

welcome to this first edition of the McMillan automotive law e-newsletter!

Greetings and welcome to the first issue of this e-newsletter. The McMillan Automotive Law e-newsletter will be 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-nNewsletter 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 June.

Until next time, thanks for reading.

Andrew Stead

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about the author



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can anyone lie about my business on the internet?

It is hard enough dealing with legitimate complaints. Every business strives to build a strong reputation and satisfied customers. By that token, when an identifiable customer raises an issue, a new car dealer takes reasonable steps to try and resolve it. That's not always possible, but at least an identifiable, live customer can be reasoned with. Which is the exact opposite of what happens on the internet.

What does that mean for your business? McMillan's lawyers can tell you about your rights when it comes to malicious, anonymous accusations about your business. You have a right to sue anyone that defames your business, or you personally.

First some background: defamation is the act of harming the reputation of another (including corporations) by making a false statement to a third person, or to put it another way, a false written or oral statement that damages another's reputation. There are three parts: the message has to lower the reputation in the estimation of a reasonable person. Words such as "crook, thief, scoundrel" fit the bill, while "smart and sexy" do not. The second part is that the message has to defame a particular party. A reasonable person that sees or hears the message has to understand that it refers to a specific target. Third, the message has to be broadcast to a third party. Like the unheard tree falling in a forest, it isn't defamation to tell one person, in an otherwise empty room, that he is stealing the church's funds.

That's the starting point. We've all seen someone do something outrageous, only to justify it by saying "it's a free country". Freedom of speech is protected in Canada, and there are defences to defamation. Telling the truth is one—it isn't defamation to tell a sumo wrestler that he's fat. But the baseless, unfounded drivel that is anonymously

spewed on the internet is not close to the line of exceptions to defamation.

Courts recognize the problem, finding that "communication via the internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching" and suggesting that the impersonal and anonymous nature of the internet creates a greater risk that comments will be believed and taken at face value. By the time we are adults, we know to disregard comments from certain people on the street. We don't know who it is that posted a great, or scathing, review of a hotel.

Context also matters. In a U.S. case, Evel Knievel sued ESPN because of a website caption under a photo of the daredevil with his wife, saying "you're never too old to pimp." In dismissing the case, the court considered the fact that a viewer had to click past nine earlier photos to get to that particular one, and that a reasonable person would not conclude that ESPN.com was suggesting Evel was actually involved in running prostitutes. Likewise, the old Calvin and Hobbes decal of the trouble-maker urinating on another truck company's logo is likely to be seen as humour, and not a serious suggestion of a flawed product.

Broadcasting matters, too, and the internet has made this issue increasingly complicated. We've all received mass-forwarded emails, and we've all forwarded some on, too. A person that forwards an email is broadcasting it, even if someone else wrote it. A defamed party can bring a claim against anyone who broadcasts the harmful message. Hyperlinks are a kind of exception, in that they have not been held, by themselves, to constitute defamation. But if one webpage repeats a defamatory message, along with a hyperlink to the original webpage, that likely constitutes defamation by both parties.

Normally any party suing for damages has to prove that it suffered harm. In the case of defamation, a court can find that damages occurred without needing to hear from a list of witnesses saying "I would have bought a vehicle from them, until I saw that message board, and then I went elsewhere." Defamatory content can be held to cause harm based upon how a reasonable person would react to it. The nature and extent of the distribution matters—a mildly defamatory email to five people is less severe than an explicit one to 500.

To recap—you have worked hard to build your business's brand, and your brand is protected at law from false allegations on the internet that denigrate your brand to your current, and future, customers. Your entitlement to damages can vary, but damages aside, there is value in taking steps to force the content to be removed.

this issue's tip!: take advantage of your contractual forms!

Every new car dealer has plenty of paperwork. It's an occupational hazard for lawyers, too. But a lot can turn on how you use it. At some point someone paid to have all of the fine print drafted, but the terms will not protect you by themselves. Make sure that your customers have the opportunity to read all of the fine print, and then make sure that your customers sign documents before any work starts in your service bays, or before handing over a set of keys. A contract must be a "meeting of the minds", which includes both parties having the opportunity to review the terms that they are agreeing to before the deal is reached. Remember, there is little benefit in getting a work order signed after the job is finished.

questions?

Send your questions or topic suggestions for upcoming newsletters to:

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