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Summary judgment denied over defamatory TV show first aired in Pakistan

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Ontario's *Rules of Civil Procedure* provide that where there is no genuine issue requiring a trial, summary judgment shall be granted. It has been determined by Ontario courts that this rule is available in defamation actions: see *Zhong v. Wu*, 2019 ONC 7088 at para. 13 and *Zoutman v. Graham*, 2019 ONSC 2834 at para. 59.

However, simply because the rule is available does not of course mean that a court will grant summary judgment whenever sought in a defamation case. In the recent case of *Vivo Canadian Inc. v. Geo TV*, 2021 ONSC 3402, the court found that the plaintiffs' defamation action raised genuine issues requiring a trial, and therefore the defendant's motion for summary judgment was dismissed.

The plaintiffs were involved in the immigration business. In 2011, the corporate plaintiff became the sponsor of the 6th Annual Canada-Pakistan Trade Fair. There were two components to the Trade Fair: a trade show and a musical concert. The concert featured musicians from Pakistan.

Approximately six weeks before the scheduled Trade Fair, the defendant broadcasted a television program called "Khabernak" in Pakistan. Khabernak was a satirical television show about political and current affairs. In this particular broadcast, a segment was devoted to the Trade Fair.

The segment made comments about visa fraud. According to the plaintiffs, the segment was disastrous for the Trade Fair. The musical concert eventually had to be cancelled because the musicians expected to play at the concert were denied visas and purchased tickets had to be refunded.

The defendant argued that the show was not defamatory, that it was not about the plaintiffs and that any broadcast of the show in Ontario was illegal and thus not a publication. The defendant also argued that the plaintiffs had failed to issue a Notice of Libel under the *Libel and Slander Act* before commencing their action. The failure to issue of Notice of Libel where required is fatal to a defamation claim.

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As we have explained in other blogs, to succeed in a defamation action a plaintiff must prove:

> (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;
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> (2) that the words in fact referred to the plaintiff; and
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> (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. (See *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28)

With respect to whether the broadcast was defamatory, the court rejected the defendant's contention that the tenor of the show was comical. After viewing the segment, the court found that the tone of the segment was serious. It alleged that Pakistanis were being brought into Canada illegally, that those responsible for the plan were akin to a "Mafia" and were profiting significantly, and that because of the activity, the Canadian government would not recommend issuing visas to Pakistanis.

As well, the court found that the impugned program referred to the plaintiffs. There was a direct reference to the "Vivo Canada Pakistan Trade Fair", which reasonably could be taken as referring to the corporate plaintiff, and there was affidavit evidence of a clear association within the Pakistani community between the corporate plaintiff and the individual plaintiff. The overall impression of the segment was that the corporate plaintiff (and the individual plaintiff by association) were a Mafia engaged in immigration fraud, that the fraud caused legitimate visa applications to be rejected and that the fraud was going to be perpetrated at the Trade Fair.

On the issue of publication, the defendant contended that the program was not published by it in Ontario. While the plaintiffs contended that the program was available on the internet and on YouTube, the defendant explained that it had not authorized the program to be broadcast or rebroadcasted into Ontario. The defendant also contended that the publication in Ontario was illegal. Based on *Breeden v. Black*, 2012 SCC 19, the court rejected the defendant's arguments. Under the law of defamation, an original author of a statement may be held liable for a republication "where the republication is the natural and probable result of the original publication." If the republication is foreseen or reasonably foreseeable, a defendant can be liable for a third party's republication.

The evidence did not favour the defendant. The court found that it had intended vast reproduction and circulation of its programming worldwide and indeed had authorized republication into the U.S, where it could be accessed in Canada.

While the defendant sought to rely on *Browne v. Toronto Star Newspapers Ltd.*, 2013 ONSC 3348 to suggest that the plaintiffs could not rely on republication because they had failed to properly plead in the statement of claim that the defendant was responsible for republication by third parties, the court held that the program satisfied the notoriety exception set out therein. Also, the defendant never raised this issue in its Notice of Motion or factum and was not taken by surprise by the plaintiffs allegations of republication by third parties. This position had

been asserted by the plaintiffs throughout the action and the defendant was well aware that its programs were being pirated on a regular basis.

Failure to comply with the requirements under the *Libel and Slander Act* can be fatal to a libel action. In a defamation action based on a libel "in a newspaper or broadcast", the plaintiff must provide a written notice specifying the matter complained of within six weeks after the libel has come to the plaintiff's knowledge. This is a pre-requisite.

However, for the purposes of the summary judgment motion, the court noted that the defendant had contended that there was no broadcast or rebroadcast. In any event, case law held that this issue should not be determined on a summary judgment motion where the defamation was based on material circulated on the internet. As stated by the Ontario Court of Appeal in *Shtaif v. Toronto Life Publishing Co.*, 2013 ONCA 405:

> The Act was drafted to address alleged defamation in traditional print media and in radio and television broadcasting. It did not contemplate this era of emerging technology, especially the widespread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or through judicial interpretation of statutory language drafted in a far earlier era.

Lastly, in rejecting the summary judgment, the court held that the evidence showed a potential link between the TV program and the plaintiffs' damages. The court accepted that there were several factors that supported some link between the broadcast and the cancelled concert.

Aside from showing that summary judgment can be difficult to obtain in a defamation action, this case demonstrates that a publisher of defamatory material can be liable for the republication of his or her defamatory words. This is subject to foreseeability or reasonable foreseeability. Moreover, without any amendments to the *Libel and Slander Act* on the horizon, this case is a reminder that defamatory material distributed or accessed over the internet is not necessarily subject to the notice requirements under the Act. Whether material published on the internet or a social media platform will constitute a broadcast for the purposes of the Act will require expert evidence and is not suitable for summary judgment. As stated in *Bahlieda v. Santa* 2003 CanLII 2883 (ON CA): "Summary judgment applications are not a substitute for trial and thus will seldom prove suitable for resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications."

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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