

Defamation and Social Media
An Update

Presented by: James Cook & Chris Junior
November 10, 2016



WELCOME
5th Annual Continuing
Professional Development Event



Outline

- **Overview**
 - The Legal Framework of Defamation in Canada
- **Recent Developments**
 - Recent Jurisprudence and Amendments to the Legislative Framework
- **Social Media**
 - Practical Considerations for In-House Counsel



3

Not all publicity is good publicity

"La Carnita apologizes for Trump-inspired 'grab her by the taco' post" – CBC Oct. 12, 2016



4

What is Defamation?

- A statement is defamatory if:

"the impugned words might tend to expose the plaintiff to hatred, contempt, or ridicule or whether they lower the plaintiff in the estimation of reasonable persons who have common sense and who are reasonably thoughtful and well-informed but who do not have an overly fragile sensibility"

Guegis v. Novak, 2013 ONCA 449 (CanLII)

- Defamation has primarily developed from common law.
- In Ontario, the *Libel and Slander Act* supplements or modifies the existing common law.



5

Slander vs. Libel

- Slander is the publication of a defamatory statement by means of an oral communication.
- Libel is the publication of a defamatory statement by means of a written communication.



6

Elements of the Tort of Defamation

The plaintiff must show...

- I. The statement was defamatory
- II. The statement made reference to the plaintiff
- III. The words were published or disseminated

Grant v. Torstar Corp., 2009 SCC 61, para 28 (CanLII)



7

Elements of the Tort of Defamation

- Virtually a strict liability tort.
- Strict liability is modified by the requirement that the publication itself must have been intended or negligent.
- Publication may be inferred.



8

Elements of the Tort of Defamation

- **Statement must be defamatory**
 - General test is whether the defamatory statement would tend to lower the plaintiff in the estimation of right-thinking members of society generally.
 - Unless there is some innuendo implied by the words in question, the words must be considered in their ordinary meaning and in the full context of how they were published.
 - Liability for defamatory comments is *not* limited to originator of the comment.



9

Elements of the Tort of Defamation

- **Statement must make reference to the plaintiff**
 - Plaintiff is required to prove that the statement referred to him or her, but the plaintiff does not need to be specifically named.
 - Plaintiff must prove that ordinary and sensible persons familiar with the plaintiff would understand that the words referred to him or her.



10

Elements of the Tort of Defamation

- **Statement must have been published or disseminated**
 - Defamatory statement must be published to a third party.
 - Publication is the final criteria that a plaintiff must prove in order to make a successful claim in defamation.
 - The *Libel and Slander Act* does not encompass internet publication



11

Elements of the Tort of Defamation

Defences

- Truth
- Absolute privilege
- Qualified privilege
- Fair comment
- Responsible communication on matters of public interest
- Consent



12

Elements of the Tort of Defamation

Damages

- General damages are *presumed* from the publication of a libel
- Assessed with the following considerations:
 - Nature and seriousness of the libel
 - Mode and extent of publication
 - Reputation and conduct of the plaintiff
 - Conduct of the defendant
 - Apologies and retractions
 - Other recovery of the plaintiff



13

Elements of the Tort of Defamation

Damages

- **Aggravated, Punitive and Special Damages**
 - Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency
 - Retraction and publication of an apology to mitigate damages
 - Special damages for pecuniary loss resulting from the libel must be specifically pleaded and proven in Court



14

Recent Developments



15

Recent Developments

Recent Internet Defamation Jurisprudence

- *Baglow v Smith*, 2015 ONSC 1175 (CanLII)
 - The Court held the defendant operators of a blog “published” the user-generated content of third parties.
- *Pritchard v Van Nes*, 2016 BCSC 686 (CanLII)
 - The Court held the defendant was liable for defamatory third party Facebook comments of “Friends”.



16

Recent Developments

Recent Internet Defamation Jurisprudence

- *Niemela v Malamas*, 2015 BCSC 1024 (CanLII)
 - Google is a passive instrument and not the publisher of “snippets”.
- *Kent v Martin*, 2016 ABQB 314 (CanLII)
 - Online publication of an alleged defamatory article does not cease after links are removed from the website homepage.



17

Recent Developments

Protection of Public Participation Act, 2015, S.O 2015, c. 23 – Bill 52

- Intended to curtail strategic lawsuits against public participation (SLAPPs)
- Extends the defence of qualified privilege under the *Libel and Slander Act* (s.25 of the Act)



18

Recent Developments

Protection of Public Participation Act, 2015, S.O 2015, c. 23 – Bill 52

- **Courts of Justice Act s. 137.1(3)**
...a judge shall, subject to subsection (4), dismiss the proceeding against the moving party if the judge is satisfied that the proceeding arises from an **expression that relates to a matter of public interest**.
- If established, the onus shifts to the responding party who must satisfy the test set out in Section 137.1(4), failing which the action shall be dismissed.
- If the action is dismissed, the moving party may be entitled to costs on a full indemnity basis.



19

Recent Developments

Law Commission of Ontario - Defamation in the Internet Age

- Fundamental overhaul of the *Libel and Slander Act*
- Two main catalysts of reform:
 - The constitutional enshrinement of freedom of expression
 - The emergence of the internet
- Defamation law as a tool for regulating internet content



20

Recent Developments

Law Commission of Ontario - Defamation in the Internet Age

- Fifteen potential issues to be explored
 - When internet speech is defamatory
 - Hyperlinks and other secondary forms of online communication
 - Intermediary liability
 - Just to name a few.....
- Formal consultation process to occur in early 2017



21

Social Media

Practical Considerations for In-House Counsel



22

Social Media

Protecting Your Business

- Understanding and monitoring social media exposure
 - What are your social media outlets and areas of exposure?
 - Outbound:
 - Press release
 - Tweets
 - Blogs
 - Facebook
 - Podcast
 - LinkedIn
 - Inbound:
 - Comment or post on business's social media by third party



23

Social Media

Protecting Your Business

- Develop a comprehensive policy framework
 - Develop internal and external policies regarding the use of social media
 - Ensure that all employees are aware of the policies and all managers are trained to disseminate the information and monitor compliance
 - Policies should be in writing and available for employees to access



24

Social Media

Protecting Your Business

- **Internal Policy Considerations**
 - What social media tools are acceptable for employees to use?
 - How and in what context employees can reference the company name and/or brand?
 - How employees are allowed to engage with customers/clients through social media tools?
 - The penalties that employees may face for violating the policy?
 - Educate employees on the internal policies and potential legal consequences of defamatory comments
 - Encourage "pause and reflect" attitude before making comments on social media sites



25

Social Media

Protecting Your Business

- **Are your social media tools protected?**
 - Case Studies:
 - Applebees
 - La Carnita



26

Social Media

Protecting Your Business



27

Social Media

Protecting Your Business

- **Going Viral**

- “McDonald's 'Make Burger History' site hijacked with offensive burger ideas”



31

Social Media

Protecting Your Business

- **Has the business been defamed?**

- Act Fast
 - Time is of the essence - potentially short notice and limitation periods
 - Libel: Notice required in six weeks and action in three months
- Contact counsel immediately
- Jurisdictional considerations
- Determine the parties



32

Social Media

Protecting Your Business

- **Has the business been defamed?**

- Considerations
 - Ignore it?
 - Refute it?
 - Bury it?
- Cease and Desist Notice
- Legal action



33

Social Media

Protecting Your Business

- Has the business defamed others?
 - Contact counsel immediately
 - Jurisdictional considerations
 - Retractions and/or apologies
 - Remove defamatory statements
 - Preserve evidence



34



Questions?



35

Contact Us

James Cook

416.865.6628

jcook@grllp.com

grllp.com

@jamesrgcook

Chris Junior

416.865.4011

cjunior@grllp.com

grllp.com

@grllp



36
