



The Law Of Defamation:
A Primer

By
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THE LAW OF DEFAMATION: A PRIMER

By the Honourable Judge Thomas S. Woods¹ and Marko Vesely²

INTRODUCTION

Editors, publishers, writers, advertisers and all who are involved in the dissemination of information in written or electronic form should have at least an elementary grasp of the principles of the law of defamation. It is often said that a little information can be a dangerous thing. But knowing enough about the law of defamation to pause and reflect (and if appropriate, seek legal advice) before going forward with a potentially risky project can often prevent embarrassment and the substantial cost and inconvenience of defending a claim for defamation.

What follows in this article therefore is a brief overview of the basic principles of the law of defamation. Of course, no brief overview can ever take the place of a legal opinion tailored to the unique circumstances of any given set of facts. If you are involved in the preparation of materials that you think could potentially give rise to the risk of a claim for defamation, or if you believe that you may have a claim for defamation that you could assert, then you should seek the advice of a lawyer practising in the media law area before proceeding further.

WHAT IS DEFAMATION?

Defamation is a “tort” or civil wrong for which a court, in a proper case, will provide the wronged party with a remedy in an action for damages. All torts, including defamation, involve three essential elements. These are:

- (a) a legal duty owed by a defendant to a plaintiff;
- (b) a breach of that duty by the defendant; and
- (c) a harm suffered by the plaintiff that can be proven to have been caused by the breach.

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Tort law protects a variety of interests. In the case of defamation, the interest that the law protects is the plaintiff's right to a reputation that corresponds to his or her (or its)³ true character. Thus, each person owes a duty to conduct himself or herself in a manner that will not cause unjustifiable injury to the reputation of any other person. If that duty is breached, then, subject to the availability of certain defences (discussed below), the injured party is entitled to be compensated in damages for the harm caused by the person who committed the breach.

Defamation communicated by spoken word or gesture is known as "slander." Defamation communicated in writing or some other permanent form (including letters, newspaper articles, graphic images, tape recordings, radio and television broadcasts, e-mail transmissions, Internet websites and the like) is known as "libel." The distinction between these two basic forms of defamation is less important now than it was in the past. One important difference that does persist, at least in British Columbia, is that in cases of slander, a plaintiff must prove actual harm to reputation in order to recover general damages;⁴ by contrast, where a plaintiff is libelled, harm to reputation is assumed and a court will award general damages without actual proof of the same.

The law of defamation is jointly governed by statute law (in British Columbia, the Libel and Slander Act) and by the common law (judge-made law based upon an accumulation of centuries of legal precedents arising out of actual cases). Trials of defamation disputes may be conducted before either a judge sitting alone, or before a judge and jury, in the British Columbia Supreme Court.

WHAT MUST A PLAINTIFF PROVE?

A. The Impugned Statement Must Carry a "Defamatory Imputation"

To be defamatory, the statement⁵ complained of must carry a "defamatory imputation". The courts have held that a defamatory statement is one that tends to discredit or lower an individual "in the estimation of right-thinking members of society generally" or otherwise exposes the complainant to hatred, contempt or ridicule, or injures his or her reputation in an office, trade or profession.

B. The Impugned Statement Must Refer to the Plaintiff

A plaintiff in an action for defamation must prove that the statement complained of refers to him or her. This does not mean that in every case the plaintiff must be named in the offending statement; it

³ Not only natural persons, but corporations, societies, trade unions and all other legal entities ("legal persons") can seek compensation for injury to their reputations. While throughout this summary the word "person" is used to describe potential plaintiffs and defendants, that word should be understood to embrace all "legal persons".

⁴ This may be done by calling witnesses to testify that the statement in question actually caused them to think less of the plaintiff.

⁵ For brevity, the word "statement" here is used to embrace all forms in which defamatory content may be published, including images.

is sufficient to demonstrate that the words used or the circumstances surrounding the making of the statement would lead a reasonable person to conclude that the plaintiff was the subject of it, whether the defendant intended that result or not.

C. The Impugned Statement
Must have been “Published”

To be actionable, a defamatory statement must have been communicated to some person other than the plaintiff. Each person who repeats a defamatory statement to another “publishes” it and is potentially liable for the defamation.

D. The Impugned Statement Must have
Damaged the Plaintiff’s Reputation

Subject to the exception noted above with respect to damage to reputation being presumed in cases of libel, a plaintiff in a defamation action must prove, by way of evidence, the losses he or she claims were suffered by reason of the publication of the defamatory statement.

WHAT DEFENCES ARE AVAILABLE TO RESIST A DEFAMATION CLAIM?

Even where it can be proven that a defendant published to a person other than the plaintiff a statement that refers to the plaintiff and carries a defamatory imputation concerning him or her, the defendant may still escape liability if one of several recognised defences can be raised.

A. Truth (or “Justification”)

As was stated in an early case, “the law will not permit a man to recover damages in respect of an injury to a character that he either does not, or ought not, to possess.” For this reason, and for reasons of public policy – i.e., the paramount importance of truth over reputation – generally, a defamatory statement is not actionable if it can be proven to be true.

B. Consent

Where it can be shown that a plaintiff consented to the publication of defamatory remarks or statements about him or her, or that those remarks were elicited at the plaintiff’s instigation or invitation, then the defendant will be held immune from liability for making those remarks or statements.

C. Privilege

There are circumstances where, when the interest of ensuring candour and the free flow of information in certain important settings is balanced against the conflicting interests that individuals have in protecting their reputations from injury, the former interest will prevail. In those

circumstances, the impugned communications are “privileged” and, even if defamatory and false, they will not attract liability.

1. Absolute Privilege

All statements made by high executive officers “acting in the performance of their official duties relating to matters of state” are protected by an absolute privilege. Similarly, communications made in the course of Parliamentary proceedings, or in the course of (or incidental to) judicial and quasi-judicial proceedings, are protected by an absolute privilege. This is so even if the impugned statements are false and were made dishonestly, with malice and in bad faith.

2. Qualified Privilege

If the maker of a false statement that injures the reputation of another can prove that the statement was made fairly in the discharge of some public or private duty, or for the purpose of pursuing or protecting some public or private interest, then the maker of the statement may be held immune from liability if the statement is made to a person or persons with a corresponding duty or interest in receiving it. For example, an employer who comments negatively about the performance and skills of a former employee when queried by a potential new employer will not be held liable for defaming the former employee if the assessment given is given in good faith. So long as they were uttered in good faith, the former employer’s critical words (even if they might seem harsh or excessive to some) are protected by a qualified privilege in the interest of enabling sensitive information to pass freely between persons with a genuine interest in exchanging that information. Because honesty, good faith and an absence of malice are essential to the proof of this defence, the privilege is said to be qualified (as distinct from absolute).

D. Fair Comment

The defence of fair comment is generally invoked by the media, or persons whose words are reported in the media or broadcast widely, when it is alleged that published statements have defamed a person to whom the statements refer. Those who comment fairly – i.e., honestly, in good faith and without malice – upon matters of public interest enjoy an immunity from liability, even where their comments are defamatory. However, to qualify for the protection, the maker of the statement must establish, among other things, that the statement was a “comment” (as opposed to a statement of fact), that it was based on fact, and that it consists of an opinion that someone could honestly express on the proven facts.

E. Responsible Journalism

Canadian courts have recently recognized a new “responsible journalism” defence for media defendants. That defence – already available in other common law jurisdictions – will relieve a media defendant of liability for publishing a story containing libellous content if it can show that, even though it may have gotten some of its facts wrong, it acted in accordance with prevailing standards of responsible journalism and that the story otherwise addressed subject matter that the

public was entitled to hear. Among the factors that a court will consider in determining whether a media defendant took reasonable steps in the circumstances to ensure that the story was fair and its contents were true are the following: the seriousness of the allegation, the extent to which the subject-matter is a matter of public concern, the source of the information, the steps taken to verify the information, the urgency of the matter, whether comment was sought from the plaintiff, whether the article contained the gist of the plaintiff's side of the story, and the tone of the article.

WHAT REMEDIES ARE AVAILABLE WHERE A PERSON HAS BEEN DEFAMED?

Often, where a person has been defamed, the complainant's most pressing priority is to have the record set straight by the maker of the defamatory statement, generally in the form of an apology, retraction or clarification that is published or distributed in a timely way and as conspicuously and widely as the defamatory words themselves. While such corrective action cannot wholly undo the harm done by the defamatory statement itself, if prepared in conformity with the governing legal requirements, the publication or distribution of an apology, retraction or clarification will satisfy many potential plaintiffs.

The publication or distribution of a timely apology or clarification does not constitute a defence to a claim for defamation, but it is a mitigating factor that will be taken into account when damages are assessed if litigation ensues.

Where a defamation claim is litigated successfully, a plaintiff is awarded general damages to compensate him or her (as best a money judgment can do so) for the intangible injury to reputation that was suffered. In addition to general damages, a plaintiff may also recover special damages (which are also compensatory) to cover specific losses or expenses that the plaintiff can prove were caused by the defendant's wrongful conduct. Beyond that, in certain circumstances where the conduct of the defendant or the character of the defamation is particularly egregious, a general damages award may be increased to reflect the presence of aggravating factors; in extreme cases punitive damages (which are not compensatory but rather are aimed at conveying the court's condemnation of the defendant's conduct) may be awarded in an effort to deter others from engaging in similar conduct.

In Canada, damages awards generally, and damages awards in defamation proceedings particularly, have historically been much lower than those made in the USA.

Successful plaintiffs in civil actions, including defamation actions, are typically able to recover from defendants a proportion of the legal fees and expenses they incur in pursuing their claims to judgment. That compensation comes in the form of court costs.

A CAVEAT AND DISCLAIMER

The law of defamation is characterised by many subtleties and complexities. As was noted at the beginning, this brief summary is intended only as a broad outline of the basic legal concepts in the

area. This brief summary is not, and should not be taken to be, a substitute for legal advice tailored to the specific needs of a specific person in specific circumstances. If you find yourself in circumstances where you believe that something that you are working on may raise the spectre of a defamation claim, or if you believe that your reputation may have been injured by defamatory words, innuendo or images, you should consult with a lawyer who is skilled and experienced in the media law area.

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