

**Submission to the Joint Committee
on the Draft Defamation Bill**

Prepared by the Canadian Media Lawyers Association

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Introduction

The Canadian Media Lawyers Association (or *Ad IDEM*) is pleased to provide submissions on the draft Defamation Bill. The CMLA was formed approximately 15 years ago and has over 100 members – lawyers who represent media and advocate in favour of freedom of expression (the sub-name, “*Ad IDEM*” is derived from the phrase “Advocates in Defence of Expression in the Media”). The CMLA has made submissions to provincial and federal governments on free expression issues, and has been permitted to intervene and make submissions in several cases in the Supreme Court of Canada. It holds an annual conference every November.

The draft Defamation Bill is of considerable interest to the CMLA, as Canadian and English defamation law is similar and developments in England are of interest to Canadian courts. However, Canada has gone in its own direction on some of the issues raised in the Bill, which may be of interest to the Joint Committee. It is hoped that the CMLA’s perspective will be of assistance in the Committee’s review

Clause 1: definition of defamation; a “substantial harm” test

The CMLA supports the inclusion of a substantial harm requirement.

Recent decisions by Canadian courts demonstrate a growing recognition that the traditional emphasis on protection of reputation must be modernized to reconcile the tort with each citizen’s constitutionally-protected right to free expression.¹ The introduction of a substantial harm requirement would assist in reconciling the law in two ways:

1. A substantial harm requirement discourages trivial cases. The presumptions that favour the plaintiff in a defamation action often mean that the cost of prosecuting a trivial case for the plaintiff pales in comparison to the cost of defending the action. There are few procedural opportunities in Canada to dispose of trivial defamation cases prior to trial due in large part to the breadth of the traditional definition of defamation (“would the words *tend to* lower the plaintiff in the estimation of right-thinking members of society generally?”).² We infer that a similar difficulty in the UK has led to *ad hoc* judicial responses to control the court’s docket.³ The introduction of a substantial harm requirement would deter plaintiffs from launching trivial cases and would provide defendants with an early opportunity to efficiently dispose of such cases if launched.

¹ For example, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, www.canlii.org/en/ca/scc/doc/2008/2008scc40/2008scc40.html; *Grant v. Torstar Corp.*, 2009 SCC 61, www.canlii.org/en/ca/scc/doc/2009/2009scc61/2009scc61.html

² *Sim v. Stretch*, [1936] 2 ALL ER 1237 at 1240, CMLA’s emphasis

³ For example, *Dow Jones & Co Inc. v. Jameel*, [2005] EWCA Civ 75, <http://www.bailii.org/ew/cases/EWCA/Civ/2005/75.html>

2. A substantial harm requirement highlights the plaintiff's actual reputation. As with other torts, a defamation plaintiff sues for injury sustained and seeks damages to compensate for that injury. The true extent of the injury is a prominent feature of other tort litigation. In libel cases, however, the plaintiff is presumed to have suffered damage and is not required to lead any evidence of harm, and a defendant is limited in the evidence that can be called to establish the plaintiff's pre-publication reputation.⁴ Taken together, the presumption of damage and the restriction on evidence of the plaintiff's actual reputation have, in our experience, promoted an inclination to favour the plaintiff with a lofty and idealistic pre-publication reputation often far removed from the plaintiff's true standing in the community. This in turn presents a risk that the verdict will compensate the plaintiff beyond the actual injury sustained.⁵

A substantial harm test would properly focus attention on the reputation that the plaintiff actually had at the time of the publication and therefore on the injury he or she actually sustained. Thus, it is a useful measure that will assist in reconciling the protection of reputation with free expression. In this regard, we suggest that the traditional definition of defamation could be reformulated as follows: a publication is defamatory if it substantially lowers the plaintiff in the estimation of right-thinking members of society generally.

Clause 2: Responsible publication in the public interest

The CMLA supports the inclusion of a public interest defence in the Bill.

The Supreme Court of Canada recently recognized a defence of "public interest responsible communication"⁶, which is similar to, but distinguishable from, the responsible journalism defence developed in *Reynolds* and *Jameel*. It applies to "anyone who publishes material of public interest in any medium". The CMLA agrees that the defence ought to be broadly available, as indicated in the draft Bill, and consideration should be given to adopting the Canadian terminology that it applies to responsible "communication", which may be seen to be broader than "publication".

⁴ *Scott v. Sampson* (1882), 8 QB 491

⁵ See e.g., the large damage awards by juries, subsequently overturned, in *Grant v. Torstar Corp.*, 2009 SCC 61, www.canlii.org/en/ca/scc/doc/2009/2009scc61/2009scc61.html and *Quan v. Cusson*, 2009 SCC 62, www.canlii.org/en/ca/scc/doc/2009/2009scc62/2009scc62.html

⁶ *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, 2009 SCC 61, www.canlii.org/en/ca/scc/doc/2009/2009scc61/2009scc61.html

“Public Interest”

The term “public interest” requires clarification and definition to ensure it is not given a narrow meaning (such as confined to political matters as is the case in Australia and New Zealand). In *Grant v. Torstar Corp.*, the Supreme Court of Canada described matters of public interest as subject matter ““inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached””. Such matters can range from “science and the arts to the environment, religion and morality”. As well, public interest “may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough.” The Canadian Supreme Court’s view of public interest is properly broad, and the draft Bill should be amended to include the following statement: “Public interest shall be construed broadly having regard to the content and context of the entire publication.”

The commentary suggesting that the statement complained of “make a contribution to the public interest element of the publication” should be removed as it focuses the inquiry on the statement, whereas the definition of public interest urged by the CMLA will help to ensure that the focus of the inquiry is not on the specific statement complained of, but looks more broadly at the subject matter of the article as a whole.⁷

The Factors

Regarding the factors listed in s. 2(2) of the Bill, the CMLA suggests that reference to “tone” be deleted. As the Supreme Court of Canada stated in *Grant v. Torstar Corp.* at para. 123:

... While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness: see *Roberts*, at para. 74, per Sedley LJ. Neither should the law encourage the fiction that fairness and responsibility lie in disavowing or concealing one’s point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

In a similar vein, the CMLA urges a clause that states that the defence shall not be defeated by malice. Either a publication is responsible, or it is not. The motivations of the publisher should be irrelevant to the inquiry.

⁷ This is consistent with the generous and deferential latitude to be afforded to editorial discretion in respect of the inclusion of an alleged defamatory statement in a publication. See: Lord Hoffman in *Jameel v. Wall Street Journal*, [2006] UKHL 44 at para. 51; <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee-1.htm>, and *Grant v. Torstar Corp.* at paras. 108-109, 118.

The CMLA notes with concern the lack of reference to considerations of “urgency”, respect for editorial judgment and discretion, the appropriate use of confidential sources, and that it should not always be necessary to approach a plaintiff. If the *Reynolds* factors are to be the basis for the statutory defence, then more of the substance of them should be included to ensure that the robustness of the defence is not diminished.

Inferences and Opinions

The question whether the defence should apply to inferences and opinions as well as statements of fact, is important. In *Quan v. Cusson* the Supreme Court of Canada suggested that it may be necessary for the judge to separate the statements and consider (or have the jury consider) the individual defences of public interest responsible communication and fair comment separately.⁸ Such a complicated approach should be avoided. The CMLA submits that, in principle, there is no reason why the new defence should not apply in appropriate cases to expressions of opinion, especially when, as often occurs, the words complained of may be difficult to pigeon hole as fact or comment. This cannot mean, however, that the fair comment or honest opinion defence is excluded, as opinions are protected even when they are unreasonable.

The Defence is for the Judge, not the Jury

The CMLA urges the Committee to clarify that the defence is solely a matter for a judge. Confusion has arisen about whether there is any role for a jury to consider disputed issues of fact, as occurred in *Jameel*, and which was a factor in the trial judgment being overturned. The CMLA supports the view of Abella J. (dissenting) in *Grant v. Torstar Corp.*, that the defence is appropriately considered, in its entirety, by a judge. As she stated at para. 143:

The responsible communication analysis requires that the defendant’s interest in freely disseminating information and the public’s interest in the free flow of information be weighed against the plaintiff’s interest in protecting his or her reputation. This is true no less of the second and determinative step as of the first. The exercise as a whole involves balancing freedom of expression, freedom of the press, the protection of reputation, privacy concerns, and the public interest. Each of these is a complex value protected either directly or indirectly by the *Canadian Charter of Rights and Freedoms* [citations omitted]. *Weighing these often competing constitutional interests is a legal determination. It is, therefore, a determination that the judge should undertake.* [emphasis added]

⁸ *Quan v. Cusson*, 2009 SCC 62 at para. 30. Available at: www.canlii.org/en/ca/scc/doc/2009/2009scc62/2009scc62.html

“Reportage”

The formulation of the reportage defence in the draft Bill is too narrow, insofar as it requires an “accurate and impartial account of a dispute”. The degree of accuracy in the reporting of allegations ought not to be higher than the standard required in the truth defence, and so “substantially accurate” ought to be sufficient. The inclusion of “impartial” should be reconsidered, as it invites a court to give unnecessary scrutiny to whether one side was given more prominence or coverage than the other. A substantially accurate account of the dispute should be sufficient. Again, the Supreme Court of Canada’s approach is helpful, from *Grant v Torstar*, paras. 120-121:

If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made.

Clause 3: Truth

The CMLA supports a statutory defence of truth. This is consistent with the policy of simplifying the law. The proposed defence also clarifies and appropriately broadens the defence from the common law justification defence which requires, in Canada, that a defendant prove that a defamatory imputation is true in substance and in fact. By creating a statutory defence, Parliament is clearly indicating a deliberate change in policy.

The statutory defence should ensure that a claimant is not able to succeed in an action by only pleading one imputation that arises from the publication where the defendant is not able to prove it, but other defamatory meanings are proven to be true. Consideration should be given to expanding the defence to apply when the defendant proves the truth of any meaning reasonably borne by the publication, and where the unproven allegation results in no further harm to the plaintiff’s reputation. Additionally, or alternatively, where the truth of a lesser defamatory imputation can be established (for example that the plaintiff was investigated for a crime), but not the truth of a more serious meaning (that the plaintiff committed the crime), the statute should provide that damages should be reduced to reflect the meaning proven to be true. Thus a plaintiff will not receive an unwarranted windfall.

The CMLA submits that the draft clause should be amended to place the onus of proving falsity on the plaintiff where the action is brought by a corporation or other entity that is not an individual. Just as commercial speech, while important, is less valued than individual expression⁹, so too should reputations of corporate bodies or other entities be treated

⁹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, www.canlii.org/en/ca/scc/doc/1989/1989canlii87/1989canlii87.html

differently from individuals.¹⁰ As well, corporations which sue for defamation are often large and have considerable resources that may chill valid criticism of corporate activities, which are often extensive and raise important matters of public interest.¹¹ The presumption of falsity, therefore, is not appropriate in circumstances where a defamation action is brought by an entity other than an individual, and removing it in such circumstances would appropriately rebalance the competing interests of freedom of expression and protection of reputation.

Clause 4: Honest opinion

The proposed statutory defence of “honest opinion” potentially represents an improvement over the common law defence of fair comment. In disentangling the relationship to “fact”, it recognizes that commentary merely represents someone’s opinion, which people can accept or reject but is fundamentally unverifiable, and that open discussion of matters of public interest is essential to democratic society.

However, the CMLA objects to one aspect of the proposed law: the requirement under s. 4(5) that the opinion at issue was, in fact, subjectively held by the defendant. As long as the court may decide an opinion’s meaning is different from the one intended by the author, as permitted at common law, a defendant may be unable to rely on this defence when it is most needed.

This issue was addressed by the Supreme Court of Canada recently in *WIC Radio Ltd. v. Simpson*.¹² In that case, a radio editorial was held by the trial judge to bear a different meaning from the one intended by the commentator. As a result, the defendant did not have a subjective honest belief in that meaning and, therefore, under existing Canadian precedent the fair comment defence did not apply. In reformulating the defence, the Supreme Court made it clear that only an objective test would avoid this problem and meet society’s needs. As Justice Binnie put it:

It seems to me that defamation proceedings will have reached a troubling level of technicality if the protection afforded by the defence of fair comment to freedom of expression (“the very life blood of our freedom”) is made to depend on whether or not the speaker is prepared to swear to an honest belief in something he does not believe he ever said. [para. 35]

¹⁰ Differential treatment for corporations has been recognized in Australian law. Section 9 of the uniform Defamation Act prohibits corporations from suing for defamation at all, unless the corporation is not-for profit, or employs fewer than 10 persons. The CMLA’s proposal would permit large corporations to protect their reputations, while ensuring a broader protection for free expression by requiring those entities to prove that the defamatory imputation is false.

¹¹ The “*McLibel*” case is perhaps the most notorious example.

¹² *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 2008 SCC 40
www.canlii.org/en/ca/scc/doc/2008/2008scc40/2008scc40.html

On the test of *subjective* honest belief applied by the Court of Appeal, Mair would be robbed of his defence, even though on the public record someone could honestly express the view *imputed* to him...and thus the objective honest belief test would be met. [para. 46]

It may be noted that such circumstances are not uncommon. In much modern media, personalities such as Rafe Mair are as much entertainers as journalists. The media regularly match up assailants who attack each other on a set topic. The audience understands that the combatants, like lawyers or a devil's advocate, are arguing a brief. [para. 47]

Further, the manner in which the proposed s. 4(6) would apply in such circumstances is unclear.. For example, when is it that a publisher or broadcaster "ought to have known" that the author did not actually hold the opinion in question - at least, in the defamatory meaning ultimately found by a court?

Sections 4 (5) and (6) of the proposed amendments appear to be an attempt to replace "malice" as a basis for denying free expression of opinion on matters of public interest. Lord Nicholls criticized the use of "malice" in this context in *Cheng v. Tse Wai Chun Paul*,¹³ but the solution that is adopted in the draft Defamation Bill causes its own difficulties and doesn't go far enough. Instead, "malice" should play no role in determining the availability of a "comment" defence. After all, as Lord Nicholls pointed out, why should someone's intention affect a comment's usefulness to public debate?

The CMLA also urges the Committee to consider whether the requirement that comment be on a matter of "public interest" should be maintained. This question was raised in *Spiller v. Joseph*,¹⁴ and the Committee should take this opportunity to address this question as well.

Clause 5: Privilege

The CMLA applauds the effort to update the existing provision, with its outdated list of privileged occasions. The proposed amendments both broaden and modernize the scope of the defence. However, the CMLA submits that it is desirable to seek more simplicity and clarity, and that these sections can be codified with more brevity, which will provide more effective guidance to publishers, and eliminate redundancy, repetition and the potential for missing new tribunals or new occasions as they arise that would fit within the principle of public access to public information, and which ought to be covered by the privilege. This will also help to avoid periodic legislative amendment which, in practice, occurs too infrequently.

¹³ *Cheng v. Tse Wai Chun Paul*, [2000] HKCFA 88; <http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfa/2000/FACV000012%5f2000%2d21112.html?query=%7e+cheng+v%2e+tse+wai+chun+paul>

¹⁴ *Spiller v. Joseph*, [2010] UKSC 53, http://www.supremecourt.gov.uk/docs/UKSC_2009_0210_Judgment.pdf

In this electronic era, there should be no difference in the protection available for contemporaneous and non-contemporaneous reports. The internet makes reports instantly accessible and more contemporaneous than ever, as well as more widely available for longer periods of time, if they are not lost in the deluge of information which continues and will continue to flood the internet. Attempting to maintain a distinction between contemporaneous and non-contemporaneous reports is an exercise in futility and pointless.

The CMLA also questions why there should be a distinction between the privilege applicable to reports of court proceedings and those of other proceedings open to the public.

Malice should be removed from these privilege sections of the Act. Malice complicates the analysis unnecessarily. It is rarely invoked in this context. Reports are only protected if they are fair and accurate, so malice effectively adds nothing. Why one publisher ought to be able to rely on the privilege for a fair and accurate report, while another, in respect of a report that is also fair and accurate, cannot, simply on the basis of malice, makes no sense. The report to the public is the same in both cases, and ought to be protected.

The CMLA sees no reason why a right of reply should be necessary in respect of a report on a foreign court, when none is required for a court in the UK, for example. A right of reply may be appropriate in the context of a public meeting; however it should only apply where the plaintiff's perspective has not already been incorporated into the original report.

The CMLA recommends eliminating s.15(3) of the *Defamation Act 1996*. Matter that is covered by the privilege is so covered because the public is entitled to hear it on the basis of where and when it took place. The broad exclusion in s.15(3) attempts to negate and contradict that right, on a basis that is less than clear.

Clause 6: Single publication rule

The CMLA supports the introduction of a single publication rule. The rule is necessary to bring certainty and finality to potential litigation, avoids endless restarting of limitation periods and accompanying uncertainty, and avoids a multiplicity of actions over the same internet publication.

One aspect of Clause 6 which requires additional definition is the exemption for "materially different" publications. As currently drafted it is uncertain whether an article is "materially different" when:

- a web publication is moved to an archive or database of past articles;
- new technologies (for example, the ability to view it on a mobile reader) permit access to the same article through a different lens; or
- there are references to the article by hyperlink, either in a third party article or on a "past stories" list of links accompanying fresh articles.

In all these cases, the publisher has not altered the article and has not re-published some materially different article repeating any allegedly defamatory portions. A provision which explicitly excludes archives or databases, hyperlinks or access through new technologies from the definition of “materially different” should therefore be added.

Clause 7: Jurisdiction – “Libel tourism”

The CMLA supports the inclusion of provisions regarding libel tourism, and that the requirement that “England and Wales [be] clearly the most appropriate place in which to bring an action in respect of a statement” is an appropriate test to curb the English courts practice of taking libel cases over which it has little interest.

The Canadian experience is also instructive here. Canada too has seen its share of cases in which libel tourism has been raised¹⁵; however, in most cases the courts have achieved an appropriate result by applying a “real and substantial connection” test, based on principles of order, fairness and jurisdictional restraint that consider (1) the connection between the plaintiff’s claim (i.e., the substance of the action) and the jurisdiction, and (2) the connections between the defendant and the jurisdiction.¹⁶

The application of the real and substantial connection test to internet libel is currently reserved by the Supreme Court of Canada in *Breedon v. Black*.¹⁷ That case deals with allegedly defamatory statements about Conrad Black’s conduct in running Hollinger International Inc., an American corporation, posted on the Internet by the company in New York, and republished by American, British and Canadian press. Black, as a former Canadian citizen and resident – but who is now inadmissible to Canada as a non-citizen and convicted felon – seeks to sue the largely American defendants in Toronto. The defendants have urged the Supreme Court to take a holistic view and to consider all the circumstances – including, most importantly, the substance of the alleged defamation – to assess whether a Canadian court should properly exercise jurisdiction. In particular, the Court has been asked to consider that defamation actions largely focus on the conduct of the defendants and the subject matter of the libel, whereas the lower courts focused on the historic, but unhelpful, view that the tort of defamation occurs where publication takes place. In the age of the

¹⁵ *Bangoura v. Washington Post* (2005), 258 DLR (4th) 341 • 202 OAC 76 (Ont. C.A.)
www.canlii.org/en/on/onca/doc/2005/2005canlii32906/2005canlii32906.htm

Burke v. NYP Holdings, Inc., (2005), 48 BCLR (4th) 363 (B.C.S.C.)
www.canlii.org/en/bc/bcsc/doc/2005/2005bcsc1287/2005bcsc1287.html
Barrick Gold Corp. v. Blanchard & Co (2003), 9 BLR (4th) 316 (Ont. S.C.)
www.canlii.org/en/on/onsc/doc/2003/2003canlii64238/2003canlii64238.html
Trizec Properties Inc. v. Citigroup Global Markets Inc. (2004), CanLii 28046
www.canlii.org/en/on/onsc/doc/2004/2004canlii28046/2004canlii28046.html

¹⁶ *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077
www.canlii.org/en/ca/scc/doc/1990/1990canlii29/1990canlii29.html

Van Breda v. Village Resorts Limited, 2010 ONCA 84 (Ont. C.A.)
www.canlii.org/en/on/onca/doc/2010/2010onca84/2010onca84.html

Leave to appeal to Supreme Court of Canada granted, appeal heard March 21, 2011. Judgment reserved.

¹⁷ *Black v. Breedon*, 2010 ONCA 547 (Ont. C.A.)

www.canlii.org/en/on/onca/doc/2010/2010onca547/2010onca547.html. Leave to appeal to Supreme Court of Canada granted, appeal heard March 22, 2011. Judgment reserved.

internet, publication occurs everywhere and so place of publication is not an appropriate basis on which to assume jurisdiction.

Drawing from the Canadian approach and the need to avoid a publication-based test, the section may be further clarified by, for example, including the words “having regard to the substance and subject-matter of the action” before the words “England and Wales”.

Clause 8: Jury trial

The CMLA supports the removal of the presumption in favour of trial by jury. Canadian provinces are not consistent in their approach to jury trials in defamation actions. At one extreme, is Quebec with no provisions providing for juries in civil actions at all.¹⁸ At the other end of the spectrum are Manitoba and Nova Scotia which require that actions for defamation be tried with a jury unless the parties consent or waive their right.¹⁹ In British Columbia, Alberta, Saskatchewan, New Brunswick, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut, on request by a party, a defamation action shall be tried by a jury, unless a Judge orders otherwise. (The grounds for dispensing with a jury vary by jurisdiction.)²⁰ In both Ontario, and Prince Edward Island, a defamation action is on the same footing as other civil actions which “may” be tried by a jury unless a Judge orders otherwise²¹.

The lack of uniformity across Canada make generalizing a practice difficult.

For the reasons identified in the draft Bill and Consultation, including complexity (both procedural and substantive) and cost, as well as the increased need to balance competing constitutional values, the CMLA supports removing the presumption of a jury trial in defamation cases.

The CMLA recommends that no additional guidelines on the exercise of the Court’s discretion should be included on the face of the Bill. The body of jurisprudence which has been built up in other civil proceedings should offer appropriate guidance for defamation actions. Any guidelines may pre-empt or unduly narrow the discretion which could be exercised on a case-by-case basis.

¹⁸ Quebec Code of Civil Procedure, R.S.Q., c.C-25.

¹⁹ Manitoba Queen’s Bench Act, C.C.S.N.c.C.280, s.64(1); Nova Scotia Judicature Act, R.S.N.S. 1989, c.240, s.34(a).

²⁰ British Columbia, Supreme Court Civil Rules, B.C. Reg. 168/2009 R.12-6; Supreme Court Act, R.S.B.C. 1996, c.443, s.17; Alberta Jury Act, R.S.A. 2000, c.J-3; Saskatchewan, Jury Act, 1998, S.S. 1998, c. J-4.2, s. 18(1); New Brunswick Rules of Court, N.B. Reg. 82-73 R.46.0; Newfoundland Jury Act, 1991, S.N.L. 1991, c.16; Yukon, Jury Act, R.S.Y. 2002, c.129; Northwest Territories Jury Act, R.S.N.W.T. 1988, c.J-2; Nunavut Jury Act, R.S.N.W.T. (Nu.) 1988, c.J-2.

²¹ Ontario, Courts of Justice Act, R.S.O. 1990, c. C.43, s. 108; Prince Edward Island Rules of Civil Procedure, R.47; Jury Act, R.S.P.E.I. 1988, c.J-5.1, s.3

The division of roles where a jury is present is complex and could benefit from legislative clarity. As noted in our comments on the public interest responsible publication defence, the CMLA submits that it is inappropriate to have a jury weigh competing constitutional values – a question of law that should be left to judges.

Consultation issues:

The current law does not adequately deal with secondary liability issues in an online world. It is now frequently the case that the “owner” of electronic space does not make choices about, and frequently is not even aware of, third party words published on the space.

Those who provide a forum for the expression of others, be they web hosting companies or bloggers whose sites permit reader comments, will often not have the resources to withstand a concerted “libel notice” attack, and will censor as an economic imperative. Public discussion suffers.

Immunizing from liability those who merely provide the means by which third parties can publish information is the best solution, as is the case under s. 230 of the American *Communications Decency Act*. It forces claimants to sue actual authors and does not permit them to pursue secondary providers, either for their deep pockets or, where the provider is a small player, to create chill. While s.1 of the *Defamation Act 1996* codifies the common law defence of innocent dissemination, the defence is lost once the ISP has actual knowledge of the posting through notice, and leaves the statement up at its peril: *Godfrey v Demon Internet*²² This is unsatisfactory, in favouring reputation over free speech simply due to notice,

A provision akin to s. 230 of the *Communications Decency Act* would also align laws globally. For Facebook or Twitter to be immune in the USA but face potential liability in the UK would merely invite forum shopping and conflicting results between jurisdictions.

Forcing claimants to pursue actual authors does not leave claimants without a remedy. Information about users may be obtained on the basis of a *Norwich Pharmacal*²³ test for pre-action disclosure from a third party. Similar considerations apply to statutory takedown procedures, which should immunize the secondary carrier so long as they comply with requirements to notify the publisher of the material in question, and remove the material if either the publisher does not respond or the dispute between the complainant and publisher is resolved in favour of the complainant.

²² *Godfrey v Demon Internet Limited*, [1999] EWHC QB 244, <http://www.bailii.org/ew/cases/EWHC/QB/1999/244.html>

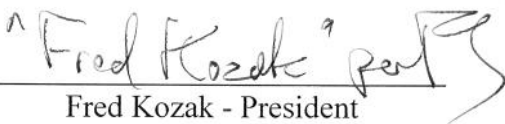
²³ *Norwich Pharmacal Co. & Ors v Commissioners of Customs and Excise* [1973] 3 WLR 164; [1973] FSR 365; [1973] 2 All ER 943; [1974] RPC 101; [1973] UKHL 6; [1974] AC 133. <http://www.bailii.org/uk/cases/UKHL/1973/6.html>

Overarching Issues

Overall, the CMLA believes the draft Bill and Consultation takes important steps in striking a more appropriate balance between the protection of free speech and the protection of reputation. Similar consideration will need to be given to the balance between free speech and privacy. The CMLA urges the Committee to move forward with this discussion which should lead to the resolution of many of the problems identified with current defamation law.

Respectfully submitted May 31, 2011.

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