

KEEPING CURRENT

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The failure to prove publication is fatal to a defamation claim (*Knight v. Sunshine Coast Campground Group Ltd.*)

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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My purpose in writing law blogs is to educate the reader about the legal issues reviewed in court decisions in a way that makes the law less complicated and to provide practical guidance, particularly in relation to the law of defamation. The law of defamation contains multiple shifting burdens of proof and special defences which have their own elements that must be proven in order to apply in a specific fact scenario.

The British Columbia Court of Appeal decision in [Knight v. Sunshine Coast Campground Group Ltd., 2024 BCCA 121](#) provides another opportunity to educate the reader on the law of defamation and to provide practical guidance.

In this case, the plaintiff commenced an action against a campground and its employee for alleged wrongful removal of personal property and defamation.

The claim for wrongful removal of personal property revolved around the plaintiff's use and occupation of a campsite on the campground's property, whether the plaintiff was a tenant under

British Columbia's [Manufactured Home Park Tenancy Act](#) or a mere occupier of the campsite under a licence, and the eventual removal of the plaintiff's property by the campground from the campsite.

The plaintiff's claim in connection with this aspect of the case was dismissed. The British Columbia Court of Appeal upheld the dismissal.

With respect to the plaintiff's claim for defamation, which is the focus of this blog, the plaintiff claimed that the employee of the campground had slandered him when the employee allegedly called the plaintiff a pedophile within earshot of another person.

Accusing someone of being a pedophile is clearly defamatory and one of the worst forms of defamatory statements that can be made about an individual.

In defence of the plaintiff's allegation, the defendants contended that the plaintiff had not proven publication of the comment and, in the alternative, pleaded justification.

The law of defamation uses the word “publication” to capture defamatory words or statements that are either spoken or written. Spoken defamatory words are referred to as “slander”. Written defamatory words are referred to as “libel”.

The defence of justification is one of the special defences that, if proven, defeats a defamation action. Alleged defamatory words that are true or substantially true cannot be defamatory.

The defendants contended that the plaintiff’s conviction under [section 173\(2\)](#) of the [Criminal Code](#) seventeen-years prior to the statement defeated the plaintiff’s claim.

On a motion for summary judgment, the motion judge dismissed the plaintiff’s defamation action on the grounds that the defendants had satisfied the elements of the justification defence. However, the British Columbia Court of Appeal dismissed the plaintiff’s defamation action for other reasons. The appellate court stated that there was no need to discuss the defence of justification and no need to label the plaintiff on the basis of a single 17-year old guilty plea, particularly since the circumstances of that conviction had not been explained to the court.

Instead, the British Columbia Court of Appeal found that the plaintiff’s defamation action should be dismissed because there was insufficient proof that the defamatory statement had been made at all.

In the alternative, the appellate court noted that the plaintiff’s claim in defamation also could not succeed in any event because there was no evidence of special damages.

As we have written in many blogs on the law of defamation, a plaintiff must establish the following three elements in order to succeed. A plaintiff bears the burden of proving:

(1) That the impugned words were

defamatory, in the sense that they would tend to lower him/her in the eyes of a reasonable person;

- (2) That the words in fact referred to the plaintiff; and
- (3) That the words were published, meaning that they were communicated to at least one person other than the plaintiff.

The plaintiff was unable to prove the third element.

Although the plaintiff alleged that someone heard the campground employee’s statement, the plaintiff, during the course of the proceedings, neither identified this witness nor provided a statement from this witness confirming that the statement was heard. The plaintiff submitted that he thought that the witness was dead and argued that a campground video would show that the employee’s statement was made loudly so that others could hear the statement. The alleged video, for what it would have been worth, was not in evidence.

The failure of the plaintiff to prove on a balance of probabilities that the campground employee made the alleged comment was fatal to the action.

In the alternative, the British Columbia Court of Appeal also found that the action was fatally flawed because a defamation action based on spoken words, or slander, requires a plaintiff to plead and prove special damages: see [Pootlass v. Pootlass, 1999 CanLII 6665 \(B.C.S.C.\) at paragraph 63](#).

In this regard, the law in British Columbia is not different from the law in Ontario. However, statutes, such as the Ontario [Libel and Slander Act](#) (the “LSA”), can alter the requirement for a plaintiff to prove special damages for slander. For example, as set out in [section 16](#) of the [LSA](#), in an action for slander for words calculated to disparage a plaintiff in any office, profession,



calling, trade or business held or carried on by the plaintiff at the time of publication, special damages do not need to be proven in order to obtain a damages award.

As a matter of practical guidance, this case demonstrates that before commencing an action for defamation, a plaintiff should carefully consider the three elements of the tort and ensure that each element can be proven on a balance of probabilities. In an action based on slander, a plaintiff should not withhold evidence of the third person who heard the alleged defamatory comment.

Also, unless a statutory provision provides otherwise, in an action based on slander, the parties must consider whether the plaintiff has suffered special damages. The plaintiff must plead special damages. In the absence of such a pleading, a defendant should use the procedural tools available in their respective jurisdiction to obtain the dismissal of the claim.

Contact us

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

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