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Defamation: Employment letter not subject to six-week notice deadline

By **James R.G. Cook**

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Law360 Canada (March 15, 2024, 10:25 AM EDT) -- It may come as a surprise to some that a letter sent to another person for their private viewing may still be subject to a defamation claim. The law of defamation does not require that the letter be sent to more than one person to attract potential liability. If the letter is obtained by the person discussed there during the course of a lawsuit or otherwise, the author may be required to defend any defamatory statements on the grounds of justification or other available defences.

These circumstances were illustrated in the Ontario Divisional Court appeal decision of *Wurdell v. Paramount Safety Consulting Inc.*, 2024 ONSC 669.

The matter arose from an Ontario Small Claims Court action commenced by the plaintiff alleging wrongful dismissal against his former employer. During the proceedings, the employer filed documents that included a letter sent by the employer's owner to the employment agency that had referred the plaintiff to them. The letter indicated that it was sent via fax and email, and referred to a telephone conversation between the owner and the employment agency which explained why they had terminated the plaintiff's employment.

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The plaintiff then added a defamation claim against the employer and its owner. The defendants brought a motion to strike the defamation claims under Rule 12.02(1)(c) of the *Rules of the Small Claims Court* on the basis that the letter could not give rise to a defamation claim since it was not a publication or a newspaper that was intended to be viewed by the public.

Alternatively, the defendants argued that the claim was statute-barred since notice had not been given under s. 5(1) of the *Libel and Slander Act* (the Act), which provides:

> 5 (1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

The Small Claims Court agreed with the defendants and struck the defamation claims.

On appeal, the Divisional Court concluded that the motion judge erred in finding that the letter was not a publication that could give rise to defamation or that the plaintiff was required to comply with the notice requirement under s. 5(1) of the Act.

The test for defamation set out by the Supreme Court of Canada in *Grant v. Torstar Corp*., 2009 SCC 61, requires a plaintiff to establish three elements to prove defamation:

> (i) 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;
>
> (ii) that the words in fact referred to the plaintiff; and
>
> (iii) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

The motion judge had struck the claim on the basis that the letter was a "private correspondence in a closed, unpublished environment," and was not a communication to the public or a communication to third parties. Since the letter was not "published" to more than one person it could not ground a defamation claim.

However, *Grant v. Torstar* affirmed that words can be "published" by way of a written communication sent from one person to at least one other person. It was not necessary that the written communication at issue be sent to more than one recipient.

In the appellate court's view, the motion judge erred in holding that a defamatory statement must be made to third parties (plural) or that it must be "disseminated to the public." A letter can be "published" even if it is a private communication between two parties, not intended to be publicized or shared outside of the two of them.

Whether or not the letter was private, protected by qualified privilege or other available defences was a matter for trial rather than a pleadings motion.

The Divisional Court further concluded that the motion judge erred in striking the claim based on the notice requirements under s. 5(1) of the Act.

The appellate court noted that the historical purpose of the notice requirement was to bring an alleged libel to the publisher or broadcaster's attention so that they could investigate and publish a retraction, correction, or apology if appropriate: *J.K. v. The Korea Times & Hankookilbo Ltd. (The Korea Times Daily)*, 2016 ONCA 375, at paragraph 19(iv).

Prior Ontario Court of Appeal decisions have affirmed that allegedly defamatory emails do not constitute a "newspaper" or "broadcast" for the purposes of s. 5(1) of the Act: *Janssen-Ortho Inc. v. Amgen Canada Inc*., [2005] O.J. No. 2265 at paragraph 6; *Weiss v. Sawyer*, 2002 O.J. No. 3570, at paras. 28-30.

Further, oral communications made over a telephone call do not constitute a "broadcast": *Elguindy v. Koren*, [2008] O.J. No. 764, at paragraph 27; *Bedessee Imports Ltd. v. K M Imports Inc.*, 2014 ONSC 1889, at paragraph 81.

In the appellate court's view, s. 5(1) of the Act was not triggered since there was no underlying newspaper publication or broadcast alleged in the statement of claim. The motion judge therefore erred in finding that the letter was subject to compliance with the six-week notice requirement.

In the result, the appeal was allowed and the decision striking the defamation claims was set aside.

The ultimate result of the proceeding remains to be seen since the action will continue and the employer will presumably rely upon the available defences at trial, including qualified privilege, justification, or fair comment, all of which may be a complete answer to the plaintiff's defamation claim. The decision nevertheless shows that some care should be taken, even in an otherwise private letter, to avoid making statements that could give rise to an actionable claim in defamation if the letter falls into the hands of the person being discussed.

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