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Special Issue: Reforming Defamation Law in the Age of
the Internet

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Article 1

OHLJ Special Issue: Reforming Defamation Law in the Age of the Internet

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Introduction



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OHLJ Special Issue: Reforming Defamation Law in the Age of the Internet

Abstract

Even as technology transforms the world of communication—as it has over the course of history—defamation law remains strangely impervious to change. True enough, the law has evolved over time, indeed centuries, but seems as beholden as ever to an archaic muddle of backwater rules and concepts. It is disappointing, for instance, that the law arguably worsened after the Supreme Court of Canada considered the status of defamation under s.2(b) of the Charter of Rights and Freedoms, which guarantees expressive freedom. Doctrinal corrections were slow and even then served in the main to bring Canada abreast of jurisprudential developments in Commonwealth countries without constitutional rights.

Preface

OHLJ Special Issue: Reforming Defamation Law in the Age of the Internet

JAMIE CAMERON*

Even as technology transforms the world of communication—as it has over the course of history—defamation law remains strangely impervious to change. True enough, the law has evolved over time, indeed centuries, but seems as beholden as ever to an archaic muddle of backwater rules and concepts. It is disappointing, for instance, that the law arguably worsened after the Supreme Court of Canada considered the status of defamation under s.2(b) of the *Charter of Rights and Freedoms*, which guarantees expressive freedom.¹ Doctrinal corrections were slow and even then served in the main to bring Canada abreast of jurisprudential developments in Commonwealth countries without constitutional rights.²

Whether, when, or just how internet technology will force a re-conception of defamation law remains to be seen. On May 3, 2018, and with co-chairs Professors Jamie Cameron and Hilary Young, the Law Commission of Ontario (“LCO”) hosted a conference in Toronto titled “Defamation Law and the Internet: Where do we go from here?” This conference was part of the LCO’s

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1. See *e.g.*, *Church of Scientology v Hill*, [1995] 2 SCR 1130.
2. See *e.g.*, *WIC Radio v Simpson*, [2008] 2 SCR 420; see also *Grant v Torstar Corp.*, [2009] 3 SCR 640.

project to consider and recommend law reform specific to internet defamation.³ Notably, the project is one of the first to brave this task; though libel reform has been a work in progress for many years, less attention has as yet been dedicated to the daunting problem of online defamation.

The internet is a juggernaut—a virtual space where any and all can send and post material almost at will, and in doing so deploy uncounted sites and mechanisms to leverage internet voice. Reputation and the distinctive online damage it may sustain—by virtue of the speed, scope, impact and longevity of the internet’s reach—are caught in a vortex of freedom that spirals all the time, in virtually all places and directions.

Online reputational harm poses regulatory challenges that are complex and intersectional; on any view, they defy easy or clear resolution. It is unclear, for example, how any reform project should be conceptualized. One approach is to return to the foundations of defamation law, re-configure existing doctrine, and then apply a modernized conception of the tort to the internet. A more ambitious alternative would bypass the status quo, moving directly to the internet and re-styling doctrine to accommodate reputational harm in that setting. If the basics of defamation law are harmonized along the way, so much the better.

Though it might appear backward to center on the internet, rather than begin by repairing baseline defamation law, the idea of reverse engineering is well worth considering. Much of current doctrine does not translate readily or at all to the networked world, and online technology challenges many of the assumptions of current law. An approach to reform that treats the status quo as its starting point might be less likely to appreciate or achieve the kind of transformative change that is warranted.

The forthcoming LCO Report and recommendations on these difficult issues will provide a breakthrough and much-awaited response. This special issue of the Osgoode Hall Law Journal complements the LCO’s work, offering a valuable opportunity to experts who have participated in the project and conference to publish their scholarship. The result is a rich offering of articles by scholars from Canada, the United Kingdom, and Australia.

This collection is anchored by Dr. Gratton’s Introduction explaining the LCO project.⁴ Professor Daithi Macsithigh served as a conference “rapporteur” and has written a scholarly and insightful report connecting the conference

3. “Defamation Law in the Internet Age”, online: <www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/>.

4. Sue Gratton, “Introduction to OHLJ Special Issue: Reforming Defamation Law in the Age of the Internet” (2019) 56 Osgoode Hall LJ iv.

proceedings to the broader issues of reform.⁵ It is followed by Professors Andrew Kenyon and Andrew Scott, who contribute thoughtful articles on longstanding issues in defamation law.⁶ While Professor Kenyon’s “Defamation, Privacy and Aspects of Reputation” calls for clarification of the different roles defamation and privacy law play in protecting reputation, Professor Scott’s inventively titled “‘O! they have lived long on the alms-basket of words” tackles the technicalities of the “single meaning rule”, which is an important foundation of defamation doctrine. In addition, the special issue draws strength from Dr. Randall Stephenson’s focus on the theoretical foundations of defamation law. “Restoring ‘Accountability’ in Freedom of Expression Theory: Public Libel Law and Radical Whig Ideology” provides a deep historical and theoretical argument for embedding accountability values in defamation law.⁷

The special issue also directs its attention to the problems arising from online defamation. Professors Emily Laidlaw and Hilary Young have co-authored an article, titled “Intermediary Internet Liability in Defamation”, which examines the common law definition of publication and proposes changes that would exclude intermediary liability in most instances.⁸ In its place the authors advance a regulatory framework or system of notice-and-notice plus, which would require intermediaries to forward a notice of complaint and take content down in some circumstances, but expose them to a fine—rather than defamation liability—for failure to comply. Finally, Professor Laidlaw’s “Re-Imaging Resolution of Online Defamation Disputes” addresses access to justice concerns, asking how remedies can be modernized and re-structured to respond to the realities of internet defamation; the result is a proposal for an online defamation tribunal.⁹

Taken together, these articles form a unique collection that informs ongoing debate about the law of defamation’s fundamentals; the imperatives arising from the challenges of internet defamation; and difficult questions of whether and how to reform the law.

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5. Daithí Mac Síthigh, “Where Do We Go from Here? Reflections on the LCO’s Consultation and Conference” (2019) 56 Osgoode Hall LJ 1.
 6. Andrew T. Kenyon, “Defamation, Privacy and Aspects of Reputation” (2019) 56 Osgoode Hall LJ 59; Andrew Scott, “‘O! they have lived long on the alms-basket of words” (2019) 56 Osgoode Hall LJ 80.
 7. Randall Stephenson, “Restoring ‘Accountability’ in Freedom of Expression Theory: Public Libel Law and Radical Whig Ideology” (2019) 56 Osgoode Hall LJ 17
 8. Emily B. Laidlaw & Hilary Young, “Intermediary Internet Liability in Defamation” (2019) 56 Osgoode Hall LJ 112.
 9. Emily B. Laidlaw, “Re-Imaging Resolution of Online Defamation Disputes” (2019) 56 Osgoode Hall LJ 162.