

CYBER LIBEL

THE TANGLED WEB OF INTERNET DEFAMATION

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The Internet & Defamation Claims

- A precarious balance between freedom of speech and the safeguarding of reputations
- Claims are unavoidable
- Users don't realize the consequences
- Difficult, even impossible to make a retraction
- Potential worldwide exposure
- Potential for multiple claims from a single statement
- Potential for separate actions in multiple jurisdictions
- Litigation can quickly spiral out of control
- Unpredictable outcomes
- Greater damages

Is this defamation?

- A gun dealer publishes an advertisement referring to a senior municipal servant as “the Fascist Swine” after experiencing difficulty obtaining his business license.

Is this defamation?



Is this defamation?

- During back-and-forth posting on a political blog, a commentator refers to the blogger as “one of the Taliban's more vocal supporters” due to that blogger’s opposition to the war in Afghanistan and his support for the right of Omar Khadr to a fair trial.

Defamation Defined

- *“A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.”*
- The totality of circumstances surrounding the publication of the words must be considered.

Defences

- Justification
 - Fair Comment
 - Qualified Privilege
 - Absolute Privilege
 - Responsible Communication
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- If malice is the dominant purpose of the publication, the defences of Fair Comment and Qualified Privilege will not succeed.

An Inappropriate Tweet

“Lupul, Phaneuf & wife Elisha Cuthbert threaten to sue TSN over inappropriate Tweet broadcast on trade deadline day”

- TSN quickly issued a formal apology for broadcasting the tweet.

Lesson Learned

The Toronto fan who posted the tweet deleted it and posted this apology on his twitter account:

“On March 2, I posted an inappropriate tweet with the #tradedcentre not thinking about the consequences that could occur... Although this remark was only meant to be seen by a select few, it does not excuse my decision to post this tweet. I now realize that everything I post online is not just for a select few, but in fact, the entire world to see.”

On the other hand...

- [That Guy](#) • [2 months ago](#) lol threatening to sue someone for a tweet? is this Russia? Iran? Are we not allowed to say what we want on social media?

The Libel and Slander Act RSO 1990, c L.12

- Applies to newspapers and “broadcasts”
- Broadcasts = TV and radio broadcasts
- Act applies to online editions of newspapers, but nothing else on the Internet (yet)

- Plaintiff must give notice within 6 weeks of discovery of publication
- Action must be brought within 3 months of discovery

Libel Tourism

- A defendant can *prima facie* be held liable wherever a defamatory statement is downloaded and read.
- A plaintiff can bring separate actions in more than one jurisdiction.
- In Canada, a court may exercise jurisdiction only if it has a “**real and substantial connection**” with the subject matter of the litigation, and there is no “clearly” more appropriate or convenient jurisdiction.

Breedon v. Black, [2012] 1 SCR 666

- Conrad Black brought 6 libel actions in Ontario after 3 Ontario newspapers repeated info from press releases on a U.S. web site
- 8 of 10 defendants based in U.S.
- Defendants brought motion to stay actions

- Black's reputation suffered harm in Ontario
- Black awarded **\$90,000 in costs** for motion and **\$35,000 in costs** by Court of Appeal
- SCC dismissed appeal **with costs**

Ripoff Report

- From the web site: *“Ripoff Report® is a worldwide consumer reporting Web site and publication, by consumers, for consumers, to file and document complaints about companies or individuals. While we encourage and even require authors to only file truthful reports, Ripoff Report does not guarantee that all reports are authentic or accurate.”*
- *“By filing a Ripoff Report it's almost like creating your own web site...And, it's FREE.”*

Terms and Conditions

- Ripoff Report policy is not to remove reports -- even when they are claimed to contain defamatory statements, and even when the original author asks for the report to be removed.
- If your company is the subject of a complaint, you can post a rebuttal, or you can use Ripoff Report's **VIP Arbitration Program**.
- *"The arbitration program gives you the opportunity to prove, through a neutral third-party arbitrator, that the report about you is false."*
- There is a **\$2,000** arbitration fee.

The Communications Decency Act

- *“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”*

47 U.S.C. § 230(c)(1)

- When a user posts material on an “interactive website” in the U.S., the site itself cannot, in most cases, be held legally responsible for the posted material.
- Freedom of speech and the free flow of information online trumps the reputation of the individual in the U.S.

Who is liable for libel in Ontario?

❖ Website Hosts

❖ Internet Service Providers

❖ Search Engines

❖ Employers

- The Innocent Dissemination Rule is a partial defense.
- But once notice of a defamatory statement is received, there is a duty to take reasonable steps to remove it.
- Do your insureds have effective social media policies in place for their employees?

Republication

- Each repetition of a defamatory statement is a new publication, for which **a separate cause of action** arises.
- Generally speaking, a person is responsible only for his or her own defamatory publications.
- However, a defendant may be held liable if repetition was **the natural or probable result** of the original publication.
- The plaintiff may pursue separate causes of action or pursue an action only for the original publication, but seeking to recover additional damages flowing from republication.

The Unpredictability of Damages

Barrick Gold Corp. v. Lopehandia, 71 OR (3d) 416

- The defendant embarked upon an Internet smear campaign, including accusations of extensive criminal misconduct.
- The trial judge awarded **\$15,000** in general damages and **no punitive damages**.
- The Court of Appeal for Ontario set aside that award and replaced it with an award of **\$75,000** in general damages, plus punitive damages in the amount of **\$50,000**.

The Unpredictability of Damages

Bernstein v. Poon, 2015 ONSC 155, 2015 ONSC 2125

- Dr. Poon described the Bernstein Diet as a “starvation diet” in his book and on his web site
- Dr. Bernstein sued Dr. Poon for \$10,000,000
- 6 years of litigation
- 7.5 days of trial
- The plaintiffs incurred legal costs of \$545,272.58
- The defendant’s costs were \$247,194.33

The Result

- The trial judge awarded Dr. Bernstein **\$10,000** in damages.
- *“Defamation litigation is a high stakes business, in large measure because the costs incurred by the parties will often exceed the monetary recovery. This case involved two egos, not just one. The plaintiff ruthlessly pursued the defendant. The defendant stubbornly refused to yield... **The parties should each bear their own costs.**”*

Mew J., 9 April 2015

Cyber Risks

- 1. The Internet makes defamation easy
- 2. Publication is to the world at large
- 3. No control over republication
- 4. Each repetition is a new cause of action
- 5. The Internet is forever
- 6. Anonymity shields some defendants
- 7. The potential for libel tourism
- 8. Unpredictable outcomes and damages

Questions? Please contact

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Thank you!



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**Called to the Bar of
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Sheldon joined Blaney McMurtry LLP in 2012 after an extensive career in the film and television industry as a freelance writer, director and assistant director. Prior to becoming a lawyer, Sheldon also worked as a commercial leasing consultant and teacher. He has drawn on these varied life experiences as part of the firm's Insurance Litigation group, handling claims for breach of contract, defamation, professional negligence, product liability, personal injury and copyright infringement. He has successfully argued an appeal of a trial decision at Divisional Court, and has also had a decision for summary judgment upheld by the Ontario Court of Appeal.

Sheldon is also a produced playwright and published writer. His hands on experience in both the arts scene and film business makes him a natural for the firm's Entertainment Law group.