

OCNA LEGAL SESSION

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Prepublication Advice

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- Common Issues
 - Defamation, copyright, court reporting, publication bans, Youth Criminal Justice Act, privacy
- Process

Defamation

What is Defamation?

- Defamation law protects an individual's reputation but it also restricts freedom of speech, an important constitutional right. Courts are required to balance these two societal values in deciding defamation actions
- Statement that would tend to lower the reputation of a person in the community
- Most or all editions of your newspapers defame someone
- All subject areas

Defamation

Who or What Can Be Defamed?

- People
- Corporations
- Associations
- Charities
- Government Officials

Defamation

Your Responsibility

- Entire newspaper
 - Articles, columns, Op-eds, letters to the editor, cartoons, advertisements
- Comments on website
 - With notice or knowledge

Defamation

Misconceptions and Pitfalls

- U.S. vs. Canadian Law
- “We Didn’t Say it”
- “Alleged”
- The “Sideswipe”
- Did not identify
- The “dirtbag” defence

Defamation

The Burden of Proof

- Plaintiff's Burden -
 1. Words are defamatory;
 2. Defamatory words identify Plaintiff; and
 3. Defamatory words were communicated to a third person
- Burden then shifts to newspaper to justify publication

Defamation

Defences

- Truth
- Fair Comment
- Privilege
- Responsible Communication on a Matter of Public Interest

Defamation

Truth

- Absolute defence. The materials may be defamatory, but if it can be shown to be true or “substantially” true, defendant will not be liable
- Impact of Rules of Evidence
- Confidential sources
- “He said/she said”

Defamation

Fair Comment

- opinions made on matters of public interest, without malice, are protected
- based on true facts set out in the piece or well known to the community
- comment not fact
- honest belief – “could any person honestly express that opinion on the proved facts?”
- made without malice

Defamation

- Distinction between “fair” and “honest” as addressed by the Supreme Court in *WIC Radio Ltd. v. Simpson*:

The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.

Defamation

Privilege

- “**Fair and accurate**” reports of the following are privileged:
 - Court proceedings
 - Administrative tribunal/association proceedings and/or decisions
 - Legislative proceedings
 - Government press releases
 - Police press releases

Defamation

Responsible Communication on a Matter of Public Interest

- If a statement cannot be proven as fact, publishers may avoid liability by establishing that the statement was “responsibly” made

Two part test-

1. Was the publication on a matter of public interest, and;
2. Did the publisher act responsibly in trying to verify the information?

Defamation

Responsible Communication

Part 1 – Public Interest

“Some segment of the public must have a genuine stake in knowing about the matter published.”

“Mere curiosity or prurient interest is not enough.”

-Supreme Court of Canada, *Grant v. Torstar*, [2009]

Defamation

Responsible Communication

Part 2 – Responsibility – factors considered

- (a) the seriousness of the allegation;
- (b) the public importance of the matter;
- (c) the urgency of the matter;
- (d) the status and reliability of the sources;
- (e) whether the plaintiff's side of the story was sought and accurately reported;
- (f) whether the inclusion of the defamatory statement was justifiable;
- (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth; and
- (h) any other relevant considerations.

Copyright

What is copyright?

- Exclusive legal right of copyright owner to control use of work
- Any written document, notes, music, letters, video, photo
- No need to register or have copyright notice

Copyright

Social Media

The laws of copyright apply to social media and other internet platforms

- No requirement to register

Copyright

Exceptions –

When can you use works subject to copyright?

- Public Domain
- Licence/Permission
- Fair Dealing

Copyright

Public Domain

- Minimum 50 years until work enters public domain
- Works usually don't enter public domain for the "life of the author" plus 50 years

Copyright

Permission or Licence

- Permission must be explicit
 - Probably not permission to include in newspaper because setting on social media is “public” or “open”
- Record of Permission to Use
 - Could be email
 - Specify what use (ie. newspaper and on website) and any fee (or no fee)
- Check terms of use on website or platform

Copyright

Fair Dealing

- Exception to copyright infringement permitting use of, or “dealing” with, a copyright protected work without permission or payment of copyright royalties
- must be for specified purpose
- must be “fair”
- must include credit

Copyright

Fair Dealing

- Exception applies to specified purposes set out in the in *Copyright Act* which include:
 - news reporting;
 - criticism or review;
 - research, private study, education, parody or satire.

Copyright

Fair Dealing

- What is “Fair” – not defined in Act
 - Use only what is necessary
 - Consider Impact on Copyright Owner
 - Non-copyrighted alternative?

Copyright

Fair Dealing

- Must Provide Credit
- Credit must include:
 - the source; and
 - if given, the author

Copyright

- ***The Guardian***

Trump cancels summit but says he will invite Putin to later G7 event

US president intends to convene 11 nations at later date in push to counter China

Donald Trump listens to other leaders make a point during the G7 meeting in Canada in June 2019. Photograph: Handout/Getty Images

Patrick Wintour *Diplomatic editor*

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