

## DEFENCES AVAILABLE IN DEFAMATION CLAIMS

### Defence of Truth

Truth (also referred to as “justification”) is a complete defence. However it is an exacting defence and operates under rigorous rules. If a statement conveys a defamatory meaning there is a presumption that the words are untrue. The burden of proof is on the defendant to call evidence that establishes the words are accurate. A wholly unfounded plea of truth – and especially where it is maintained unsuccessfully through to the end of trial – can result in a higher level of damages.

### Qualified Privilege

Qualified privilege provides a complete defence (even with respect to a defamatory statement that turns out to be untrue) provided the defendant can establish that the communication was made on an occasion of qualified privilege. An occasion of qualified privilege exists when the defendant has a duty or interest to communicate information to the recipient and the recipient has a corresponding “legitimate” interest to receive the information. The underlying principle is that full and candid communication should be encouraged and protected in certain situations. The key requirements are as follows:

The occasion must be one of qualified privilege. A court must be satisfied that the defendant had a duty – *legal, social, or moral* - to make the communication and that the recipients had a legitimate reason to receive the information. Qualified privilege can also arise in other situations including when a person is responding to an “attack” on his own reputation or interests.

The communication must have been made without malice. If a defendant’s *dominant motive* in communicating information was “vindictiveness” or a desire to humiliate or injure (rather than to discharge a duty or need to communicate information) then there will be a finding of “actual malice” and the defence of qualified privilege will fail. In many cases absence of malice is established by showing that the defendant “honestly believed” the truth of the statement. A finding that a statement was made with “reckless indifference” as to whether it was true or not can result in a finding of actual malice. Once it is established that the occasion is one of qualified privilege, the burden of proving actual malice is on the plaintiff.

It can turn out that *some of the recipients* of a communication did have the necessary “legitimate interest” to receive the material but that copies were distributed to other persons who had no proper interest. In that situation an award of damages will be limited to the injury caused by circulation of the material to persons who had no legitimate interest to receive it.

As a practical matter in handling sensitive information, effective risk management focuses on who (inside or outside an organization) should receive material that contains potentially defamatory content. And even after a complaint is received there can be real advantages in taking immediate steps to prevent republication or further distribution of material until the

merits of a complaint can be considered.

### **Fair Comment**

This is the important defence that safeguards freedom of expression on political and social issues and on any subject of public interest. A defence of fair comment can only succeed if the following conditions apply:

A court must accept that the words are recognizable as an expression of “comment” or opinion. “Comment” may include any statement of conclusion, inference, or observation that in context can be recognized as an evaluation, critique, or commentary;

Comment must be *based on facts and the stated facts must be true*. The defendant has the burden of proving that the facts are true. The facts must be set out in the published material or must be sufficiently referred to in the text so that they are made known to the reader;

The comment must satisfy the following objective test: *could any person honestly express the opinion on the proved facts?*;

The subject matter of the “opinion” must be one that is of “public interest”;

The defence of fair comment is defeated if the plaintiff proves that the defendant was actuated by “actual malice”.

In some cases that proceed to trial on the defence of fair comment the key issue is often whether the words are “recognizable” as an expression of opinion. The fair comment defence fails if the court decides that the words are merely a “bare statement of fact”. An untrue statement of fact cannot be protected by fair comment.

The defence of fair comment was the subject of a recent decision by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 (an appeal from British Columbia) where one of the key elements of the defence was broadened. Formerly the law required that the comment must be an honest expression of the defendant’s own opinion. It is now sufficient for the defence to satisfy the court that the comment is one that “any person” could honestly express on the proven facts.

### **Responsible communication on a matter of public interest**

As a result of the recent decision of the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61 a new defence is available in defamation cases in certain situations. The new defence will have particular application in circumstances where the media or other persons publish information to the general public, and where the facts turn out to be untrue. Provided the subject matter of the publication meets a test of being of “public interest” and the defendant exercises due diligence prior to publication to ensure that the facts are accurate, there may be a complete defence. This new defence is known as “responsible communication on matters of public interest”. This is a significant expansion of the protection available to defendants because, formerly, the defence of fair comment only applied where the complained of words were recognizable as expressions of “comment” or opinion. The new defence applies even to factual statements that turn out to be untrue. But the defence will only be available provided the defendants can establish that they acted responsibly in attempting to verify the information. The degree of care required to meet that test will depend on the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the reliability of the source(s), and may take into account other factors including

whether the claimant's side of the story was included in the report.

### **Absolute Privilege**

Absolute privilege is a complete defence that cannot be defeated by malice. However, it is available limited situations: where statements are made during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings or where statements are made in the proceeding of a legislative assembly. Common issues with respect to whether this defence applies include whether the communication is truly a part of the quasi-judicial proceeding. It is obviously not sufficient to establish that the statements were about the proceeding. A witness talking to a non-party or reporter about his or her evidence is not protected. The communication must be necessary for the proceeding.

### **Innocent Dissemination**

This defence, traditionally used by bookstores, libraries, news vendors, etc. is available in circumstances where the defendant had no actual knowledge of the defamatory words contained in the publication, was aware of no circumstances to put him or her on notice to suspect an alleged libel, and committed no negligence in failing to find out about a libel.

### **Consent**

In rare cases, defendants have established the defence of consent. If established, it is an absolute defence. If a plaintiff consents to the publication of the words then she or he cannot complain about damages to his or her reputation.