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Defamation - Slander

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Legal Test

Before proceeding with a case of defamation - slander, one must look to establishing the necessary elements of the tort. The legal test for defamation is found in *Grant v. Torstar Corp.*, (2009) SCC 61, [2009] 3 S.C.R. 640 and is outlined as follows:

- 1) The impugned words were defamatory, such to lower a person's reputation in the eyes of a reasonable person;
- 2) The words did refer to the plaintiff; and
- 3) The words were published, meaning that they were communicated to at least one other person other than the plaintiff.

Should the above elements be satisfied on a balance of probabilities, falsity and damage are presumed. This is elaborated upon later.

1) Defining a Defamatory Statement

In defining a defamatory statement, the courts have looked to *Canadian Broadcasting Corp. v. Color your world Corp.*, 1998 CanLII 1983 (ON CA). On page 13, the Court of Appeal stated:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him or her in the estimation of right-thinking members of society generally and in particular, to cause him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one...

The highlights in this definition would be: a statement that injures the reputation of the person to whom it refers...as judged by the standard of an ordinary, right thinking member of society (the reasonable person). Thus, **the test is an objective one.**

The Supreme Court on *Grant* goes on to mention that “slander requires proof of special damages, unless the impugned words were slanderous per se.” Slander per se is then defined as:

- a. Accusations imputing the commission of a criminal offence;
- b. Accusations imputing a contagious or infectious disease; or
- c. Words calculated to disparage a person in his/her office, profession, calling, trade or business.

Even if the statement does not specify the commission of a specific criminal offence, does the statement **imply** the commission of crimes? In the persuasive *Pritchard v. Van Nes*, 2016 BCSC 686 (CanLII), the court held “liability for defamation also arises...through the innuendo of the defendant’s words”.

2) The statement was made about the Plaintiff

In order to meet this element, the Plaintiff does need to prove, on a balance of probabilities, that the defamatory statements in question were in fact made about the Plaintiff.

3) The Words were Published

Referring back to *Grant*, the court defined publication as “meaning that [the words] were communicated to at least one person other than the plaintiff”.

One can easily misread “published” as being printed or broadcast. This is far from the case. The words were “communicated to at least one other person”. This can mean a conversation was had where the words were spoken. It can mean another person was within earshot as the defamation was spoken. It could also possibly extend to the reasonable belief that another person **may have**, on a balance of probabilities, overheard the comments. An example could be if the statements were shouted over a significant distance. For the comments to have been heard by the Plaintiff, it is reasonable to presume any person located in between the Plaintiff and Defendant also heard the defamatory comments.

Defences to Defamation - Slander

We return again to *Grant* where in paragraph 29, the Court stated there are usually only two defences to defamation:

- 1) The statement is substantially true,
- 2) The statement was made in a protected or privileged context.

It is important to note that, as mentioned above, once the elements of the initial tort have been met, the onus falls to the defendant to prove the comments were not false. The Plaintiff need not prove the allegations are in fact false, although any evidence to that effect is always helpful.

Damages

Once the elements of the initial tort are proven, damage is also presumed. What is not presumed is the amount. So, what contributes to the calculation of damages from defamation?

In *Walker et al. v. CFTO Ltd. et al.* 59 O.R. (2d) 104, (1987) O.J. No. 236, the Court of Appeal held that a “compensatory damage award in a defamation action should represent the Judge or jury’s estimate of the amount necessary in all the circumstances of the case: (i) to vindicate the plaintiff’s reputation; and (ii) to compensate him for his wounded feelings”.

This distinction is significant in that the ruling holds that one does not necessarily have to provide proof of financial damage.

Also considered are the ongoing ramifications of defamation as noted in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130:

[166] ...A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation.

In noting the above case, the Court in *Pritchard v Van Nes*, 2016 BCSC 686 (CanLII) added:

(205) In attempting to arrive at the appropriate level of general damages in a defamation case, one must always be aware of not only the damage inflicted to a person's reputation but also the fact that once damaged a reputation is very difficult to restore. Always mindful of the fine balance between freedom of speech and the protection of reputation, once the scales have been tipped through defamation, a plaintiff is entitled to be compensated not only for the injury caused by the damage to his integrity within his broad community but also for the suffering occasioned by the defamation.

Also considered in calculating damages are the nature of the defamatory statement, the level of egregiousness, and also the intent of the defendant. On that last note, was there provable malice on the part of the defendant (which can increase the level of damages), has the defendant apologized or expressed remorse, or rather were the defendant's actions high-handed or oppressive. Also, a defendant's plea of justification where there is no reasonable chance of success can also be a contributing factor to overall damages.

In extreme cases, a Plaintiff may seek punitive damages. These are rarely awarded, but for those looking for the leading case on when they would apply, look to *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595, 2002 SCC 18.

While this provides a brief overview, the law can be very complex, and many aspects are case specific. If you have an issue, call a paralegal at Cochrane Moore LLP in Oshawa for a free consultation.

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