

You Can't Say That!!

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DEFAMATION! The threat of libel and slander is being heard more often these days. We may think we know what defamation is and how far we can go in making comments about another person. But sometimes we step over the line of what is legally acceptable unwittingly or simply because we are caught up in an emotionally charged and unfortunate situation.

Our discussion of defamation is divided into two parts. This part looks at what makes a comment defamatory. Our next column will discuss defences to an allegation of defamation. When is an otherwise defamatory comment allowable?

Most of our columns have revolved around a particular legal decision on a subject as it relates to coaches. This one is no exception. The case of *Pliuskaitis v. Jotautas* (unreported, November 8, 1999, Ontario Superior Court of Justice) is a sport case involving allegations of defamation, specifically, allegations of libel.

THE CASE

Pliuskaitis, the plaintiff, was a swim coach, and Jotautas a volunteer board member of a swim club. A dispute arose between the two. Eventually, the coach sent a letter to the board of directors of the club criticizing the board member, alleging that he was attempting to undermine the coach by the use of "unethical tactics" and was abusing his position through a personal bias against the coach. The letter was posted in a conspicuous place for all to see. The board member started a lawsuit against the coach for libel. Before the matter went to trial, a settlement was reached and the coach was required to pay a cash settlement and circulate a letter of apology.

Within a month of the terms of the settlement being completed, the board member wrote two letters to the Canadian Swimming Coaches Association (CSCA), of which the coach was a member.¹ Referring to the Code of Conduct of CSCA, the board member reviewed some of the past history of the matter and then gave his own opinion of the plaintiff as a coach and a role model. He urged the association to revoke the coach's membership and bar him from coaching in any swimming club.

Based on these letters, the coach brought his own action for libel. In such a lawsuit, the coach has the onus of proving the statements are libellous. If he does, the defendant may then try to raise one of the defences to libel.

The court found that several statements made by the board member (the defendant in the suit), combined with the editorial comment he included in his letter to CSCA, were in fact libellous and caused harm to the character and reputation of the coach.

DEFAMATION

So, what is defamation? In particular, what is libel? Defamation is all about causing harm to another person's reputation. Defamation refers to any written or spoken words or acts that tend to lower a person in the estimation of others or expose such person to hatred, contempt, or ridicule. Where the harmful comment is in written form, it is called libel and where it is verbal, it is called slander.

This is a very tricky area of the law, as it requires finding a fair balance between the protection of a person's reputation and protection of the right to freedom of speech. The courts presume a person's good reputation. There is not only a very low threshold to a finding that a comment, whether written or spoken, is defamatory, but the courts will also give very broad interpretation to what is defamatory. However, there are also several defences to defamation that recognize the right to make certain comments under certain circumstances. Given the very low threshold to a finding of defamation, these defences become very important.

Defamation consists of three simple elements:

THERE MUST BE A "PUBLICATION." A publication can be as simple as a single written communication to someone other than to the person about whom the comment is made, that is, to a third party. Why to a third party? Because this area of the law is about protecting a person's reputation in the minds of others. Thus, you can say or write what you like to the person just so long as no one else overhears or sees the communication. A letter, a paragraph in a newsletter, or an e-mail may each constitute a publication. Putting a critical letter in an employee's file to which other employees have access has been considered a publication as has handing a letter to an assistant for typing.

There are a number of pitfalls to watch out for. In the electronic age, it is very difficult to control any publication. Notice, for example, how often you are copied on e-mails with great long lists of other people also copied. Each of those other people can easily redistribute the communication. Once a message is in the electronic domain, it is virtually impossible to control where it will go.

Another area of concern, particularly for sport organizations, is in investigating a situation without disclosing to various people what may in fact be a defamatory statement couched in a complaint. Investigators need to be very careful about what they disclose of an allegation or suspicion when interviewing potential witnesses because each time they disclose details of the situation to another, it is a "publication."

THE PUBLICATION MUST IMPART A DEFAMATORY MEANING. The intended meaning is irrelevant; the words will be taken to mean what they convey in everyday language. However, where they can be interpreted several ways, they will be given their worst meaning and, of course, the circumstances surrounding the comments will be taken into consideration. Thus, innuendo or even the [negative] cumulative effect of a series of true statements may be interpreted as being defamatory. Quite clearly, comments that attribute to a person a criminal act, or an act of fraud, dishonesty, immorality, or dishonourable conduct, are defamatory.

THE PUBLICATION MUST BE ABOUT ANOTHER PERSON. The individual claiming defamation must prove the comment refers to him or her. It need not refer to the person by name, and if only a small select group of people recognize the identity, that is sufficient. Even the fact that the person making the comment did not know or

know of the person does not make any difference; the person's reputation is still potentially harmed.

A finding of defamation is quite easily made. Our courts presume the good reputation of each person and will protect that reputation scrupulously. However, there are a number of very clear defences to a finding of defamation that essentially justify the making of such comments. We will discuss these defences in the next column.

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1. The board member had since been required to resign and the coach's contract was not renewed for the subsequent year.