

## Suing for Defamation - A Call for Restraint

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The law of Defamation continues to be one of the most technical areas of law, with special limitation periods, notice pre-conditions to the commencement of proceedings, special rules of pleading and evidence, and reverse onuses of proof. It is an area of law that requires great expertise and more importantly experience. A lawyer who provides advice and proceeds with a claim based solely on a review of the relevant legislation may do a great disservice to his or her client.

Absent the existence of special damages, defamation actions should rarely be brought for monetary reasons alone. It is an unfortunate reality for plaintiffs with legitimate claims that the unreimbursed costs of the litigation may well exceed both the damages and a partial indemnity costs award. After a careful consideration of the monetary pitfalls of proceeding with an action, experienced lawyers will often advise clients to proceed only where there is a compelling need to prevent further reputational harm or achieve judicial vindication of a harmed reputation.

An effective strategy to redress a perceived attack on reputation requires more than a legal analysis: It requires a risk/benefit analysis that extends beyond the consideration of only the prospects of success or the financial risks. A client's decision to proceed with an action for defamation is difficult and comes with often unanticipated risks: An ill-conceived defamation action may, in fact, risk causing more harm to the client. This is particularly the case where a client may face further negative media exposure through the reporting of court proceedings. In this scenario, the decision to proceed with a claim may very well result in the self-infliction of new harm to the client's reputation and greater financial loss. Sometimes an alternative strategy is the most prudent and least damaging course of action.

The relatively recent enactment of the *Protection of Public Participation Act, 2015* ("PPPA"),<sup>1</sup> adds another layer of risk to consider when proceeding with a defamation claim. The Act added sections 137.1 to 137.5 to the *Courts of Justice Act* ("CJA"),<sup>2</sup> providing, among other things, a fast-track mechanism for the Court to dismiss a proceeding on a motion by a defendant where the Court is satisfied that the proceeding arises from an expression that relates to a matter of public interest.

Section 137.1 confers a broad scope of protection on expression, regardless of whether the expression is communicated in "public" or "private" and contains no restriction on the class of defendant who may seek a remedy.<sup>3</sup> Further, the term "a matter of public interest" is

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<sup>1</sup> *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23

<sup>2</sup> *Courts of Justice Act*, RSO 1990, c C.43 [CJA]

<sup>3</sup> *Ibid.* ss. 137.1(2)

similarly broad in scope and likely to capture a wide range of expression.<sup>4</sup> The PPPA also amends *the Libel and Slander Act*<sup>5</sup> to extend the application of the defence of qualified privilege.

Significantly, subsection 137.1(7) of the *CJA* provides that if a judge dismisses an action under s. 137.1, then the moving party is *prima facie* entitled to costs of both the motion and the proceeding on a full indemnity basis. While there is discretion given to the judge not to award the full indemnity costs to the moving party, the financial risk for the plaintiff is very real and must not be ignored.

It is crucial when drafting a pleading that a lawyer has the requisite expertise in defamation law. The jurisprudence is replete with defamation claims being struck at the pleadings stage. Courts have struck defamation claims on, among others, the following grounds:

- A notice of libel was not delivered in time.<sup>6</sup>
- A notice of libel was not properly served on all proposed defendants.
- A notice of libel did not provide enough clear information to the defendants for an appropriate response to be considered and taken.<sup>7</sup>
- No government body may sue in defamation.<sup>8</sup>
- Groups have no claim for defamation where no individual member of the group is singled out and individuals in the group have not set out the full particulars of their individual causes of action.<sup>9</sup>
- The plaintiff was not sufficiently identified or identifiable in the words complained of.<sup>10</sup>
- The words complained of, when read in their entire context, are not capable of bearing a defamatory meaning.<sup>11</sup>
- Statements made during the course of court proceedings are subject to an absolute immunity and this immunity extends to a report which formed the basis of the witness' evidence.<sup>12</sup>

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<sup>4</sup> See *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 (CanLII)

<sup>5</sup> *Libel and Slander Act*, RSO 1990, c L.12, s. 25.

<sup>6</sup> See *Siddiqui v. Canadian Broadcasting Corporation*, 2000 CanLII 16920 (ON CA) [*Siddiqui*]; *Supreme Auto Group Inc. v. Toronto (Police Services Board)*, 2010 ONSC 3803 (CanLII) [*Supreme Auto*]

<sup>7</sup> See *Siddiqui*, *ibid.*

<sup>8</sup> See *Halton Hills (Town) v. Kerouac*, 2006 CanLII 12970 (ON SC)

<sup>9</sup> See *Elliott v. Canadian Broadcasting Corp.*, 1995 CanLII 244 (ON CA)

<sup>10</sup> See *Supreme Auto*, *supra*.

<sup>11</sup> See *Supreme Auto*, *supra*

<sup>12</sup> *Fabian v. Margulies*, 1985 CanLII 2063 (ON CA)

In deciding whether to sue for defamation, a prospective plaintiff, with the assistance of his or her lawyer, should consider, among other things, the following:

- Have special damages been suffered to such an extent that the need to recover the loss outweighs the financial and reputational risks of proceeding?
- Is the plaintiff truly identified or identifiable from the words published? If not, there is a risk that the plaintiff will self-identify by bringing proceedings and cause reputational harm that might not otherwise have arisen.
- Has the reputation of the plaintiff in the community been so irreparably damaged and has the plaintiff been so subjected to ridicule, hatred and contempt that only the vindication resulting from a favorable court judgment will address the damage?
- How prominent is the publication? If the publication of the defamatory statements appears on the Internet, then consider whether the website or blog has a large viewership. Also, consider whether the plaintiff's name in relation to the defamation appears on a Google search beyond the first couple of pages of a search result. If not, then is the publication going to be seen by members of the community and cause reputational damage of any lasting impact or at all?
- Is the plaintiff being overly sensitive to the publication of the words? It is critical to consider whether a client's perception of the meaning of the subject words differs from what an ordinary reader would conclude.
- If the defamatory statement is made to a small group, then consider whether the maker of the statement is really only "preaching to the converted". Before proceeding with a claim, it is important to consider how much harm has in fact been done to the client's reputation.
- Will the bringing of legal proceedings simply further engage an adversary, who rather than cease in the offending conduct, will simply amplify their attack. Some people have an axe to grind and will persist in their defamatory conduct even in the face of legal proceedings. As a result, a client's time and resources in redressing the continued attacks may be significantly depleted. In circumstances involving an unrepentant defendant, clients should be prepared for a battle.
- Will the bringing of proceedings bring the offending statement into the public domain where the dispute and the alleged defamation will be able to be reported on by mass media with immunity? This relates to the earlier consideration about a plaintiff's "self-infliction" of harm. Sometimes the best course of action is to keep one's head down and let the publication slip into oblivion, particularly where the scope of the publication is restricted.
- Relatedly, has the harm caused by the defamation subsided or been mitigated or is it likely to become mitigated over time? It is important for lawyers to advise clients that it may take the action several years to come to trial at which point the wounds of the defamation may have healed, only to be reopened by the public trial process.

- If the statement complained of is in relation to a matter of public interest will it be caught by the provisions of the *Protection of Public Participation Act*? A lawyer must counsel his or her client that the legislation may result in a summary dismissal even if the statement complained of is, in fact, defamatory and the action has some merit.

As alternatives, prospective plaintiffs and their lawyers should consider, among other things, the following:

- If the offending statement was published in print or on a website with a consistent readership, then consider a letter to the editor setting out the client's position and response. Most responsible media will readily publish opposing views for the consideration of their readership.
- If the offending statement appears on a Google search, then investigate whether it can be pushed down in priority with both effective Search Engine Optimization ("SEO") and the publication of fresh positive content. A word of warning here. SEO is both a science and an art. There are many service providers who will promise the moon and after great expense will achieve no meaningful results.
- Lawyers should counsel clients to seek the publication of an apology, retraction or clarification. These must be carefully and skillfully drafted to balance the need for vindication against the risk of republishing the defamation, which may inflict greater harm. Also, consideration must be given to what the other party is likely to accept. Requesting an apology that has no hope of being accepted simply serves to waste time and money.
- If the subject of the defamation is a public figure or the issue raised is one of public interest, then a strategic press release should be considered for mass distribution. PR firms should always be engaged in conjunction with legal counsel. The last thing a client needs is to create liability by carelessly shifting blame to another party, who may then sue the client for defamation. An effective press release will ideally be published to the same audience to whom the original defamation was directed.
- If an action has already been commenced, then a lawyer should propose an early mediation. Early mediation may provide an effective mechanism for executing an exit strategy which may serve all parties' interests. In order to capitalize on the effectiveness of mediation, a lawyer would be wise to choose a mediator who has expertise in defamation law, who will be sensitive to the respective interests of the parties and who can provide an authoritative reality check for the parties.
- Consider using the simplified procedure rules, which permit a claim for damages in the \$25,000 to \$100,000 range. Restricted discovery and summary trial provisions in the simplified procedure rules may result in a less costly and more timely disposition of an action.<sup>13</sup>
- Consider bringing any action in the Small Claims Court where matters are disposed of with less cost and delay: Damages of up to \$25,000 may be awarded and vindication may still be achieved through the Judgment of the Court. Nonetheless, in terms of

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<sup>13</sup> See *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 76.04 and Rule 76.10.

vindication for the plaintiff, there remains a perception that a Small Claim Court win does not carry the same weight as a Superior Court win.

- Counsel and parties should be assessing the wisdom of litigation on an ongoing basis, in particular, after delivery of the defence, the delivery of a section 137.1 *CJA* motion, and production of documents and discoveries. Defendants are often willing to avoid the cost of ongoing litigation and the potential exposure, through a without costs dismissal of a proceeding.

Lawyers have a professional obligation to not only advise clients on the legal merits of a proposed action but must also advise clients on the benefits and risks of proceeding with a claim, especially as they relate to the management of the client's overall reputation and financial interests. Often, in the heat of the moment and when the wounds of insult are the deepest, it will fall to lawyers to protect the best interests of their clients by considering restraint or alternatives to an all-out war.

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