

by Antonin I Pribetic

“Online publications are often about people, and it is perhaps human nature to find greater pleasure in writing and reading scandalous stories reflecting upon the wickedness of one’s fellow men than about the Mother Teresas of this world, defamatory material abounds in cyberspace.”

Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity*, (Cambridge, U.K.: Cambridge University Press, 2007) at 111.

“The law recognizes in every man the right to have the estimation in which he stands in the opinion of other unaffected by false statements to his discredit.”

Scott v. Sampson, (1882), 8 Q.B.D. 491 at 503, quoted in Lever v. George, [1950] O.R. 115, [1950] 2 D.L.R. 85 (H.C.), cited in Klar, et al., *Remedies in Tort*, Rainaldi (Ed.) (Toronto: Carswell-Thompson Professional Publishing, 2006-Rel.1-looseleaf), at 6-17.

Internet communication through social networking websites such as MySpace, Facebook and Twitter, is fast becoming the most popular mode of communication in the 21st century and has facilitated freedom of expression and globalization of information. Many readers enjoy posting their personal views, opinions and musings on blogs and chat rooms on a variety of topics---social, political, and legal (including this AdviceScene website.)

However, as Elbert Hubbard once said, “To act in absolute freedom and at the same time to realize that responsibility is the price of freedom, is salvation.” (Fra Elbert Hubbard, *Inspirational Writings of Elbert Hubbard*, Kessinger Publishing, LLC, 2005).

Generally, the torts of libel and slander consist of the publication of words or matter containing defamatory imputations against a person which diminishes his or her reputation. To succeed in an action for libel (publication of defamatory material in permanent form) or slander (defamatory statements communicated by spoken words or other transitory form--audible or visible---such as significant sounds, looks, signs or gestures), a plaintiff must prove:

- (i) the words are defamatory;
- (ii) the words were published, and
- (iii) the plaintiff is the person who was defamed.

Under Canadian, Australian and English common law, a transnational defamation dispute is generally heard within the territory or location of the defamation, or where the defamed person suffered damages to his or her personal and/or business reputation (the “lex loci delicti” or the law of the place of the wrong) (Kohl, at 112-113). Of course, there are often thorny jurisdictional issues if the defendant challenges the plaintiff’s chosen forum on the grounds that the local court lacks a “real and substantial connection” to the parties or the subject-matter of the dispute, or, alternatively, that there is another more convenient forum elsewhere based upon the doctrine of forum non conveniens. Moreover, choice of law issues may also be problematic depending on the nature of the plaintiff’s claim (i.e. contract, tort, unjust enrichment, etc.)

Anyone who republishes a defamatory statement, or facilitates its publication to the public (electronic or otherwise), may be liable for per se damages for injury to reputation (and subject to an injunction (a court order enjoining or prohibiting continued republication, such as ordering a webmaster to remove

the alleged defamatory postings) and adverse cost consequences.

As Raymond E. Brown, in his leading text, *The Law of Defamation in Canada*, 2nd ed. (1999) puts it: "Jurisdiction may ... be exercised even though the defendant's website is located in the foreign jurisdiction ... where the republication of the defamatory material in the jurisdiction where the plaintiff resides [or where he resided or has a reputation] is the natural and probable consequence of the posting elsewhere."

While there is some British Columbia caselaw that has held that linking to allegedly defamatory material does not constitute republication so as to expose the linking site to liability in defamation (see, *Crookes v. Wikimedia Foundation Inc.*, 2008 BCSC 1424), there is a recent decision by Mr. Justice Belobaba in *Black v. Breeden* 2009 WL 850497 (Ont. S.C.J.), 2009 CarswellOnt 1730, where the Ontario court assumed jurisdiction over the plaintiff's actions in libel against the defendants who issued certain press releases and posted them on the defendant company's website. The plaintiff, a former director of the defendant company, alleged that the press releases contained defamatory statements that were downloaded, read and republished in Ontario.

For example, the posting of any workplace related misconduct regarding a fellow employee falls under the law of defamation. In other words, the issue is not the form of the communication, but the content of the alleged defamatory words. The disclaimer or click-wrap agreement on a website or online forum may offer indemnification from the alleged defamer (the person who posted the private and potentially defamatory words) for any damages claim by the third party, but the webmaster or owner of the website may still be liable for republication, depending on the underlying facts and nature of the dispute. This means that if both the defamer and the republisher were sued, the republisher would have to cross-claim against the defamer and claim contribution and indemnity, but any damages award would be on a joint and several basis.

In any event, based upon the doctrine of contractual privity, any contractual agreement with on-line users of a website does not bind third parties who may suffer damages as a consequence of the improper use of the website. As each case turns on its facts, readers are strongly encouraged to moderate their online activity and internet based statements to protect against a costly lawsuit. However, if you are one of those unfortunate individuals whose reputation or credibility has been improperly impugned or defamed on a website or other internet-based forum, you should consult with a duly qualified lawyer specializing in defamation law and to determine the applicable limitation period in your jurisdiction.

Antonin I. Pribetic, B.A. (Hons.), LL.B., LL.M., MCI Arb.
Litigation Counsel | Steinberg Morton Hope & Israel LLP
Yonge Norton Centre , 5255 Yonge Street | Suite 1100
Toronto | Ontario | Canada | M2N 6P4
Tel: 416-225-2777 (ext. 237) | Fax: 416-225-7112
email: apribetic@smhilaw.com