Toronto Law Journal

Proposals to Amend the *Libel and Slander Act*

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In April 2020, Attorney General Doug Downey asked certain stakeholders to provide feedback about proposals contained in the Law Commission of Ontario (LCO)'s report titled *Defamation Law in the Internet Age* (Report).[1] The LCO did a thorough job in their review of the existing law and their consideration of the amendments needed to reflect the internet age. There are, however, some recommendations in the Report which we believe need to be tweaked. In particular, in our view:

- There should not be a mandatory four-week negotiation period before issuing a claim, as had been proposed in the Report;
- The shorter limitation period for news media should be preserved to encourage a more active and vigorous press. The Report proposes abolishing the existing short limitation periods for newspapers and broadcasters in the current *Libel and Slander Act*;
- The takedown regime proposed in the Report should be modified;
- The definition of "publisher" in a new *Defamation Act* should not absolve an intermediary platform, such as Google, from responsibility for the publication where the platform has been given notice of a defamatory publication on its platform and fails to take it down; and
- A specialized tribunal should be established to dispose of defamation claims under $10,000.

There are three primary recommendations that we believe need to be included in any new legislation: (1) preserving a shorter limitation period for the news media; (2) expanding liability for online platforms; and (3) creating a specialized defamation law tribunal.

1. Preserving the Shorter Limitation Period for News Media

It is still important in terms of encouraging an active and vigorous press to provide for the shorter limitation period. The impact of the publication by a newspaper or broadcaster is swift, meaning that if someone has a complaint, they need to address it immediately to mitigate the damage. The significance and the seriousness of the complaint against a media report

[1] The author provided submissions to the Attorney General regarding the Report (co-authored with Eryn Pond): Eryn Pond and Howard Winkler, *Submissions to the Attorney General of Ontario on the Law Commission of Ontario's Defamation in the Internet Age Final Report*, July 2020, available online: https://www.winklerresolution.com/wp-content/uploads/2020/08/Winker-Law-Submission-to-the-AG-on-the-LCOs-Defamation-Law-in-the-Internet-Age-Final-Report.pdf

diminishes over time. A shorter limitation period provides protection for publishers and broadcasters, so they do not continue to face the exposure and risk of lawsuits that inhibit their ability to do their necessary job in our democracy.

Under the current law, a plaintiff must give notice of their complaint within six weeks and then must commence the action within three months. The LCO was concerned that a six-week notice of libel period was too short for unsophisticated, unrepresented parties, and they might miss it because they were not aware of the limitation period which, if missed, becomes a complete bar to them taking action. But the answer is not to completely abolish the shorter limitation period. The purpose of a notice of libel is to give the broadcaster or publisher an opportunity to consider the matter and publish a correction, an apology, or a retraction to mitigate the harm where they conclude they made a mistake.

Given the purpose of the current law, we suggest keeping the three-month limitation period for news media. However, we suggest that if complainants do not avail themselves of the opportunity of the notice of libel within the six-week period, they should not lose the right to sue.

We also propose a simple solution to offset the impact of the short limitation period on unrepresented, unsophisticated persons. Specifically, we propose a requirement that media outlets must post a notice in their contact sections alerting people that they have three months in which to commence an action about any matter contained in their publication. That way, if someone has a problem with a newspaper or broadcaster, they simply go to the contact page to figure out who to contact, and they will see the notice. This balances the protection of unsophisticated plaintiffs and the public interest in an unfettered media.

2. Expanding Liability for Online Platforms

More must be done to hold online platforms such as Google liable when they refuse to remove defamatory material after they have been made aware of it. Unless these platforms take down offending material after it is brought to their attention, there should be a right to include them as a defendant in any defamation action.

We propose that online platforms should have *prima facie* liability as a secondary publisher after having been put on notice of defamatory content, but it should then be a complete defence if they comply with the takedown obligations proposed by the LCO (subject to certain modifications). As it stands now, under the LCO recommendations, someone can make a takedown request of Google if something is published on the internet that they find offensive. Google then contacts the original publisher or author and alerts them to the request. If that person does not respond, Google removes it. But if the originator objects to the takedown notice, the posting remains. The Report suggests that, in these circumstances, Google may keep the identity of the original publisher confidential.

We believe that is wrong. In our view, if somebody wants to take a stand and have the material stay up, Google should be required to give the plaintiff identifying information for that person for service of a statement of claim. If Google cooperates in providing the identifying information, then the true wrongdoer can be held to account and only then should Google be immune from liability. Allowing Google to maintain the anonymity of the original poster leaves the offended person with little recourse to clear their name.

We acknowledge there may be good public policy reasons for the author of a post to remain anonymous. However, under the current law, it is up to the plaintiff to uncover their identity, which could include filing a motion or multiple motions for *Norwich* orders —that compel third parties to hand over information that identifies the original publisher — which can be time-consuming and very expensive. In our view the onus should be on the person who wants to remain anonymous to go to court and obtain that relief. Instead of forcing the plaintiff who has been harmed to spend tens of thousands of dollars, Google should have to give up the identity of the person if they want the information to stay online. If the original poster believes there is a public interest in their staying anonymous, then they should incur the expense of seeking an order from the court.

3. Creating a Specialized Defamation Law Tribunal

When a person's reputation has been defamed, immediate action is essential, but the current legal system falls short in providing swift justice. We propose creating a Defamation Law Tribunal (DLT) to handle damage claims under $10,000. The tribunal would be staffed with decision-makers with subject matter expertise, and the process would be conducted in writing.

The problem with such a tribunal is that in many cases the plaintiff seeks the removal of content, not only a declaration that they were wronged. A tribunal would not have the jurisdiction of a judge to grant an injunction. Accordingly, we envision that the tribunal would be empowered to make a recommendation as to the relief that should be available to the plaintiff. The plaintiff could then move before a judge of the Superior Court of Justice to obtain that relief. Such a process would be fast and cheap and could provide the kind of remedy that people really seek, namely, vindication and the removal of defamatory content.

Conclusion

The LCO was asked to report on reform of the defamation system. They have fulfilled that mandate. Stakeholders have now commented on the recommendations of the LCO.

Now it is over to the Attorney General to consider whether to amend the *Libel and Slander Act* and what recommendations to accept if it is amended.