

Publish safely!

Know Your Libel Basics

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What are the legal risks in publishing information about people or organizations? This brief article will endeavour to explain, in general terms, a complex area of law.

Libel and slander are both part of the law of defamation, which is governed by provincial statute and the common law. Generally, slander involves defamatory spoken words, while libel concerns defamatory statements in printed or other permanent form, for example, magazine or newspaper cartoons or articles, television programs, emails or blogs.

Defamation law balances society's desire to protect both the reputation of individuals and freedom of expression. The law recognizes that a person's good reputation can be destroyed quickly by defamatory statements, but it also seeks to protect the right of persons to freely express critical opinions and ideas without which a healthy democratic society could not exist.

The contest between these competing values, as played out in libel lawsuits, turns on two basic questions: (1) Is a statement defamatory? (2) If the statement is in fact defamatory, is it defensible?

Is the published statement defamatory?

In order for a statement to be found defamatory, it must (1) refer to the person making the libel claim (the "plaintiff"), (2) be communicated to a person other than the plaintiff ("published"), and (3) defame the plaintiff. The plaintiff need not be specifically named in the statement. Instead, it is enough for the plaintiff to establish that others would identify the plaintiff as the subject of the statement.

The Supreme Court of Canada has stated that a "publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability." Courts do not take a narrow or legalistic approach in making such determination: words can be defamatory based on their

ordinary meaning ("Mr. Plaintiff is a liar") or by innuendo (the statement can reasonably be taken to mean that Mr. Plaintiff is a liar).

Is the defamatory statement defensible?

It is not a defence to a libel action to prove that the person publishing a defamatory statement (the "defendant") did not intend to defame the plaintiff. Defences that may apply are truth ("justification"), consent, privilege and fair comment on a matter of public interest.

Justification or truth

The defendant will not be found liable if he or she can establish that the defamatory statement is true. The principle here is that a person's reputation should not be protected from truth. However, it is not enough to be confident about the truth of a statement. It is the defendant who must prove its truth.

Consent

The defendant will not be found liable if he or she can establish that the plaintiff consented to the publication of a defamatory statement.

Privilege

Parliamentary or judicial proceedings are examples of occasions that demand that free speech override a person's interest in his or her reputation. A defendant will not be found liable for a defamatory statement made during such proceedings, as it is protected by an "absolute privilege." Provincial defamation statutes also provide an absolute privilege to the media in respect of a "fair and accurate report" of proceedings heard by a court in public.

A statement may be protected by a "qualified privilege" where the person who makes the statement has an interest or a legal, social or moral duty to make the statement to someone and that person has a corresponding interest or duty to receive it. For example, this privilege may apply to a reference letter written by a professor, at a student's request, to a prospective employer or graduate school. However, a qualified privilege defence is not available to a defendant who was motivated by "malice," by which is meant spite, ill will or any other improper motive.

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Fair comment on a matter of public interest

Comment or opinions (as opposed to statements of fact) that are honestly made without malice on matters of public interest are considered to be “fair comment.” For this defence to be successful, a defendant needs to prove that the defamatory statement was an honest opinion based on accurate facts that are set out in the publication, so that the reader may form his or her own opinion. The fair comment defence will fail if the plaintiff proves that the defendant was motivated by malice, for example, printing something the defendant knew to be false.

Time restrictions on lawsuits

Libel actions cannot usually be pursued more than two years after the offending words were published or came to the defendant’s attention. However, provincial defamation statutes prescribe much shorter times for notices and times within which law suits must be commenced against the media, including some magazines, and a period for publishing an apology that may lessen any damages ultimately awarded by the court.

Damages

Where liability for a defamatory statement is found, the Court will usually order the defendant to pay the plaintiff damages. The damages awarded will depend upon a host of factors, including the nature and gravity of the statement, the circulation of the publication, the extent of the damage suffered by the plaintiff, and the conduct of the defendant. Egregious conduct by the defendant may lead a court to award aggravated or punitive damages.

Know the law and play safe! It is nevertheless usually possible to convey to your readers whatever you want to convey, provided that you do so carefully. Libel is a complicated area of the law and you will sometimes need to consult your lawyer for advice on specific matters.

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