

Defamation and Social Media

An Update

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Outline

Overview

- The Legal Framework of Defamation in Canada

Recent Developments

- Recent Jurisprudence and Amendments to the Legislative Framework

What is Defamation?

- **A statement is defamatory if:**

“the impugned words might tend to expose the plaintiff to hatred, contempt, or ridicule or whether they lower the plaintiff in the estimation of reasonable persons who have common sense and who are reasonably thoughtful and well-informed but who do not have an overly fragile sensibility”

Guergis v. Novak, 2013 ONCA 449 (CanLII)

- Defamation has primarily developed from common law.
- In Ontario, the *Libel and Slander Act* supplements or modifies the existing common law.

Slander vs. Libel

- Slander is the publication of a defamatory statement by means of an oral communication.
- Libel is the publication of a defamatory statement by means of a written communication.



Elements of the Tort of Defamation

The plaintiff must show...

- I. The statement was defamatory
- II. The statement made reference to the plaintiff
- III. The words were published or disseminated

Grant v. Torstar Corp., 2009 SCC 61, para 28 (CanLII)

Elements of the Tort of Defamation

- Virtually a strict liability tort.
- Strict liability is modified by the requirement that the publication itself must have been intended or negligent.
- Publication may be inferred.

Elements of the Tort of Defamation

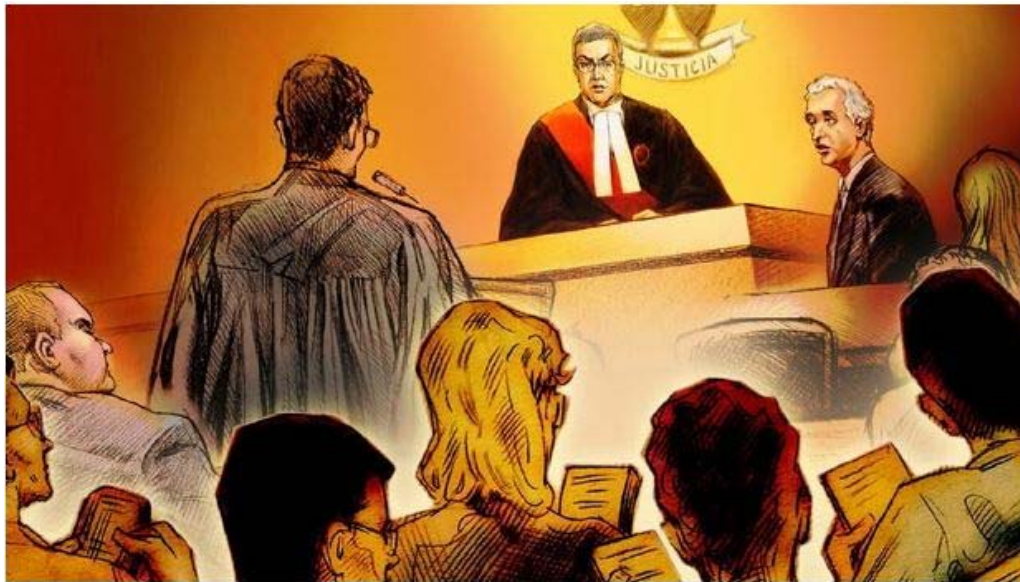
- **Statement must be defamatory**
 - General test is whether the defamatory statement would tend to lower the plaintiff in the estimation of right-thinking members of society generally.
 - Unless there is some innuendo implied by the words in question, the words must be considered in their ordinary meaning and in the full context of how they were published.
 - Liability for defamatory comments is *not* limited to originator of the comment.

Elements of the Tort of Defamation

- **Statement must make reference to the plaintiff**
 - Plaintiff is required to prove that the statement referred to him or her, but the plaintiff does not need to be specifically named.
 - Plaintiff must prove that ordinary and sensible persons familiar with the plaintiff would understand that the words referred to him or her.

Elements of the Tort of Defamation

Man suing Rob Ford for \$6M brought to tears at trial



<http://www.cbc.ca/news/canada/toronto/man-suing-rob-ford-for-6m-brought-to-tears-at-trial-1.1159446>

Elements of the Tort of Defamation

- **Statement must have been published or disseminated**
 - Defamatory statement must be published to a third party.
 - Publication is the final criteria that a plaintiff must prove in order to make a successful claim in defamation.
 - The *Libel and Slander Act* does not encompass internet publication

Elements of the Tort of Defamation

Defences

- Truth
- Absolute privilege
- Qualified privilege
- Fair comment
- Responsible communication on matters of public interest
- Consent

Elements of the Tort of Defamation

Damages

- General damages are *presumed* from the publication of a libel
- Assessed with the following considerations:
 - Nature and seriousness of the libel
 - Mode and extent of publication
 - Reputation and conduct of the plaintiff
 - Conduct of the defendant
 - Apologies and retractions
 - Other recovery of the plaintiff

Elements of the Tort of Defamation

Damages

- **Aggravated, Punitive and Special Damages**
 - Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency
 - Retraction and publication of an apology to mitigate damages
 - Special damages for pecuniary loss resulting from the libel must be specifically pleaded and proven in Court

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Practical Considerations – Everyone is a Publisher



Breadth of The Distribution of The Publication

The Medium is the Message

Defamation takes on new scales in the day and age of the Internet. Once published, one can never be assured that these allegations will ever be totally removed from the Internet. The breadth and the distribution of the defamation was nationwide and repeated on numerous occasions, even repeated after the plaintiff asked the defendant to stop the allegations.

Gagnon v. Firth, 2017 YKSC 26 (CanLII)



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Protecting Your Business

- **Has the business been defamed?**
 - Act Fast
 - Time is of the essence - potentially short notice and limitation periods
 - Libel: Notice required in six weeks and action in three months
 - Contact counsel immediately
 - Jurisdictional considerations
 - Determine the parties



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Protecting Your Business

- **Has the business been defamed?**
 - Considerations
 - Ignore it?
 - Refute it?
 - Bury it?
 - Cease and Desist Notice
 - Legal action



Social Media

Protecting Your Business

- **Has the business defamed others?**
 - Contact counsel immediately
 - Jurisdictional considerations
 - Retractions and/or apologies
 - Remove defamatory statements
 - Preserve evidence





Thank You





Questions?



Contact Us



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