

BLOGGERS IN A DANGEROUS TIME – FREE SPEECH, DEFAMATION AND INTERNET DISCOURSE

Posted on March 5, 2015

Categories: [Insights](#), [Publications](#)

The Ontario Superior Court in *Baglow v. Smith*^[1] has summed up the Internet blogging world perfectly:

"Political debate in the Internet blogosphere can be, and, often is, rude, aggressive, sarcastic, hyperbolic, insulting, caustic and/or vulgar. It is not for the faint of heart."^[2]

The decision which follows this apt quote involved an action for defamation brought by an individual against the moderators of an online political forum.

Expanding on the relatively small amount of Canadian jurisprudence on Internet defamation, the Court found that the defendants, who were moderators of a political message board, were liable as a publisher for the purposes of defamation.

The defendants operated an online message board called "Free Dominion" where a user referred to the plaintiff as a supporter of a terrorist group. The plaintiff requested that the defendants remove the content but they refused and the plaintiff brought the action for defamation.

To establish defamation, the plaintiff is required to show the following:

1. that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. that the words referred to the plaintiff; and
3. that the words were published.

The Court found that the above elements (1) and (2) were met but of most interest is the analysis relating to element (3); i.e., whether the words were "published" by the defendants who moderated the online forum.

The Court distinguished the present circumstances from those in the Supreme Court of Canada ("SCC") decision in *Crookes v. Newton*, [2011] S.C.J. No. 269 ("*Crookes*"). There, the SCC held that the mere posting of a hyperlink to defamatory content did not constitute defamation as hyperlinks are mere references and do not communicate or publish the content.^[3]

In the present case, the defendants were moderators and administrators of the forum. They were not passive "bystanders" but made posts themselves and participated in threads.^[4] They were also able to control the content on the forum and delete posts or ban users (this was supported by the terms of use of the site, though the defendants admitted that they rarely deleted comments). In finding that publication had occurred, the Court noted that a "message board or forum is set up precisely to provide content to its readers. Its whole purpose is to provide content." ^[5]

The Court also highlighted the "delicate" balance between the value of one's reputation and freedom of expression.^[6] A failure in these circumstances to find that publication had occurred would "leave potential plaintiffs with little ability to correct reputational damage and would impair the delicate balance."^[7]

Despite the finding of defamation, and to the expected relief of the defendants and online forum operators everywhere, the Court found that the defendants successfully made out the defence of fair comment.^[8]

Following this decision, moderators and administrators of online forums should, if they have not already, consider their potential liability for defamation. More importantly, they should consider whether changes in the operation of the forum and the policing of particular comments can be made to increase the chances of being able to successfully raise the defence of fair comment.

by Sarah Kilpatrick

[1][ps2id id='1' target=''] 2015 ONSC 1175 ["*Baglow v. Smith*"].

[2][ps2id id='2' target=''] *Ibid*, para 1.

[3][ps2id id='3' target=''] The SCC in *Crookes* was of the view that inserting a hyperlink does not result in control over the content to which the link points. Hyperlinks and references communicate that something exists, but do not, by themselves, communicate its content. Accordingly, a hyperlink itself does not publish the content, unless the text containing the link is itself defamatory; e.g., "X is a crook".

[4][ps2id id='4' target=''] *Supra* note 1, para 193.

[5][ps2id id='5' target=''] *Ibid*, para 192.

[6][ps2id id='6' target=''] *Ibid*, para 196.

[7][ps2id id='7' target=''] *Ibid*.

[8][ps2id id='8' target=''] It was held in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 that to succeed on the defence of fair comment, the defendant must prove that: (1) the comment is on a matter of public interest; (2) the comment is based on fact; (3) the comment, though it can include inferences of fact, is recognizable as

comment; and (4) any person could honestly express that opinion on the proved facts. While a plaintiff can defeat the defence of fair comment by proving that the defendant was actuated by express malice, there was insufficient evidence in *Baglow v. Smith* to support a finding of malice.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2015