

Publisher's Note

2018 — Release 4

Previous release was 2018-3

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Brown

Brown on Defamation

This service is a comprehensive, authoritative and extremely discerning text that addresses significant new developments in this complex area of legal practice. This landmark text offers an authoritative and comprehensive treatment of defamation law in Canada and elsewhere. The service includes topics such as: available defences, remedies, Charter implications, injurious falsehood and malicious prosecution.

This release provides valuable updates to the case law and commentary in Chapter 4 (Definitions and Defamatory Imputations) and Chapter 25 (Damages).

Highlights:

Definitions and Defamatory imputations — Classification of Defamatory Imputations — Business, Profession and Trade — Nature of the Business, Profession and Trade — In this release, the author discusses how criticism of a product sold or manufactured by the plaintiff in a defamation case may be defamatory of the plaintiff and refers to the case *Chevalier Chrysler v. Hastings-James (2003)*, 2003 CarswellOnt 4888 (SCJ). In this release the author adds further commentary on this issues and refers to *Cana International Distributing Inc. v. Standard Innovation Corp.*, 2016 ONSC 7197 (S.C.J.), reversed in part 2018 ONCA 145, additional reasons 2018 ONCA 387, where the plaintiff by counterclaim succeeded in an action for defamation even though it appears that the letter sent by the defendant by counterclaim to Health Canada complained solely of possible

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defects and safety concerns with respect to the products of the plaintiff by counterclaim. The trial court rejected the defence of qualified privilege on the ground that it was not asserted in its pleading and it appears that the rejection was the only issue raised on appeal in the defamation action. The appellate court held that in any event, the finding of malice by the trial court would have defeated the privilege and affirmed the award of \$50,000. *Cana International Distributing Inc. v. Standard Innovation Corporation*, 2018 ONCA 145, additional reasons 2018 ONCA 387.

Definitions and Defamatory imputations — Classification of Defamatory Imputations — Business, Profession and Trade — Public Officials — Generally — It is defamatory to characterize a candidate for parliament, among other things, as a person with an oversized ego, a “scud dud” who noisily blustered his way through an ailing campaign and was so self-absorbed and in love with himself that he mocked the party for failing to treat him with the desired level of reverence, an arrogant and high handed individual who was unworthy of trust and public office and who formerly was a journalistic has-been rather than a valuable commentator on international affairs, and lacked support from the members of his own campaign team and the Alberta Progressive Conservative Party. *Kent v. Martin*, 2016 ABQB 314, additional reasons 2017 ABQB 27, varied 2018 ABCA 202.

Damages — Compensatory Damages — Aggravated Damages — In the author’s view a separate award of aggravated damages is a pernicious development in the law. The theory is that where a defendant acts maliciously and outrageously, the plaintiff’s mental distress, humiliation, anxiety, and so on will be greater than when the defendant acts innocently, inadvertently or negligently. In practice, however, when a plaintiff seeks to justify an award of general compensatory damages, and to maximize the compensatory amount, he will offer evidence as follows: because of his humiliation, he no longer attended places he previously frequented or avoided friends and associates he previously knew; because of his anxiety, he could not sleep well, was unable to hold his food and lost weight; and so on. To support an allegation of aggravated damages, the same evidence must be led. Instead of the allegation that he or she was humiliated, anxious, fearful, and angry, the allegation may be that because of the malice and outrageous conduct of the defendant he or she was extremely humiliated, anxious, fearful and angry, but the evidence necessarily must be the same. The result is that if the court makes a separate award for aggravated damages it will necessarily be double counting and awarding an additional amount in compensation for the same evidence that was offered in support of that admitted in aggravation of the general compensatory damages. To avoid this double counting, the court should recognize a single award for compensatory damages which takes into consideration all those factors that might aggravate the plaintiff’s humiliation, anxiety, fear, anger, distress, indignation and grief. *Nazerali v. Mitchell*, (2018) BCCA 104, 421 D.L.R. (4th) 399 (B.C. C.A.).