

Defamation

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Agenda

1. What is Defamation?
2. Legal Test for Defamatory Communication
3. Libel vs. Slander
4. Defences
5. Risk Management Tips and Takeaways
6. Questions

What is Defamation?

- It is communication made to other people that tends to hurt someone's reputation
- It can be written, spoken, or a gesture



Legal Test

A plaintiff must prove three elements:

1. that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. the words referred to the plaintiff; and
3. the words were published, meaning that they were communicated to at least one person other than the plaintiff.

The plaintiff need not show that the defendant intended to do harm or was careless.

The tort is one of strict liability.

If the plaintiff proves the three elements, the onus shifts to the defendant to advance a defence to escape liability: *Grant v Torstar Corp.*, 2009 SCC 61.



Libel vs. Slander



WRITTEN



SPOKEN

Republication

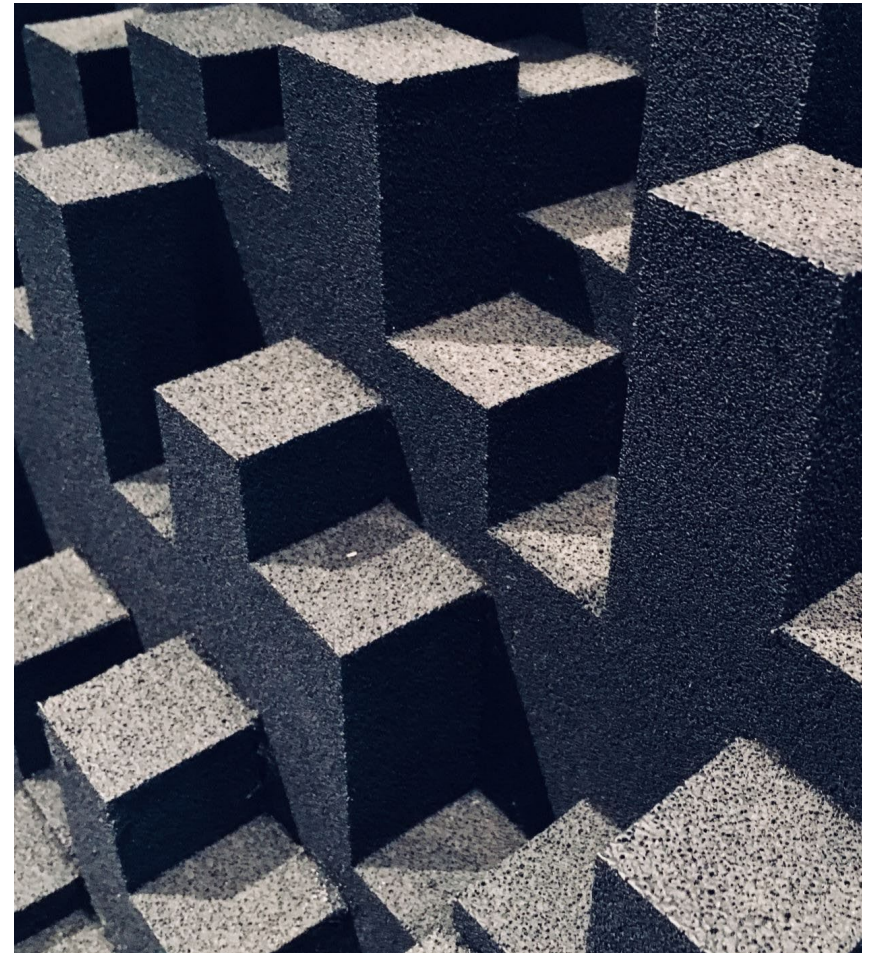
In general, the law treats someone who repeats a defamatory statement as no less liable as the person who originated the defamatory statement, often called the “repetition rule”.

If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury.

Hill v Church of Scientology of Toronto, [1995] 2 SCR 1130

Defences to Defamation

- **Justification**
- **Qualified Privilege**
- **Fair Comment**
- **Responsible Communication**



Justification

- The justification defence requires the defendant to adduce evidence showing that the impugned statement was substantially true, including its main thrust (or sting). Partial truth is not a defence: *Bent v Platnick*, 2020 SCC 23.



Qualified Privilege

- The person who makes a communication had an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made had a corresponding duty to receive it.
- The defence can be defeated by malice or if the limits of the duty are exceeded: *Botiuk v Toronto Free Press Publications Ltd.*, 1995 CanLii 60 (SCC).
- Malice can be demonstrated by evidence that the speaker knew the comment was FALSE, or with reckless indifference to its truth or falsity, or he does so for the dominant purpose of injuring the plaintiff because of spite or animosity, or for some other dominant purpose that is improper, indirect, or outside the occasion of privilege: *Kent v Martin*, 2016 ABQB 314.



Fair Comment



- The defence of fair comment requires a number of elements:
 - (a) it must be a comment on a matter of public interest
 - (b) based on fact
 - (c) it must be recognizable as a comment, and
 - (d) the following question must be satisfied: could anyone honestly express that opinion on the proven facts?
- Like qualified privilege, the defence of fair comment can be defeated if a defendant was actuated by malice: *WIC Radio v Simpson*, 2008 SCC.

Responsible Communication

- Responsible communication on matters of public interest defence is a relatively new defence created by the Supreme Court of Canada in *Grant*.
- The defence requires the publication to be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegations, having regard to all the relevant circumstances.

Bent v. Platnick, 2020 SCC 23

- B is a lawyer and partner at an Ontario law firm. She is a member and, at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (“OTLA”).
- P is a medical doctor who is typically hired through insurance companies to review other medical specialists’ assessments of persons injured in motor vehicle accidents
- B sent an email to approximately 670 OTLA members in which she made two statements that specifically mention P by name and allege that, in the context of those disputes, P “altered” doctors’ reports and “changed” a doctor’s decision as to the victim’s level of impairment.

Grant v. Torstar Corp., 2009 SCC 61

- A newspaper published a story concerning the proposed expansion of a private golf course, built on a property owned by the plaintiff, Peter Grant.
- The story contained comments from local residents that were critical of Grant, alleging that he was using his political influence to gain permission to expand the golf course from three holes to nine holes.
- After the article was published, Grant sued the newspaper's parent company for defamation
- Created the common law defence of responsible communication

Damages

General Damages

- General damages (loss of reputation and injury to feelings) are presumed and do not required proof of loss
- Factors:
 - (1) the plaintiff's position and standing;
 - (2) the nature and seriousness of the defamatory statements;
 - (3) the mode and extent of publication;
 - (4) the absence or refusal of any retraction or apology; and
 - (5) the whole conduct and motive of the defendant from publication through judgment.

Hill v. Church of Scientology of Toronto [1995] 2 S.C.R. 1130

Damages General Damages

- Calculation of damages for defamation is speculative and an inexact science
- No objective measure
- Need not be calculated mathematically

Kent v Martin, 2016 ABQB 314 - \$200,000

Elkow v Sana, 2020 ABCA 350 - \$150,000

Gouin v. White, 2013 ABQB 332 - \$100,000

Elgert v. Home Hardware Stores Limited 2011 ABCA 112 - \$60,000

Damages

- Pecuniary
- Aggravated
- Punitive

Risk Management Tips

- Develop social media policies
- Develop protocols for vetting of information posted to public channels
- Exercise caution before re-posting information with unverified sources
- Be extremely cautious before publishing opinion
- Limit distribution of critical information to only those who need to have it
- Purchase appropriate insurance

Questions?

