

DEFAMATION IN THE NEW MILLENNIUM

Defamation is one of the more peculiar areas of the law. The underlying principle is that individuals are entitled to the enjoyment of their good reputations, unimpaired by false or derogatory statements. As the spokesman for the majority of the Supreme Court of Canada said “The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.”

Our first stop on the nickel tour of defamation is to explain the difference between slander and libel. It’s really quite simple. One type of defamation is printed (libel) and the other type is spoken (slander). Beyond that, there is no difference of any great consequence or interest to anyone besides lawyers and local municipal politicians.

Note that defamation actions are not allowed in the provincial small claims courts. If you wish to bring a defamation action, you have to do so in the Supreme Court. Presumably, the idea is to limit such actions to those where there is some serious damage to reputation as the upper limit of the small claims courts jurisdiction is \$10,000.00.

There are a number of defenses that you might raise if you are sued for defamation. The most obvious one is that what you said or wrote is true. If that is the case, then your right to say true things is guaranteed and protected by the constitution - free speech and all that. As with all civil actions, it is necessary for the plaintiff to prove the case or, in other words, to prove on a balance of probabilities that there has been a defamation. It is not enough to “suspect” it is so or even to “know” it is true, you have to demonstrate it so well that even the judge agrees with you.

There are some things that, if you say them about another person, are actionable per se (without more). Words that impute criminal offences such as “she is a thief” or “he is a murderer” are examples. Words imputing that a person has an infectious or deadly disease are in the same category and, although this rule was originally to protect those wrongly accused of having leprosy or smallpox, it fits just as well centuries later for AIDS and other modern maladies.

Defamation is a strict liability tort which means that the defendant's intentions are not relevant, assuming he was not insane or crazy drunk at the time. He or she may have had the best intentions in the world when announcing to everyone at the Chamber of Commerce meeting that you are a thief and a crooked businessman but if you don't happen to be a thief or otherwise crooked then he has made defamatory statements about you. You may well be the worst scoundrel in the Valley but if, as Robbie Burns said, you are skilled in "the better art of hidin", you will likely be successful in your action.

Of course, if the judge figures out that you really are as bad as the defendant said but the defendant just can't prove it, he may give you judgment but only award a small amount of damages, presumably on the theory that your reputation can't be worth that much. In the book *QB VII* (which refers to Queen's Bench courtroom #7) author Leon Uris describes the slander trial in which he was found liable for calling a Nazi butcher a Nazi butcher, Uris' main problem being that he could not locate any witnesses as they had all been, well, butchered by the plaintiff. In that case the judge found for the plaintiff but awarded damages of only \$1 after a very long and expensive trial.

There are a number of other, less common, defenses. Consent, absolute privilege (like that enjoyed by politicians inside the legislature or judges inside the courtroom), qualified privilege, fair comment, justification and protecting common interests are just some of them. There is not enough room to go into them all but if you pop over to your local law library, they account for most of volumes 2 and 3 of the law of defamation textbook.

There are certain aggravating factors that can make the original defamation even worse. For example, was there a withdrawal of the untrue statement? Was an apology ever tendered? Was there a repetition of the defamation? Was there conduct calculated to deter the plaintiff from proceeding with the action? Was there a prolonged and hostile cross-examination of the plaintiff or did the defendant make a plea of justification that he knew was bound to fail? Finally, what was the conduct of the defendant at the times when the libel was published?

Defamation is an old cause of action that has recently been enjoying a resurgence of popularity. Fifty years ago, you could defame someone till your were blue in the face but it was not easy to publish or broadcast the defamation to a very big audience. Of course, that was when journalists worried more about facts and ethics than sales and market share, when editors had discretion and when there was no internet to send the

defamation around the world to a billion computers at the speed of light. In the “good old days” defamation actions were rare. Nowadays, you read about them every day in the newspaper, it seems. Is this to be the way of the new millennium?