Harper Grey LLP

REPUTATION MATTERS
TIPS AND TOOLS FOR DEFENDING DEFAMATION AND PRIVACY ACTIONS

Daniel Reid

> "It takes 20 years to build a reputation and five minutes to ruin it."
>
> Warren Buffet

> "For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of the "pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender."
>
> *Jones v. Tsige*, 2012 ONCA 32

I. Introduction

The law of defamation, driven by judge made common law, has evolved over centuries. While people are exceptionally adept at discovering new ways to defame one another, the common law has proven surprisingly adaptive to the modern era. The Supreme Court of Canada has signaled it is alert to changing technologies – it has rendered at least seven decisions concerning defamation law since 2008,[1] including landmark decisions expanding long-standing defenses, recognizing new defenses and confirming the ability to sue "anonymously" in respect of online abuse.

Moreover, the proliferation of electronic personal information, coupled with changes to federal and provincial law and shifting concepts of "public life" have resulted in an increase in litigation for "breach of privacy" arising out of unauthorized use and disclosure of personal information. While awards to individual plaintiffs in privacy breach cases are typically in the range of several hundred to several thousand dollars, recent cases involving intimate photographs and videos suggests damages have the potential to be significantly higher. In addition, class action lawsuits against corporations for unauthorized disclosure of personal information, waiver of tort and for breach of contract suggest potential awards for privacy breaches could reach into the hundreds of millions of dollars.

---

[1] *WIC Radio Ltd. v. Simpson,* 2008 SCC 40*; Quan v. Cusson,* 2009 SCC 62*; Grant v. Torstar Corp.,* 2009 SCC 61*; Bou Malhab v. Diffusion Métromédia CMR inc.,* 2011 SCC 9; *Crookes v. Newton,* 2011 SCC 47*; Breeden v. Black,* 2012 SCC 19*; Éditions Écosociété Inc. v. Banro Corp.,* 2012 SCC 18*; A.B. v. Bragg Communications Inc.,* 2012 SCC 46

There are likely more decisions to come –a number of unresolved issues are working their way through trial courts across Canada, including whether in Canadian law there is a "right to be forgotten" [2]. The ease of publishing on the internet means that everyone is a publisher, and technological advancement means that many legal issues relating to defamation and privacy claims remain unsettled.

As a result, these types of cases can be extremely difficult, and expensive, to successfully defend. As recently noted by the Ontario Superior Court of Justice: "it has been said that the law of defamation is "notoriously complex and difficult" (R.J. Sharpe, K.E. Swinton & K. Roach, *The Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2002 at p. 145).

This paper examines important legal issues in defending online defamation and privacy actions, as follows:

1. The emergence of defamation and "breach of privacy" claims based on online activities;

2. The importance of pleadings in defamation claims;

3. Locating the tort – where does online publication occur;

4. The role of apologies in limiting damage, without admitting liability; and

5. Insurance coverage and "intentional acts".

II. Online Defamation and Privacy Primer

Defamation

In order to establish a claim for defamation a plaintiff must establish three things:

> (a) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
>
> (b) the words in fact refer to the plaintiff; and
>
> (c) the words were published, i.e., that they were communicated to at least one person other than the plaintiff.[3]

The threshold test for determining whether words are defamatory is low one. In *Cherneskey v. Armadale Publishers Ltd*., 1 S.C.R. 1067, Dickson J., while dissenting on the issue, which concerned the defence of fair comment, expressed at p. 1095, his view of what constitutes a defamatory statement:

---

[2] *A .T. V. Globe24h.com,* 2017 FC 114 (CanLII)

[3] *Grant v. Torstar Corp.,* 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28

> The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement must pass in order to be defamatory. The virtually universally accepted test is that expressed by Lord Atkin "after collating the opinions of many authorities" in *Sim v. Stretch* [(1936), 52 T.L.R. 669.], at p. 671. He stated that the test of whether a statement is defamatory is: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" In the earlier case of *O'Brien v. Clement* [(1846), 15 M. and W. 435.] at p. 436 Baron Parke said that, subject to any available defences, "[e]verything printed or written, which reflects on the character of another" is a libel. It is apparent that the scope of defamatory statements is very wide indeed. … This is the reason why most defamation actions centre on the defences of justification, fair comment, or privilege. It is these defences which give substance to the principle of freedom of speech.

Unlike many other torts, defamation claims have a relatively "low" initial threshold – almost any negative statement concerning an individual, corporation or group has the potential to be "defamatory".

In the modern era, publication of defamatory material is exceedingly easy to accomplish – anything published online is "printed or written" and accordingly, if it reflects on the character of another, is defamatory. As stated by the Ontario Court of Appeal (citing Matthew Collins, The Law of Defamation and the Internet (Oxford University Press, 2001), at para 24.02.)

> The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation. [4]

Privacy

Jones v. Tsige case, the Ontario Court of Appeal recognized the right to sue for the common-law tort of "intrusion upon seclusion", a tort which had previously been recognized in a number of American states but had not been adopted by the common-law in Canada. In *Jones*, the Ontario Court of Appeal held that a civil action can be brought where a defendant "intentionally, and without lawful justification", invades the plaintiff's private affairs or concerns and where a reasonable person would regard the invasion as "highly offensive."

---

[4] *Barrick Gold Corp. v. Lopehandia,* 2004 CanLII 12938 (ON CA), at para. 1

The court found that the defendant in *Jones* had committed the tort of intrusion upon seclusion when she used her position as a bank employee to repeatedly examine private banking records of her spouse's ex wife. Moreover, the Ontario court of Appeal held that economic damage was not a required element of the tort – the plaintiff in *Jones* recovered $10,000, despite no evidence of actual damage. Prior to the *Jones* case, Ontario did not recognize an individual's right to claim for breach of privacy under the common-law.

There is no common law tort of invasion or breach of privacy in British Columbia: see *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 (CanLII). Instead, British Columbia, along with Alberta and Quebec, has privacy legislation that includes the right of private individuals to sue for breach of privacy. In British Columbia, the *Privacy Act*, R.S.B.C. 1996, c. 373 states the following:

> 1. It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.
>
> 2. The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

In practice, the common-law tort recognized in Ontario and statute-based torts such as the tort present in BC are very similar – both require an intentional or willful breach of privacy which is to be interpreted "contextually" by the courts, both in relation to the nature of the breach and any lawful justification provided by the parties.

In many cases, a breach of privacy will be relatively easy to identify. For example, in a recent Ontario "Jane Doe" case, the plaintiff, a young woman, sent intimate videos and photographs to her boyfriend, the defendant. After the relationship ended, she learned that the defendant had posted the video she sent him on an Internet pornography website.

Jane Doe sued her ex-boyfriend, alleging that the dissemination was a breach of her privacy. In awarding the plaintiff $100,000 in damages, the Ontario Court recognized that the photos and videos were sent to the plaintiff on the premise that "he alone would view it" and that sharing the videos constituted "invasion of privacy" in accordance with the common law principles articulated in *Jones*:

> *"In recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent. We now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized. … I have concluded that there are both established and developing legal grounds that support the proposition that the courts can and should provide civil recourse for individuals who suffer harm arising from this misconduct and should intervene to prevent its repetition."*
>
> Stinson J., *Doe 464533 v. xxx*, 2016 ONSC 441, at paras. 16 and 19

Online publication has raised a further, as of yet unsettled issue in Canadian courts – whether one can have a "limited" expectation of privacy in a public or quasi-public place. For example, in *Vertolli v YouTube LLC*, 2012 CanLII 99832 (ON SCSM), the plaintiff, a police officer, sued YouTube for publishing "to the world" a video of a traffic stop. The plaintiff argued that, while the individual he stopped had a right to record the event, the plaintiff "never gave his oral, written, or implied consent" for YouTube to publish the video "for the world to see." The plaintiff successfully opposed YouTube's application to strike his claim as disclosing no reasonable cause of action.

More recently, in *Grillo v. Google Inc*., 2014[5] QCCQ the plaintiff, Ms. Grillo, was recorded by a Google Streetview Car while sitting on the front steps of her house. She brought an action against Google alleging that the publication of her photograph by Google violated her right to privacy under the *Civil Code of Quebec* and the *Quebec Charter of Human Rights and Freedoms*.

Google argued that Ms. Grillo had been sitting on her front steps in plain view of her neighbors or of any passersby. Since she was in public view, it argued, she had no right to privacy. The court disagreed, rejecting the idea that there was a strict dichotomy between public and private spaces:

> [49] A person who is no longer in a private place according to the material or generally understood meaning of that expression is not necessarily or in all respects in a public place, such that, by this fact alone, his or her image may be used without restriction or limitation.
>
> [50] For example, it is difficult to conceive that people walking in the parking lot of a hospital or on the grounds of a health and wellness centre or nursing home no longer benefit from any protection of their private lives or images merely because they may be visible from a public street.

The Similarity of Defenses

Although the torts of defamation and privacy are distinct, they are both fundamentally concerned with the protection of reputation. Unlike the United States, which provides incredibly broad protection for the right to freedom of expression through its codification in the First Amendment, Canadian courts have traditionally afforded robust protection to reputation. A strong statement on the importance of reputation is found in the comments of Cory J in a 1995 case considering whether the common law concerning defamation was displaced by the *Canadian Charter of Rights and Freedoms*:

> Although much as very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

---

[5] http://www.canlii.org/en/qc/qccq/doc/2014/2014qccq9394/2014qccq9394.pdf

> ... False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited. ...[6]

Moreover, both types of claims often turn on the same defenses. In British Columbia, the *Privacy Act* expressly incorporates the common law defenses to claims in defamation of "fair comment" and "qualified privilege", in section 2 (3), as follows:

> (3) A publication of a matter is not a violation of privacy if
>
> (a) the matter published was of public interest or was fair comment on a matter of public interest, or
>
> (b) the publication was privileged in accordance with the rules of law relating to defamation

III. The Importance of Pleadings in Defamation Cases

One of the difficulties in defending claims in defamations is the strict rules governing pleadings, which can be used to strike out defences that are improperly pleaded. As noted by Raymond E. Brown in his text *The Law of Defamation in Canada*, 2nd Ed. (Toronto: Thompson Canada Limited, 1994) states at page 1230:

> "Pleadings in an action for defamation are of utmost importance. They play a disproportionate role in the conduct of the case, perhaps more so than in any other cause of action. Traditionally, courts have required the utmost strictness and formality. This was especially true in the early development of the common law of libel and slander when the courts were particularly technical in examining the pleadings. Thus, it has been said that "actions of defamation are amongst those in which regularity of pleadings is insisted upon", and the "technical rules . . . are applied with strictness."

These "technical rules" are often used to strike defences or claims that fail to accord with established common law. For example, the defence of truth (or "justification", as it is frequently referred to in the case authorities) has to be expressly and specifically pleaded. As noted by Brown, *supra*, at 1267:

> Without such a plea, evidence tending to prove the truth of the defamatory remarks is inadmissible, even if it is offered in mitigation of damages. A plea of justification says, in effect, that if the words about which the plaintiff complains should bear the defamatory meaning he or she claims, then the words as understood in that sense are true. In *Helsham v. Blackwood* Maule J. said:
>
> When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff.

---

[6] *Hill v. Church of Scientology of Toronto,* [1995] 2 SCR 1130

A court will not permit a defendant to enter an evasive pleading of justification. The plea "should be clear and distinct, exact and relevant." It must be sufficiently particular so that the plaintiff will know precisely what charge he or she will have to meet. It must justify the exact charge, or at least that part which is material.

If truth is not properly pleaded, a defendant cannot rely upon evidence of the truth of statements, even in mitigation of damages.[7] Importantly, a defendant cannot seek particulars at a later point in time to buttress a plea of justification.[8] As stated by our Court of Appeal in *Fletcher-Gordon v. Southam Inc*., (1997), 29 B.C.L.R. (3d) 197 (C.A.):

> The suggestion that upon a generalized plea of justification there exists the right to search through the plaintiffs books to gain information as to all of his affairs so to possibly buttress general allegations is as repugnant today as it was to the law Lords in 1859, regardless of expanded rules of discovery generally (see *Metropolitan Saloon Omnibus Company v. Hawkins*, supra.; *Reid v. Albertan Publishing Co. Ltd*. (1913) 3 W.W.R. 91; *Savein v. Green*, supra.). The facts to justify a libel must have been in the hands of the defendant at the time of the libel (*Parkland Chapel Limited v. Edmonton Broadcasting Co. Ltd.*, supra. at 312; *Savein v. Green*, supra.).
>
> *Fletcher-Gordon v. Southam Inc*., (1997), 29 B.C.L.R. (3d) 197 (C.A.) at paras. 9-10

The rationale for this rule was described by Hall J.A. in *International Brotherhood of Electrical Workers, Local 213 v. Pacific Newspaper Group Inc*., 2005 BCCA 44:

> [13] As I see it, the rule in defamation actions exists because of the policy Bateman J.A. identifies at para. 22 as "the longstanding policy which discourages persons from making defamatory statements about others when not possessed of facts which would support such statements".
>
> [14] Having regard to a long line of authorities stretching back beyond the middle of the nineteenth century, it seems to me that the special rule in defamation actions is well established and continues to be the applicable principle today. The rationale now, as in earlier times, seems to me to be that the law seeks generally to discourage defamatory statements. In early times, it might have been to prevent persons resorting to violence as a result of harsh words but in today's world of an omnipresent media, the rule seems equally justifiable because of the potential for harm to the reputation of those defamed by reason of a broad dissemination of defamatory matter. I cannot accede to the submission made on behalf of the appellant that somehow the enactment of provisions like Rule 26(1) have swept away this long-standing rule in the case of actions of defamation.
>
> *International Brotherhood of Electrical Workers, Local 213 v. Pacific Newspaper Group Inc*., 2005 BCCA 44

---

[7] *Jones v Barton,* 2014 NBQB 42, at para. 50

For the same reasons it cannot be open for a defendant to use the discovery process to obtain information about communications made by the plaintiff and then characterize his defamatory statements as a "reply". The "long-standing policy which discourages persons from making defamatory statements about others when not possessed of facts which would support such statements" is equally applicable to the defence of qualified privilege as it is to the defence of justification.

Another technical rule involves the pleading of a "rolled-up" plea of fair comment. Such a plea exists where a defendant relies on the defence of "fair comment", but does not specify the facts underlying the defence – in effect, pleading that the statement is both true and, if not true, is comment. Such pleas are generally not permitted: as stated by the Court of Appeal in *Savein v. CJOR 600 Radio Station* (B.C.C.A.), [1989] B.C.J. No. 376:

> I think it is necessary for the defendant raising a defence of fair comment in a rolled-up plea to particularize which parts of the publication alleged in the statement of claim are facts and also to plead or to give particulars of the basis upon which it is alleged that they are true.

A defendant can comply with the rule only by stating which of the words of the reports are statements of fact, and by then going on to state the facts and matters which they rely upon in support of the allegation that those words are true.[9] While this requirement can be onerous, it is not a "mere formality". As stated by this court in *Vogel, infra:*

> The defendants submit that, even if the existing answer does not fully comply with the rule, they should not be required to do more than they have done because such a requirement is vexatious and unnecessary. No doubt the rule creates a burden which is somewhat vexing to the defendants and which may (I do not say it does) go somewhat beyond what is necessary to achieve justice between the parties. Rule 19(12)(b) creates onerous and unique requirements in respect of particulars and, for that reason, the authorities cited by the defendants dealing with other rules are of little assistance. The rule was adopted after many decades of experience with the rolled-up plea in order to meet what had come to be regarded as the unfairness of that plea under rules which did not require the defendant to differentiate between fact and opinion or, as Lord Ellenborough, C.J. said in *Stiles v. Nokes*, 7 East 493; 103 E.R. 191 to "decompose this mass."
>
> At para. 17

Counsel must be careful when drafting a response to civil claim to ensure compliance with the rules governing pleadings in defamation cases, and should carefully scrutinize the plaintiff's claim to determine whether elements of the claim can be struck. It is often possible to apply to strike all or portions of a pleading for failure to properly plead the necessary elements of a claim or defence.

---

[9] *Vogel v. Canadian Broadcasting Corp.*, [1981] B.C.J. No. 2089, at para. 15

IV. The Difficulty of Locating the Tort

One issue that can emerge when dealing with online defamation and privacy claims is where to locate the tort and what forum is appropriate to bring an action. Fortunately, in 2012 the Supreme Court of Canada provided clear guidance (in the defamation context) as to where a claim in respect of online publication can be commenced.

In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 and the companion decisions of Breeden v. Black, 2012 SCC 19 and *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18 the court considered the doctrine of forum non conveniens with respect to online publications. Both *Breeden v. Black and Éditions Écosociété Inc. v. Banro Corp*., were actions for defamation, and include a discussion of choice of law in the context of multistate defamation claims.

In *Breeden v. Black*, the Supreme Court of Canada affirmed that Ontario had jurisdiction and was an appropriate forum to hear Conrad Black's six libel actions in respect of statements posted on the Hollinger International, Inc. website. The statements had been picked up and republished in Ontario by a number of Canadian newspapers.

In finding that the alleged tort occurred in Ontario, the trial judge pointed to evidence that defendants did target and direct their statements to this jurisdiction, including the fact that the press releases posted on the Internet specifically provide contact information for Canadian media, as well as U.S. and U.K. media: the contact information for Canadian media clearly anticipated that the statements would be read by a Canadian audience and invited Canadian media to respond.

In upholding the decision of the trial judge, the Supreme Court of Canada also noted that, while not a resident of the province, Black had significant connections to the province and a reputation in the province. Accordingly, Black's reputation in the province had been damaged:

> The evidence establishing Lord Black's reputation in Ontario is significant. As the motion judge found, while Lord Black is no longer ordinarily resident in Ontario, he spent most of his adult life in Ontario, first established his reputation as a businessman in Ontario, is a member of the Order of Canada, the Canadian Business Hall of Fame and the Canadian Press Hall of Fame, and is the subject of five books written by Toronto-area authors. Lord Black's close family also lives in Ontario. Lord Black's undertaking and the evidence of his reputation in Ontario therefore suggest that, under the "most substantial harm to reputation" approach discussed in *Éditions Écosociété*, Ontario law should be applied to the libel actions. Alternatively, as the alleged tort of defamation was committed in Ontario, under lex loci delicti, Ontario law would also apply. In the circumstances, the applicable law factor supports proceedings in Ontario.
>
> At para 33

In both *Black* and *Éditions Écosociété* (which concerned publication of a book alleging that the plaintiff had committed human rights violations in Africa) the court commented on the importance of being able to bring an action in the location where the reputational damage occurred:

> The importance of place of reputation has long been recognized in Canadian defamation law. For example, the importance of permitting plaintiffs to sue for defamation in the locality where they enjoy their reputation was recognized by the Ontario High Court in *Jenner v. Sun Oil Co*., [1952] 2 D.L.R. 526. In that case, McRuer C.J.H.C. found that the plaintiff would not be able to satisfactorily "clear his good name of the imputation made against him" other than by suing for defamation in the locality where he enjoyed his reputation — that is, where he lived and had his place of business and vocation in life (pp. 538 and 540).
>
> *Éditions Écosociété*
> At para 58

While online publications may be available globally, in order for Canadian courts to assume jurisdiction there must be something more than mere availability. A court will likely consider such factors as whether the publication was read in the province, whether the plaintiff had a reputation in the province, and whether the plaintiff's reputation was damaged in the province. When defending claims involving online publications, counsel should carefully consider whether British Columbia is the proper jurisdiction for the claim.

V. Damages and the Role of Apologies

Damages in breach of privacy cases tend to be low - in the Ontario case of Jones, the Ontario Court of Appeal put a general cap on individual damages for breaches of privacy of $20,000 (although the courts have departed from this figure where the private information is of an intimate or sexual nature).

Damages in defamation cases can be much more difficult to quantify, which can make advising a client as defence counsel quite difficult. In libel (written defamation), the common law presumes falsity, fault, and damages. In respect of damages, the difficulty in assessing damages arises out of the fact that damages in defamation cases are "at large". Accordingly, it will be up to the judge or jury in this matter to arrive at an appropriate quantum of damages. While similar cases can provide some guidance, unlike personal injury cases, damages are generally at large and can vary widely in defamation cases.

In *Leenen v. Canadian Broadcasting Corp*., 2000 CanLII 22380 (ON SC), 48 O.R. (3d) 656, [2000] O.J. No. 1359 (S.C.J.), aff'd 2001 CanLII 4874 (ON CA), [2001] O.J. No. 2229, leave to appeal ref'd [2001] S.C.C.A. No. 432, the trial judge, after referring to various authorities, identified the following considerations as useful when addressing a general damage award for libel:

> [205] …
>
> (a) the seriousness of the defamatory statement;

(b) the identity of the accuser;

(c) the breadth of the distribution of the publication of the libel;

(d) republication of the libel;

(e) the failure to give the audience both sides of the picture and not presenting a balanced review;

(f) the desire to increase one's professional reputation or to increase ratings of a particular program;

(g) the conduct of the defendant and defendant's counsel through to the end of trial;

(h) the absence or refusal of any retraction or apology;

(i) the failure to establish a plea of justification.

[206] In assessing general damages, as was the case in *Hill v. Church of Scientology of Toronto*, *supra*, the injury caused to the feelings of the plaintiff and the plaintiff's grief are to be taken into account. In that case, great pains were taken to set out the effect of the defamation on the plaintiff.

One tool that can be used by defence counsel to limit damages is an apology, which can be considered when assessing damages but, by virtue of the *Apology Act*, S.B.C. 2006, is not an admission of liability.

In British Columbia, the *Apology Act* S.B.C. 2006, permits a party to make an apology without the apology being used to establish liability. It provides as follows:

Definitions

1 In this Act:

"apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

"court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2 (1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,

(b) does not constitute a confirmation of a cause of action in relation to that matter for the purposes of section 5 of the Limitation Act,

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and

(d) must not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

As the presence or absence of an apology is something that is frequently considered by the courts in awarding damages, and as an apology is not admissible for the purpose of establishing liability, counsel in a defamation action should consider whether, so as to mitigate damages, an apology ought to be proffered.

VI. Insurance Issues

In this author's personal experience, many defendants are unaware that they may have insurance coverage under their homeowner's or commercial insurance policies for claims in defamation and privacy. Traditionally, many lawyers were of the view that insurance for defamation and privacy claims were excluded on the basis of the "intentional act exclusion" which is present in many insurance policies.

Recent jurisprudence has created a situation in British Columbia and Ontario whereby insurers often find themselves forced to pay for the defence costs for defamation claims. In the recent case of *British Columbia Medical Association v. Aviva Insurance*[10], the insurer attempted to rely on such a clause to deny that it had a duty to defend a claim brought in defamation. The insured argued that it was possible to be found liable for "*defamation simpliciter*", i.e. publishing a false statement without any intent to injure or knowledge of falsity. If the publication was "accidental", it was argued that the intentional act exclusion could not apply.

In *Aviva*, the court held that the insurer was obligated to fund the defence but was not able to direct the defence and the insured was entitled to counsel of its choice. Aviva had reserved its rights, and the court found that where the reservation of rights was with respect to coverage questions which depended upon the insured's conduct at issue in the lawsuit, the insurer was not entitled to exercise any control over the defence.

---

[9] *Vogel v. Canadian Broadcasting Corp.,* [1981] B.C.J. No. 2089, at par. 15

The court further ordered that counsel for the insured was not required to report to Aviva with respect to any matter that touched upon the liability issues. The result that was the insurer was obligation to pay counsel, of the insured's choosing, without being entitled to exercise any right to control the defence of the insured.

A similar argument has been considered and recognized as a possible outcome (although rejected on the particular facts) by the Ontario Court of Appeal.[11]

Similarly, with respect to breach of privacy claims, the *Privacy Act* provides that the actionable violation of privacy has to be "willful and without a claim of right", but the violation does not need to be "intentional". Counsel defending a defamation or breach of privacy claim should make appropriate inquiries with their client to determine whether there may be any policies that could give rise to a duty to defend.[12]

VII. Conclusion

Defamation and privacy cases can be extremely complex, time-consuming and costly to defend. Given the ease of publication and expansion of the law (particularly with respect to claims for breach of privacy), it is likely that more such claims will be seen in the future.

Counsel defending such claims should be familiar with available defences, rules governing pleadings, jurisdiction for online publications, and the role of apologies in mitigating damages. Moreover, defence counsel should give thought to whether there may be insurance coverage which might respond to a claim.

While these cases are difficult to defend, they are often equally difficult to prosecute. Familiarity with the unique technical challenges arising out of online defamation and privacy cases is an asset that can be used by defence counsel to better assist one's clients.

---

[10] *British Columbia Medical Association v. Aviva Insurance Company of Canada,* 2011 BCSC 1399

[11] *Hodgkinson v. Economical Mutual Insurance Co.,* 2003 CanLII 36413 (ON C.A.)

[12] Increasingly, insurers are including specific exclusionary clauses in their policies that exclude any damage or injury arising out of "online activities", while other insurers are offering policies specifically covering privacy claims.

This article was originally published in the Canadian Journal of Insurance Law, Issue 34, Released 4, July 2017, published by Lexis Nexis Canada Inc.

Daniel J. Reid.
Harper Grey LLP

604.895.2877
dreid@harpergrey.com

If you have any questions or comments about this article, please email or call Daniel.

Learn more about Daniel here.