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how can you force defamatory web content to be removed?

Our last issue covered defamatory content online. New car dealers make their living in a very competitive arena and have to work hard to build their brand. It is frustrating to have that brand attacked by unfounded criticism, and this happens more easily on the internet than anywhere else. In our last issue, we outlined the difference between what is acceptable content and what is defamation. We then explained how courts draw the line between comments that are likely to cause offence and impugn reputations, and those that courts decide were intended as humour and likely to be viewed as such by members of the public.

Armed with that information, the obvious next question is: once there is defamatory content, what can you do about it? This issue provides the answer.

Civil disputes, meaning disputes between private parties, centre on two issues: liability and damages. Liability means that one party has done something wrong, either by act or omission, that gives another party a legal right

to compensation. Damages are the determination of what that compensation is. Damages are grounded in putting someone back in the spot he was in before the “wrong thing” happened, so long as the damages caused were foreseeable, not too remote and the wronged party did not make things worse.

Applied to this issue, that means that once someone crosses the line into defamation territory he faces liability. The harder part is proving damages. As we noted in our last issue, there is a presumption that some damages flow from defamation. But it will be complicated to prove, for example, that a new car dealer sold 50 fewer units because of defamatory comments on the internet. Even if those damages are proven, that is not the end of the road.

This is not a golf tournament, neither the presiding Judge nor the court will write you a cheque for your big win. A party that succeeds at trial gets judgment, or a court order. Judgments are legally enforceable obligations, but

they are not a guarantee of payment. A judgment can be used to garnishee bank accounts or wages, or to have property seized and sold. However, those steps are expensive headaches. They can be cost-effective to take, but only if the other party has enough assets. We all know that stones don't bleed. We strongly recommend that you consider if a judgment can be enforced before starting a lawsuit.

Does that mean there is no point taking action against defamatory content if it's published by a unemployed 23 year-old living in his mother's basement? Not necessarily. Even if there is no reason to think that this character will be able to pay a judgment, there can be a real benefit to your business in getting defamatory content pulled from the web. The tool you need is an injunction.

Injunctions are a kind of court order that either makes a party stop doing something, or keep doing something. Injunctions can be for a specific period of time, or permanent. There is a three-part test for getting an injunction:

1. there must be a serious issue to be tried;
2. there must be irreparable harm that is not compensable with damages; and
3. the balance of convenience favors granting an injunction.

A serious issue to be tried is a relatively low bar. Someone seeking an injunction does not have to persuade a Judge that he is right, or that he will win at trial. A serious issue to be tried simply means that there is an identifiable and recognized basis for proceeding. In a defamation context, this likely means there is an actual publication that does refer to either the specific plaintiff, or an identifiable group that the plaintiff is part of.

Irreparable harm that is not compensable with damages is relatively easy to prove in defamation cases. A bell cannot be unringed. As noted earlier, it would be difficult to assess damages at an eventual trial while the defamatory content continues to be published, and thus presumably continues to harm one's brand.

Balance of convenience is weighing which party suffers more if the injunction is granted. In a defamation case, it is hard to construct an argument in the defamer's favour. If his publication is eventually found not to be defamatory, he can always broadcast his message again later.

The takeaway is simple: if the message at issue seems defamatory to the court, an interim injunction is likely to be granted.

One final issue: what if—shockingly—the person posting the content is anonymous? This issue has been considered and courts will grant an order requiring an internet provider to identify a specific user. The test for this kind of order is:

- a) is there a valid, bone fide or reasonable claim;
- b) is there an established relationship showing the third party is somehow involved in the acts at issue;
- c) is the third party the only practicable source of the requested information;
- d) can the third party be indemnified for costs to which the third party may be exposed because of the disclosure; and
- e) do the interests of justice favour obtaining the disclosure?

These criteria are common sense. There has to be a basis for seeking the relief from a specific entity, it cannot be a guess. In internet defamation cases, that means tracing the IP address to the provider. Obviously, only the internet provider can identify the responsible person. The indemnification part is also important, you have to be confident in your position and willing to make the internet provider whole if it is sued by the specific customer. This all makes sense from a policy perspective: privacy is important and should not be cast aside lightly. But we also need a system that prevents anonymous defamation on the internet. There are clear tools to allow you to identify who is defaming and put a stop to it. The business decision for new car dealers is which battles are worth fighting.

this issue's tip!: know your policies and enforce them

Know your policies and enforce them. As an employer, you want to avoid human resources headaches. A potential landmine is having policies on the books that go unenforced. If you want to keep employees accountable, you need to make sure that your policies are being enforced and there are documented consequences for breaching them. If policies go ignored or openly violated, without consequence, you limit your options to require a specific employee comply with them.

questions?

Send your questions or topic suggestions for upcoming newsletters to:

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about this newsletter

The McMillan Automotive Law e-newsletter is a quarterly publication designed to keep new vehicle Owners, Presidents, Vice-Presidents, Dealer Principals, General Managers and Sales Managers in the know about legislative changes that may affect your business, as well as updates and developments relevant to your industry, and general legal tips associated with running a busy automobile dealership, such as:

- Litigation matters – what to do when legal issues arise or when faced with a lawsuit.
- Legislation or regulatory changes – to avoid legal pitfalls and minimize your risk.
- Other issues affecting your dealership.

I hope you find this e-newsletter useful. To sign up or if you have any feedback, topic suggestions or questions you'd like to submit in a future issue, please feel free to send me an email at: andrew.stead@mcmillan.ca. As well, feel free to forward this to your friends or colleagues that you think this may interest! The next issue will be published in September.

Thanks for reading and have a great summer!

Andrew Stead

about the author



Andrew Stead, Andrew Stead, Partner, is a lawyer at McMillan LLP practicing in commercial dispute resolution and regulatory law. He is a member of McMillan's automotive group and has acted for a number of car dealerships and manufacturers, including contractual disputes, product liability claims and employment matters. McMillan is a national business law firm with considerable experience providing the automotive industry with advice on topics from competition, cross-border trade to financial products, and also dispute resolution.