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Civil Litigation

YouTube and broadcasting: Applying Libel and Slander Act to Internet

By **Richard Worsfold and Lauren Kason**

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(December 8, 2017, 9:46 AM EST) -- The Internet has been in common use for over 25 years now and for nearly all of that time, people have been complaining about things that are written about them on the Internet and going to their lawyers demanding relief.

Despite the passage of time, however, neither the courts nor the legislature has declared definitely whether the protections and notice periods under the *Libel and Slander Act,* RSO 1990, c. L. 12 (Act) apply to defamatory postings on the Internet.

Sections 5 and 6 of the Act were enacted as early as 1914 and 1958, respectively. Those sections are intended to provide protection for the media and thus encourage freedom of speech. Section 5 of the Act provides that no action for libel in a newspaper or in a broadcast can be commenced unless the plaintiff has, within six weeks after the libel has come to his or her attention, given notice in writing of the complaint specifying the matter complained of.

This requirement is intended to give the potential defendant the opportunity to publish a correction or an apology. If a proper retraction is published or broadcast within a specified time, only actual damages can be recovered.

The Act further provides that any action for libel in a newspaper or in a broadcast must be commenced within three months after the libel has come to the attention of the plaintiff. Again, the intention is to protect freedom of speech and expression by imposing a shorter limitation period.

The question in the Internet age, however, is what constitutes a "newspaper" and what constitutes a "broadcast" so as to invoke the protection of the Act.

The Court of Appeal declared early on that a newspaper did not stop being a newspaper when it was published online. The court noted in *Weiss v. Sawyer* that it would make no sense to permit the late filing of a claim concerning an online publication of a newspaper when a claim against the hard copy newspaper would be barred.

The issue is not so simple, however, with respect to a "broadcast." While YouTube and Facebook may not be newspapers, it is quite possible that they are broadcasts, and these platforms appear to be the favourite media used by most non-mainstream media and by many defamers.

Broadcasting is defined in the Act as the dissemination of "writing, signs, signals, pictures and sounds of all kinds" either directly or "through the medium of relay stations" by means of "… wireless radioelectric communication utilizing Hertzian Waves" or "cables, wires, fibre optic linkages or laser beams."

To further complicate the issue, section 7 of the Act provides that the Act only applies to broadcasts from "a station in Ontario."

Clearly, the writers of earlier versions of the Act did not contemplate the Internet and while the Court of Appeal has done a good job in other instances of defining how existing Acts apply to new technology, the court has not yet taken the opportunity to clarify how the Act applies to the Internet

despite opportunities to do so.

In 2003, a motions judge in the matter of *Bahlieda v. Santa* 68 [2003] O.J. No. 4091 held that defamation posted on a personal website was "broadcast" as the Internet used the same infrastructure as radio and television and because material placed on the Internet via a website could be accessed by a large audience.

The Court of Appeal overturned this decision, however, and suggested that a trial should occur as to issues such as whether the broadcast was "from a station in Ontario."

In the 2013 decision of *Shtaif v. Toronto Life Publishing* [2013] ONCA 405, the motions judge noted that Toronto Life's server was in Texas and accordingly found that the website was not broadcast from a station in Ontario. Again the Court of Appeal suggested that more evidence with respect to the issues as to where the server was located and what "relay stations" were involved was necessary.

Such awkward interpretations are not helpful. It would be appropriate for either the Court of Appeal or the legislature to make it clear as to whether the Act applies to statements on the Internet.

Perhaps the values of freedom of speech and expression should lead to a finding that the Act applies to all information on the Internet so as to encourage the free flow of ideas and restrict court actions. Alternatively, perhaps the Act should only apply to the "serious media" who are currently protected by the Act as was likely the original intention of the drafters.

Until this issue is clarified, however, practitioners would be wise to treat the Act as applying to any publication on the Internet, or risk having their claims struck for not complying with the Act.

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