



Marvin Huberman

Defences to defamation

It's All True, I Swear It!

In Part One of this article, we examined the essential elements of a defamation action. In this part, we look at the main defences to a defamation action.

Once the plaintiff has proven the essential elements of defamation - the defendant intentionally or negligently published the statement; the statement referred to the plaintiff; the statement is capable of being defamatory; and the statement was defamatory of the plaintiff - the onus shifts to the defendant to prove a defence. The main defences include the following.

Truth or justification

Truth is a defence. The defendant has the onus to displace the presumption that the defamatory words used are false by establishing the words are true in substance, that is, they convey an accurate impression even if there are slight inaccuracies in the details of the expression. If the words published are capable of having more than one defamatory meaning, the defendant is permitted to plead and try to justify an alternate, or lesser, defamatory meaning than that alleged by the plaintiff. The court will determine the natural and ordinary meaning to be given to the words at issue. If the truth defence fails, the court may increase the damages claimed by the plaintiff.

Fair comment

This defence, as it has been recently analyzed and defined by the courts, illustrates that defamatory statements do not automatically override freedom of expression.

The fair comment defence is available when the alleged defamatory words are comments (expressions of opinion) on matters of public interest. The comment must be based on true facts. The comment, though it can include inferences of fact, must be recognizable as comment. The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?

Even though the comment satisfies the objective test of honest belief, the defence can be defeated if the plaintiff proves the defendant was subjectively actuated by express malice, i.e. for an indirect or improper motive not connected with the purpose for which the defence exists.

The judge decides whether the publication is on a matter of public interest, which means that the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citi-

zens, or one to which considerable public notoriety or controversy has attached."

To constitute fair comment, the statement must not be a statement of fact but rather a comment or opinion. The key is that the statement must be a reflection of a subjective opinion, not an assertion of an objective fact. Once the trial judge is satisfied that the statements are reasonably capable of being a comment, the jury then determines whether the challenged statement is one of fact or one of comment. This is viewed through the perspective of a "reasonable viewer or reader".

To constitute fair comment, there must also be some factual foundation to the comments made, which must be expressly stated or be so well known that the members of the public may make up their own minds on the nature of the comment expressed.

The courts have held that the defence of fair comment applies provided the statement reflects a belief that could be expressed by an honest person, no matter how opinionated or prejudiced, on the basis of the relevant facts. The jury will decide whether or not the comments reflect an honest belief.

The plaintiff can defeat a fair comment defence if he can prove that subjective malice was the dominant motive of the particular comment. If the trial judge finds that the evidence raises a probability of the existence of malice, the jury determines whether or not malice exists.

Privilege

The defence of privilege is available where the "common convenience and welfare of society" requires it. It is not the content of the communication on which the existence of a privilege generally depends, but rather on the circumstances under which the communication is occurring. The common law recognizes an absolute immunity from liability for defamation—an "absolute" privilege. As well, the courts have recognized a "qualified" privilege in certain circumstances which do not warrant complete immunity.

Absolute privilege extends to the publication of statements made in the course of judicial or quasi-judicial proceedings for statements made in the course of proceedings in Parliament and its committees, and for certain statements made by senior government officials to each other in the course of performing their duties. Absolute privilege, with certain exceptions, has been extended by many provincial defamation statutes to fair and accurate reports of court proceedings.

The court will analyse the statement objectively and

consider “whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.”

The common law recognizes certain categories of communication as being prima facie subject to qualified privilege, including fair and accurate reports or judicial proceedings, legislative proceedings and public documents. Qualified privilege has also been recognized for a report of theft made by a store owner to the police, for statements of an employee to his superiors regarding the conduct of another employee harmful to the company, and for a parent expressing concerns to educational authorities regarding the treatment her child received from a teacher.

The onus rests on the defendant to prove that an occasion is covered by qualified privilege. The judge decides whether or not the occasion attracts a qualified privilege.

If the plaintiff establishes that the defendant acted with malice, a qualified privilege is defeated. This malice is the same malice for the purpose of defeating the defence of fair comment.

Therefore, if a statement was made maliciously, albeit on an occasion of qualified privilege, the normal immunity from liability associated with such an occasion is lost. If the trial judge finds that the evidence raises a probability of the existence of malice, the jury will determine whether or not malice existed.

Another way the protection of qualified privilege can be defeated is by the defendant exceeding the privilege. Although malice defeats the entire privilege, where privilege is exceeded, it is only that part of the communication that is outside of the occasion that is subject to liability.

The courts have held a qualified privilege to be exceeded when communication has been made to a “too broad an audience” – that is to recipients who have no legitimate interest in the subject matter.

The qualified privilege will not apply to information that is not germane or is irrelevant to the duty or interest that gives rise to the privilege, notwithstanding that the recipient has the necessary interest to receive some information.

A qualified privilege can also be lost if the language used in the communication is inappropriate or excessive having regard to the circumstances.

The judge decides whether or not a qualified privilege has been exceeded. Unlike malice, which requires an examination of the motive of the defendant and his or her belief concerning the truth of its contents, the question as to whether or not privilege is exceeded depends on the scope of the publication in regard to the mutual duty and interest giving rise to the qualified privilege.

Responsible communication

Reporters, commentators and other public communicators traditionally were unable to rely on a defence of qualified privilege. Justification, or the truth defence, was the only defence available for statements of fact. However, for reporters and commentators, this defence is very often extremely difficult to prove in a court of law on the requisite standard of proof. As a result, this may have a “chilling effect” on what is published, which, in turn, may limit the variety of public debate.

Thus the court established a new and independent defence, which is available to anyone who publishes material regardless of the medium. The new defence is called “Responsible Communication”. This defence has two elements: The publication must be on a matter of public interest; and, the defendant must show publication was responsible in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

There is no separate inquiry into malice, once the Responsible Communication defence is made out. The judge decides whether or not the publication is on a matter of public interest. For the purposes of this new defence, the test for determining whether or not the publication is on a matter of “public interest” is the same as for the defence of “fair comment”.

In determining whether a communication was responsible, the Supreme Court of Canada provided the following illustrative but non-exhaustive set of factors to consider:

- The seriousness of the allegation;
- The public importance of the matter;
- The urgency of the matter;
- The status and reliability of the source;
- Whether the plaintiff’s side of the story was sought and accurately reported;
- Whether the inclusion of the defamatory statement was justifiable;
- Whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth (“reportage”); and
- Any other relevant circumstances.

Ultimately, the analysis requires the court to weigh the potential public benefit of the publication against the risks and costs in terms of competing constitutional and other social values, including privacy. The jury determines whether or not the communication was “responsible”.

MM&D

Marvin J. Huberman, LL.B., LLM, is a Toronto trial and appellate lawyer, mediator and arbitrator. www.marvinhuberman.com.