

Law Hazy on Some Internet Libel, says Lawyer

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Despite the casual style of social media apps, litigators say they can still spark defamation lawsuits

By Joel McKay

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As more and more people gravitate to the Internet to chat, one Vancouver lawyer believes Canada's cyber defamation laws are too vague and website owners are at risk.

"We're still in a bit of a legal vacuum on it," said Lisa Martz, a partner with law firm McCarthy Tetrault. "I think some clarity on it would be good for every-body. Uncertainty in the law is never a good thing."

There's no shortage of positive and negative content on the Internet these days as billions of people log on to communicate, network and share information.

Martz said the basic law around defamation – people who publish comments that damage the reputation of others – remains clear, but the fog has yet to lift for service providers that host forums where many vicious statements can be made.

According to the U.S. Communications Decency Act of 1996, service providers can't be held liable for publishing a defamatory statement made by another party in the U.S.

Martz believes Canada could use similar clarity so local service providers know where they stand.

"Obviously, in the United States they saw fit to pass legislation to protect the whole e-commerce industry," she said. "If you had all of these providers liable every time somebody said something nasty about another person that wasn't strictly true on a website, come on, the Internet would shut down." She likened her argument to that of a phone company held responsible for defamatory statements made between parties during a telephone conversation.

But Tom Hakemi said the law appears to be working just fine.

"I think the common law is very good at dealing with new technologies like this," said Hakemi, principal of Vancouver-based Hakemi & Co. Law Corp. "If you look at what's happening in these cases, defamation law hasn't fundamentally changed, this is just the common law being applied in a different context. All that's really changed is the technology."

Hakemi said the practical reality of the law is that Internet forum providers aren't usually named as co-defendants because they're not the ones who intentionally mean to defame.

As a result, a litigator will generally approach a forum provider for access to the true identity of posters who use anonymous handles.

In April, Hakemi won a defamation case for Vancouver miners Hunter Dickinson Inc., Farallon Mining Ltd. (TSX:FAN) and Ronald Thiessen against Internet poster Robert Butler.

The case revolved around certain statements Butler made about the miners on forums at www.stockhouse.com. The plaintiffs were awarded \$425,000 in damages, which is considered to be among the highest awards of that kind in Canadian history, and an order that Butler be restrained from publishing any more defamatory statements.

Hakemi said his case was helped by a 2004 Ontario decision between Barrick Gold Corp. (TSX:ABX) and North Vancouver businessman Jorge Lopehandia.

In that case Lopehandia was found guilty of defamation for launching an Internet campaign to spread malicious information about Barrick's Pascua Lama project in Chile.

"I think what courts and judges are recognizing [is] that ... what's posted on the Internet is considered real information and people rely on it," Hakemi said. "In particular, its capability to disseminate information is so powerful that it really can level the playing field between the producers of information and those who might be targets of a defamation."

The rise of social media means more and more people are communicating via text-based technologies, which also means more information is being published and available for the public.

Hakemi said that creates the potential for more defendants than ever before.

Most people don't realize that even Facebook and Twitter messages are considered material and beholden to Canada's defamation laws.

David Crerar, a partner with the Vancouver office of national law firm Borden Ladner Gervais LLP, believes people should also be wary of any links they post.

In *Crookes vs. Newton* 2009, the B.C. Court of Appeal found that hyperlinks posted on a website, which lead to defamatory comments published elsewhere, don't necessarily mean the website owner is liable for defamation.

But if the hyperlink is published with comments that endorse or adopt the defamation, the website operator could be found guilty.

Said Crerar: "In the cyberspace world you have to be fair and nuanced about it; simply blind hyperlinking is dangerous."

Crerar agreed that courts have not decided many Internet defamation cases, so many issues remain unresolved and each case will largely turn on its own facts.

In that sense, said Crerar, an award or outcome for one case may not be applicable to the next case. He also said damages awards in an Internet defamation case will likely reflect the medium in which the statements are published.

That means casual messaging technologies such as Twitter, which business people and politicians

often use to market themselves, may not be treated as seriously or lead to as large a damages award as statements published elsewhere, such as in a well-established newspaper.

“Even if you have a million followers, a court may well observe that the ‘media is the message,’” Crerar said. “Tweets and Facebook postings and blogs are by their very nature often thrown out without much care, and are not read by the average reader as serious statements of fact. If the average reader is not likely to place much weight on the posting, then damages will likely not be high.”

Principal of Hakemi & Co. Law Corp. Tom Hakemi says even “anonymous” posters can be found and held liable for defamation.

“If you had all of these providers liable every time somebody said something nasty ... the Internet would shut down” – Lisa Martz, partner, McCarthy Tetrault