

Lawyer liable for defaming daughter of former client

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A recent decision of the Ontario Superior Court of Justice demonstrates that correspondence written by a lawyer may give rise to a claim for defamation if it is found to be motivated by malice rather than by a genuine concern for protecting a client's interests.

In *Kuehl v. Ross*, 2021 ONSC 4251 (CanLII), the plaintiffs were the estate of a former client (Budd) of the defendant lawyer, as well as Budd's children Nancy and David in their personal capacities. Budd's wife Leah—who was still alive but suffering from advanced dementia—was not a party to the litigation.

Essentially, the plaintiffs alleged that the lawyer was liable for negligence and breach of fiduciary duty surrounding the preparation of Budd's will and other matters during the lawyer's brief representation of Budd's estate. After a lengthy trial, the Ontario Superior Court of Justice found that the plaintiffs had failed to establish any negligence or breach of duty by the lawyer.

However, the plaintiffs also claimed that the lawyer was liable for defamation arising from letters she had written to the Office of the Public Guardian and Trustee ("PGT") and upon the transfer of the estate's file to new counsel.

In a defamation action, a plaintiff is generally required to prove three things:

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. that the words did, in fact, refer to the plaintiff; and
3. that the words communicated to at least one person other than the plaintiff.

Once a plaintiff does so, then the onus shifts to the defendant to establish a valid defence: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 28-29.

The first letter at issue was written to a real estate lawyer acting for Nancy in a mortgage transaction and set out Budd's alleged wishes to be repaid funds that he had loaned to Nancy and her spouse. The court found that the words used in the letter were disparaging as the clear inference was that Nancy and her spouse had repeatedly borrowed money from Budd and were taking advantage of him. There was no documentary proof of the alleged debts.

However, the court found that the letter was sent by the defendant in her capacity as Budd's lawyer, and in accordance with her instructions. There was no malice or improper purpose in writing the letter, and the lawyer was not required to obtain "proof" from her client to corroborate the alleged debts before writing the letter.

Accordingly, the lawyer established the defence of "qualified privilege," which applies to statements fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it: *Health Genetic Center Corp. o/a Health Genetics Center v. New Scientist Magazine*, 2018 ONSC 7224, at paras 133-137.

The second letter at issue was written to a new lawyer retained by Budd's estate following his death. While the letter was written for the purpose of transferring the file, it went well beyond that and reiterated the lawyer's allegations concerning alleged debts owing to Budd by Nancy. Further, the lawyer alleged that Nancy had attended with Budd at her office on several occasions and that it appeared Nancy was attempting to influence Budd on how to draft his will.

While the court accepted that it was not uncommon for counsel transferring files to provide background information or to alert new counsel to urgent or outstanding matters, this only applied to the issue of the alleged debts. The court found that there was no reason to include the allegations about Nancy influencing Budd save as a warning that Nancy could not be trusted. The court found that the lawyer was "stung" by Nancy's termination of her retainer for Budd's

estate and that the overarching purpose of her letter was to paint Nancy and her spouse in a bad light with new counsel, thereby complicating administration of Budd's estate. The letter was, in the court's view, written for spite rather than the assistance of new counsel, and therefore the plaintiffs established that the letter was not written for a legitimate purpose. The defence of qualified privilege is defeated by a finding of malice.

The next two letters at issue were written by the lawyer to the PGT, without copying the plaintiffs or their new counsel, and repeated the allegations about debts owed by Nancy and Nancy's attempts to exercise "duress and undue influence" over Budd when they attended at the lawyer's office during the preparation of Budd's will. The lawyer alleged that Budd's executors—Nancy and her spouse—were in a conflict of interest and were preferring their own interests over the estate's sole beneficiary, Budd's wife.

There was no question that the letters were defamatory as they cast the plaintiffs in a negative light and used loaded terminology while accusing Nancy of trying to bully her father and mismanaging and appropriating assets from Budd's estate. The lawyer argued that she had a duty to write to the PGT by virtue of a continuing retainer for Budd's wife. However, the court found that there was in fact no "continuing retainer" for Budd's wife at the time the letters were written. The defence of qualified privilege did not apply as a result.

While the court accepted that a lawyer may have a moral or social duty to advise public authorities such as the PGT that someone is taking advantage of an incapable person, the court was troubled by the fact that the lawyer had failed to advise that her retainer for the estate had been recently terminated. Once again, the court was satisfied that the letters to the PGT were written out of vindictiveness and spite rather than a genuine concern for the interests of a client represented by the lawyer. The court noted that had the lawyer been truly concerned over the interests of Budd's wife, she could have "openly and fairly asked the PGT to assist [Budd's wife] without painting the plaintiffs as dishonest and dishonourable. She could have acted transparently by copying the plaintiffs and [their lawyer] with her correspondence. She did not."

The lawyer also relied on the defence of "fair comment," which applies to statements that meet the following criteria, outlined in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 28:

- a. the comment must be on a matter of public interest;
- b. the comment must be based on fact;
- c. the comment, though it can include inferences of fact, must be recognizable as comment;
- d. the comment must satisfy the following objective test: "could any person honestly express that opinion on the proved facts?"; and
- e. even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice

The court rejected the lawyer's defence of fair comment. While the letters certainly expressed the lawyers' opinions, they were not based on facts but on false statements and half-truths, and did not address a matter of public interest. Further, as with the defence of qualified privilege, the defence of fair comment was defeated by a finding of malice.

In the result, the court awarded general damages to Nancy and her spouse in the amount of \$35,000, since it was not a case where the defamatory words were widely disseminated, nor were the plaintiffs "publicly stigmatized" in their community. The basis for the general damage award was the significant personal stress experienced by the plaintiffs and the finding of malice by the lawyer.

In addition, the plaintiffs were awarded special damages of \$26,320 in expenses arising from complications with their dealings with the PGT following the defamatory letters. Upon receipt of the letters, the PGT treated the plaintiffs as if guilty of the inappropriate behaviour alleged by the lawyer. Since the plaintiffs were not copied they did not have an opportunity to set the record straight. The court noted that the lawyer was a well-respected member of the Bar and to the PGT it must have seemed as though she was acting to protect the interests of a vulnerable elderly client. The court found that the plaintiffs incurred unnecessary costs as a result.

The case shows that correspondence containing allegations of misconduct by third parties should reflect an objective concern for protecting a client's interests. In the case at hand, the defendant was unable to establish a legitimate purpose for writing the defamatory correspondence at issue, and the court found that the lawyer was motivated by malice, which defeated any of the defences that might otherwise have been available. A PDF version is available to download [here](#).

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