liability under Defamation Law

Introduction to Defamation Law

Courts have long recognised that a person's good name is of great value and developed the common law of defamation to protect an individual's reputation.[1] With defamation law, legislators and courts want to protect a person's reputation while not unduly limiting freedom of expression and freedom of the press. Our society respects the importance of an untarnished reputation but also desires an uninhibited press.[2]

The law of defamation is "notoriously complex and difficult.'[3] In essence, when a person says or publishes a statement that is harmful to another's reputation (a defamatory statement), they may be held accountable. A defamatory statement is generally defined as "any communication that would cause the plaintiff to lose respect or esteem in the eyes of others,"[4] and includes both libel (written defamation) and slander (spoken defamation).

A number of defenses have been developed to counter the broad scope of what is considered defamatory.[5] These defenses are truth, privilege (both absolute and qualified), fair comment, and consent.[6]Because it is often easy to show that the statement is defamatory, the defenses usually play a central part in defamation litigation. The defences allow people to criticize others when appropriate, they provide a balance between the "competing values of reputation and free speech."[7] "These defenses are designed to permit the vigorous exchange of information, ideas, criticism, and views that are essential in a modern democracy."[8]

The Defense of Privilege

In certain situations, "full and frank communication between individuals takes precedence over protecting [a person's reputation]."[9] These occasions are guarded by the defense of privilege. "The privilege attaches to certain occasions, not to particular speakers or messages."[10] There are two types of privilege; absolute and qualified. Despite some exceptions, "absolute privilege is straightforward – it applies to coverage of courts, legislatures, and public meetings."[11]

Qualified privilege arises when one party has a moral, social, political, legal, or professional duty to communicate information to another party, who has a corresponding obligation or interest in receiving the information.[12] For instance, a reference letter from a former teacher to a potential employer is protected under qualified privilege.[13] Qualified privilege is not created lightly; there must be reason to "permit honest defamatory statements to be made at the expense of the plaintiff's (defamed person's) reputation."[14] Also, there must be a reciprocal relationship between the two parties, one

person with “a legitimate interest in providing” information (e.g. a former teacher) and another person who has a legitimate “interest in receiving it (e.g. a potential employer).”[15]

The Defense of Fair Comment on a Matter of Public Interest

The defense of fair comment is used to defend a statement of opinion. The defendant (person being sued) must establish that the statement was a “fair comment made in good faith and without malice on a matter of public interest.”[16] Fair comment does not provide a defense for statements that are interpreted as statements of fact. The statements must be recognizable as a “subjective assessment or opinion of the defendant.”[17]

The comment must also be based on facts that are provided to the audience or are common knowledge.[18] The public interest aspect of the defense extends to government actions and officials as well as other public activities and events.[19] Sports, arts, special events, business ventures, and the people involved in them are all of public interest.[20] But the defense only applies to the public aspect of these activities. Any comment about a person’s private life that is not related to their public role must be justified.[21]

The Charter: Reputation and Free Expression

In the case of Hill v. Church of Scientology of Toronto[22] the Supreme Court of Canada (SCC) addressed the impact of the Charter on defamation law.[23] Casey Hill was a Crown attorney who brought a defamation action against the Church of Scientology and the Church’s defence lawyer, Morris Manning because Mr. Manning made some statements during a press conference that harmed Mr. Hill’s reputation. At the press conference, Mr. Manning discussed the Church’s plan to bring an application for criminal contempt proceedings against Mr. Hill. Mr. Manning alleged that Mr. Hill mislead a judge and breached court orders sealing certain Church documents (two allegations that were potentially damaging to Mr. Hill’s reputation as a Crown attorney).[24] The application against Mr. Hill was eventually dismissed, but its publication at the press conference and other publications resulted in the defamation suit.[25]

1. Charter is not directly applicable to private litigation, however, the SCC recognized that the common law should be consistent with Charter values.[26] Freedom of expression is protected under the Charter, but an individual’s reputation is also very important and deserves protection similar to a Charter right. Despite freedom of expression’s importance, the Court did not feel that defamatory (false and injurious) statements were deserving of much protection. Defamatory statements have little value, they inhibit the search for truth, self-development, and the healthy participation in the affairs of the community.[27]

In the end, the Court chose not to change the law of defamation. The court held that the current law adequately balances the right of free expression and the need to provide protection to individual reputation.

I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.[28]

Publication

A defamatory statement must be published for it to be actionable. When published in a newspaper, or other media outlet, it is assumed a third party read, saw, or heard the publication. Libel (written defamation) covers all words or images that have been reduced to a permanent form and "applies to everything that a newspaper or broadcaster publishes."[29] Editorial columns, letters to the editor, cartoons, and classified advertisements can all be found defamatory.[30] Furthermore, the way a newspaper is laid out can also be defamatory, for instance, if a photograph of a person is accompanied by the wrong title or is placed as though it accompanies an unflattering story.[31]

Another important point about publication is that "regardless of a source of a piece of information or an opinion, whoever publishes it is responsible for it. A radio station is responsible for everything that is aired by that station. A newspaper is responsible for everything that appears in its pages."[32] If a news source writes a defamatory story or a defamatory letter is written to the editor, "any newspaper that publishes the defamatory statements is responsible for it."[33] A plaintiff (person who has potentially been defamed) often has choices of whom to sue. If a defamatory story was published in a newspaper, the plaintiff may choose to sue the news service, the author of the letter, the newspaper itself, or a combination of the three. Regardless of who else is sued, if the newspaper published the defamatory material they can also be found liable. "The simple point is that anyone who publishes libelous material is legally responsible for it."[34]

Comments on Defamation Law

As a publisher, it is important to remember that the SCC feels that "Those who publish statements should assume a reasonable level of responsibility."[35] The media is responsible for everything they publish, regardless of the source of the statements. This means that a media outlet must take care to ensure they are not publishing defamatory statements, as they could be held responsible for them, even if they are not; a) the original source of the statements, b) don't agree with the statements, or c) if they were not aware the publication was defamatory.

Some commentators complain that the protection Canadian courts give a person's reputation "effectively trumps a Charter right" and favors reputation over free speech.[36] However, as the Supreme Court stated in Hill, with private litigation,

the Charter only applies indirectly. With defamation law as it stands, some are concerned "that Canadian media outlets may decline to publish defamatory material about public figures on a matter of vital public interest because it is unable to prove the truth of the allegations in a court of law."[37]A journalists may be satisfied that the source of their information is correct, but still fear the consequences of being sued for running the story.

Defamation laws that favor the plaintiff may lead to a media that is reluctant to communicate freely with the public, or at least must spend more time ascertaining the reliability of its sources. This can be detrimental to the fast and free flow of information and ideas between the media and the public. However, others might argue that ensuring information is accurate and reliable should be a central objective of any media source, regardless of potential legal liability.

Further Reading

- R. E. Brown, The Law of Defamation in Canada, 2nd Ed. (Toronto: Carswell, 1999).
- Robert Martin, Media Law, 2nd ed. (Toronto: Irwin Law, 2003)
- Philip H. Osborne, The Law of Torts, 2nd. ed. (Toronto: Irwin Law, 2003).
- Allen M. Linden, Lewis N. Klar, and Bruce Feldthusen, Canadian Tort Law: Cases, Notes & Materials, 12th Edition (Markham: LexisNexis Canada Inc., 2004)
- Peter A. Downard, Libel (Markham: LexisNexis Canada Inc., 2003)
- Raymond E. Brown, Defamation Law: A Primer (Toronto: Thomson Canada Limited, 2003)

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[1] Philip H. Osborne, The Law of Torts, 2nd. ed. (Toronto: Irwin Law, 2003) at Chapter 7, A. before note 1 (accessed on Quicklaw).
[2] Robert Martin, Media Law 2nd ed. (Toronto: Irwin Law, 2003) at Chapter 4, before note 1 (accessed on Quicklaw).
[3] R.J. Sharpe, K.E. Swinton & K. Roach, The Charter of Rights and Freedoms, 2nd ed. (Toronto: Irwin law, 2002) at Chapter 9, G, before note 65.
[4] Supra note 1 at Chapter 7, B, before note 4.
[5] Ibid.
[6] Paul B. Schabas, "Media Freedom under the Charter", Chapter 16 in "The Law Society of Upper Canada, Special Lectures 2001, Constitutional and Administrative Law" (Toronto: Irwin Law, 2001) at before note 73 (accessed on Quicklaw). And Philip H. Osborne, The Law of Torts, 2nd. ed. (Toronto: Irwin Law, 2003) at Chapter 7, E. (accessed on Quicklaw).
[7] Supra note 1 at Chapter 7, B, before note 4.
[8] Ibid.
[9] Supra note 1 at Chapter 7, E,2.

[10] Ibid.
[11] Supra note 6 at before note 97.
[12] Ibid. And Supra note 2 at before note 51.
[13] Supra note 6 at before note 97.
[14] Supra note 1 at Chapter 7, E,2,b.
[15] Ibid.
[16] Supra note 2 at before note 36.
[17] Supra note 1 at Chapter 7, E,3.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130. Online: Lexum http://scc.lexum.umontreal.ca/en/1995/1995rcs2-1130/1995rcs2-1130.html
[23] Supra note 6 at Chapter 9, G, before note 67.
[24] Allen M. Linden, Lewis N. Klar, and Bruce Feldthusen, Canadian Tort Law: Cases, Notes & Materials, 12th Edition (Markham: LexisNexis Canada Inc., 2004) at 655.
[25] Ibid.
[26] Supra note 1 at Chapter 7, G, before note 26.
[27] Ibid.at para. 109.
[28] Ibid.at para. 140.
[29] Supra note 2 at Chapter 4, before note 3.
[30] Ibid.
[31] Ibid.
[32] Ibid. at Chapter 4, before note 8.
[33] Ibid.
[34] Ibid.
[35] Ibid.at para. 140.
[36] Supra note 6 after note 114.
[37] Supra note 1 at G before note 28.