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DEFAMATION ON THE INTERNET / THE ANONYMOUS DEFAMER

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The Internet has rapidly become the medium of choice for communication. The ability to communicate instantly without any limits on content and with the option of remaining anonymous is an appealing feature for Internet users. However, freer communication and online anonymity has opened the door to online defamation.

Where defamatory material can be disseminated to the world at the click of a button, what do you do when you're the subject of an attack by an anonymous online poster? This article gives a brief overview on how to identify and sue anonymous online defamers.

THE LAW OF DEFAMATION IN GENERAL

Defamation is the act of harming the reputation of another by making a false statement to a third person. Defamation is defined as any statement that is likely to lower the reputation of that individual in the estimation of "reasonable" persons.

A cause of action for defamation exists when the plaintiff (the person defamed) can prove that the defendant made a defamatory statement(s) to a third party regarding the plaintiff, consequently rendering the defendant liable for damages. The amount of damages awarded by courts varies widely, depending on the effect the defamatory words has on a person's reputation.

SUING ANONYMOUS INTERNET USERS

i) Identifying the Defamer

The plaintiff may be able to identify the defendant if any of the following is known:

1. IP address
2. email provider
3. ISP provider
4. web site host provider
5. anonymous remailer and/or browsing provider; and
6. IP mask and VPN provider.

A plaintiff may attempt to obtain information about the defamer's identity by simply asking the internet service provider ("ISP") for it. However, due to legitimate expectations of privacy, many ISP's will be unwilling to disclose such information without a court order.

Regardless of whether the ISP is willing to disclose information or not, the first step will be for the plaintiff to commence a claim.

ii) Commencing the Claim



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In Canada, a lawsuit can be commenced against an unknown defendant by substituting the name “John Doe” or “Jane Doe” for the actual defendant’s name. In this instance, the claim against the John Doe defendant(s) will contain all information known at the time, the defamatory comments and will illustrate how the legal elements of defamation have been satisfied.

The claim must then be issued and as a rule, served on the defendant’s personally. However, in the case of an anonymous defendant, the plaintiff will be unable to effect service and proceed any further with the claim. In order to move forward and identify the defendant(s), the plaintiff’s best option is to request a court order requiring disclosure from the ISP.

iii) Court Order Requiring ISP to Disclose Information

The plaintiff must bring a motion requiring the ISP to disclose relevant information.

Under Rule 30.10, courts can order non-parties to disclose information where it would be unfair to require the plaintiff to proceed to trial without the defendant’s identity. Additionally, Rule 31.10 permits discovery of non-parties with leave.

A motion must be brought pursuant to the above-mentioned rules, compelling the ISP to produce whatever documents are in their possession that will assist with identification.

Based on recent developments in Ontario case law, the courts will take the following factors into consideration when deciding to order disclosure of information related to anonymous Internet users:

1. Whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the circumstances;
2. Whether the plaintiff has established a prima facie case against the unknown alleged wrongdoer and is acting in good faith;
3. Whether the plaintiff has taken reasonable steps to identify the anonymous party and has been unable to do so; and
4. Whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

Fortunately for defamation victims, there are certain legal mechanisms available to discover the identity of anonymous Internet users. Anonymity will not necessarily be a bar to a lawsuit. As the Internet continues to impact the law of defamation, courts are becoming more sophisticated with issues of anonymous online defamation.

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