

## You Can't Say That!! continued

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In the last issue of *Coaches Report*, we wrote about defamation, that is, comments or statements that tarnish or destroy a person's reputation in the minds of others. We identified the three elements that make a communication defamatory:

- A written or spoken communication must be made to a third person.
- The communication must convey a defamatory meaning or be capable of being interpreted in a defamatory manner.
- The defamatory meaning must be about the person bringing the allegation.

We cited the case of *Pliuskaitis v. Jotautas*,<sup>1</sup> in which a board member of a swim club was found by the court to have made a number of defamatory comments about the club's coach.

We explained that there is a very low threshold for a finding of defamation. In other words, it is not difficult to prove the three elements of defamation described above. Once defamation is established, the question becomes, Are the circumstances such that a defamatory communication may be legally justified or allowable? These are called "defences" to a claim of defamation and they are the focus of this article. We will also pick up the case of *Pliuskaitis v. Jotautas* and look at the defences put forward by the board member and see whether or not they were successful.

There are four defences to a finding of defamation: consent, fair comment, justification, and qualified privilege.

**CONSENT.** If a person alleging the defamation actually consented to the publication, then they cannot complain that they have been defamed. Consent is a full defence; however, the onus rests on the person responsible for the defamatory publication (the "defendant") to prove such consent. Also, the defendant must show that the publication did not go beyond what was consented to. Although a complete defence, consent is also very narrow in scope and the courts will deal with it very restrictively.

**FAIR COMMENT.** Fair comment refers to statements or comments made by a person in response to certain facts that this person honestly believes to be true, even though they may not be. For fair comment to succeed, the defendant must be able to prove the facts upon which the comments are based. This is often not easy as the underlying facts may have only been partially known or may have been misinterpreted. The defendant must also show that the comment involves a matter of public interest and that it meets the test of "fairness," that is, it was reasonable for the defendant to interpret the facts the way he did and to believe the comments that he made. However, if there is any underlying malice, ill will, or vindictiveness, the defence of fair comment will fail.

**JUSTIFICATION.** In this defence, the defendant must prove that he or she was justified in making the defamatory comment. In other words, the defendant must be able to prove the truth of the defamatory comment. A suspicion or a belief that the comment reflects the truth of the matter is not sufficient; the substance of the

comment must be proved true and accurate. It must be noted that “knowing” that something is true is quite different from “proving” that something is true.

This defence is often used in harassment cases. A coach or a club administrator might have a reasonable and honest belief that a particular person has been harassing someone. That belief may be based on comments coming from a number of sources, including very credible third parties. Unless those sources are prepared to come forward with some direct evidence, the “honest belief” is actually based on hearsay, rumour, and suspicion and would not meet the test of the defence of justification.

**QUALIFIED PRIVILEGE.** This defence is often relied upon in situations where the public interest requires that people be able to speak freely about certain matters. This public interest is usually defined in terms of a public, moral, or legal duty to speak out.

There is no absolute test for what is privileged and what is not; it depends on the circumstances under which the comment is made. The situation must be one in which the threat to a person’s reputation gives way to a greater public interest or concern. For example, society’s interest in protecting the safety of a child creates a legal duty under child protection legislation to report to authorities where child abuse is suspected. Such reports may threaten a person’s reputation if ultimately proven untrue, but at the same time, such reporting will be protected by the defence of qualified privilege.

As with the other defences, if the comments are motivated by any malice or vindictiveness, the defence of qualified privilege will fail.

#### BACK TO THE CASE

In *Pliuskaitis v. Jotautas*, the swim club board member argued both justification and qualified privilege. Was he justified in making the comments? The court said he would be if the comments were true “in substance and in fact.” While certain of the board member’s comments were found to be true, a number of others were not borne out by the evidence. The defence of justification thus failed.

The other defence argued by the board member was qualified privilege. The board member claimed that as a member of the swimming community, he had a legal or moral duty to bring the coach’s conduct to the attention of the Canadian Swimming Coaches Association (CSCA) and the association had a corresponding interest in receiving such information. He also stated that as a parent of children taking swimming lessons (albeit with a different club), he had a public duty to report the coach’s conduct.

The court found that the defendant had no legal or statutory duty to report the coach. The court went on to say that it is almost impossible to separate a moral duty from a public duty. It recognized that in many cases disclosure of information can come “perilously close to being perceived as meddling in the affairs of another,” but, on the other hand, noted there are times when broader interests are served or protected by bringing concerns about the conduct of another forward, even though one may be under no legal obligation to do so.

Although somewhat reluctantly, the court did find in this case that the letter of complaint concerning the coach was submitted to CSCA under either a moral or a public duty. Notwithstanding the clear antagonism between the parties, the court did

not find malice in the board member's actions. The defence of qualified privilege thus succeeded.

In summary, defamation is not necessarily difficult to establish, because the courts assume, in the absence of contrary proof, that a person enjoys a good reputation. At the same time, establishing one of the defences to a finding of defamation can be difficult and requires very specific proof of facts.

In this electronic age, an e-mail message can circulate instantly to a large audience, and a private comment directed to a friend or confidante can result in being a defamatory publication. Even an offhand comment can create future problems. In short, the prudent advice is to be careful what you say and to whom you say it!

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1. (1999), 47 O.R. 227 (Ont. Sup. Ct.)