

Who is that guy? A lesson in the law of defamation

Defamation | Litigation | Litigation & Dispute Resolution | Supreme Court of Canada

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The law of defamation is about protecting a person's reputation. Accordingly, as determined by the Supreme Court of Canada in the seminal case of *Grant v. Torstar Corp.*, 2009 SCC 61, in order to establish defamation a plaintiff must show that the impugned words:

- a) were defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of the reasonable person;
- b) were in fact referring to the plaintiff; and
- c) were published by communication to at least one person other than the plaintiff.

In *L.R. v. Saskatoon Star Phoenix*, 2020 SKQB 310 (currently unavailable on CanLII), the plaintiff learned this lesson in an action he brought against the defendant newspaper over a story about the removal of posters in an area of Saskatoon.

The article was entitled "What a rip-off: Broadway Ave. stripped of posters overnight" and began with the sentence "There's a poster pest on Broadway".

The story explained that someone had ripped down every single poster that had been displayed on public poster barrels in the Broadway area and quoted from a Twitter post in which the executive director of the Broadway Business Improvement District said: "We think it's a guy who's mad I asked for a review of the poster bylaw last year. My office door is locked."

However, the story noted that the person who tore down the posters had deposited them in garbage bins and that littering could not be added to the "crime of vandalism".

The plaintiff sued the newspaper over these words on the grounds that the words were about him, that he had been alleged of committing a crime and that he was a violent criminal.

But the newspaper story never identified the plaintiff by name, so the newspaper brought a summary judgment motion to have the case dismissed on the basis that words were not directed in any way whatsoever against the plaintiff.

In the alternative, the newspaper argued that the words were protected by the defence of fair comment in any event.

An examination of the newspaper story clearly showed that the plaintiff was not named in it. Yet the test for identification in the law of defamation did not require the person being defamed to be actually named. As set out in a leading authority, *Brown on Defamation*, the test for identification, where person is not specifically named, is:

...whether or not the words used are such as to lead an ordinary sensible person, or reasonable persons, who pays reasonable attention to the contents of the communication, to understand that it was the plaintiff to whom the defendants referred...

To prove this test, the Ontario Court of Appeal in *S.G. v. J.C.*, 2001 CanLII 3041 (ON CA) has stated that extrinsic evidence must be led to connect the plaintiff to the defamatory words. According to the Saskatchewan Court of Appeal in *Arnott v. College of Physicians and Surgeons of Saskatchewan*, 1953 CanLII 217 (SK CA), there must be evidence of special circumstances that allow for people to identify the person being defamed. As well, the special circumstances must be known by the community at the time the words were spoken or published.

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While the plaintiff argued that “an ordinarily sensible person paying reasonable attention to the article would understand it was about me” and relied upon the legal view that “...it is not necessary to show that anyone did in fact identify the plaintiff if a reasonable person acquainted with the plaintiff could identify him or her from the publication” (a test which is objective), the court simply found that the plaintiff was unable to meet his burden of proof. There was no extrinsic evidence to establish that a reasonable person acquainted with the plaintiff could identify the plaintiff as the “guy who’s mad” or the “someone” in the story who tore down the posters.

Although this finding alone was sufficient to dismiss the action, the court considered the alternative ground of the fair comment defence.

The leading case on the fair comment defence in Canada is *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (CanLII) wherein the elements of the defence are identified as follows:

- 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 recognisable as comment;
- d) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?
- e) even though the comment satisfies the objective test the defences can be defeated if the plaintiff proves that the defendant was actuated by express malice.

The plaintiff argued that the story accused him of committing a “crime” and that this accusation was a statement of fact, not opinion. But the words actually written were that “The perpetrator didn’t add littering to the crime of vandalism...”

The court described that the words “crime” and “vandalism” did not have singular meanings. The word “crime” could refer to a criminal offence, but it could also mean “sinfulness”, “wickedness”, “wrongdoing” and “sin”.

The word “vandalism” meant “wilful or malicious destruction or damage to works of art or other property; *loosely* barbarous, ignorant, or inartistic construction, alteration or treatment. *Also*, an instance of this.”

In the overall context of the article, the use of the word “crime” had to be understood in the context of the first sentence of the story which described the perpetrator as a “poster pest”.

Meanwhile the use of the word “vandalism” was determined to be a matter of opinion because it flowed from the facts that someone had removed posters, which were the property of others, from the public display barrels and that those posters were thrown in the garbage.

As a matter of opinion these acts could be viewed as wilful damage to the posters or “vandalism”.

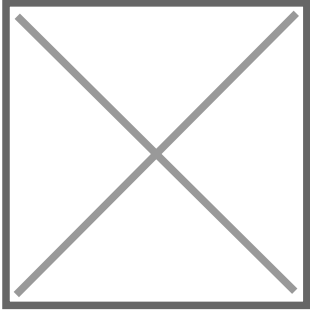
Accordingly, the court concluded that the phrase “crime of vandalism” was clearly expressing an opinion that the conduct of the perpetrator constituted wrongdoing.

The lessons to be learned from this case, aside from the obvious that no one should engage in the wilful destruction of property of another, are that the law of defamation is comprised of very concise rules and principles and that in order to bring an action the plaintiff must be able to demonstrate that the words are expressly or by way of extrinsic evidence about him or her. Identification is not to be taken lightly, especially where vague words of identification are used. As well, even where the word “crime” is used to describe an activity this will not deprive a speaker or writer of the defence of fair comment provided that sufficient facts preface the view that there has been a “crime”. The use of the word “crime” does not in every context mean that a person has committed a criminal offence.

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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