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

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

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Introduction



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

Abstract

The Law Commission of Ontario (LCO) is proud to introduce this special issue of the Osgoode Hall Law Journal, featuring papers inspired by the LCO's law reform project, Defamation Law in the Internet Age, and the international conference held as part of the project, Defamation Law and the Internet: Where Do We Go From Here? The LCO is Ontario's leading law reform agency, with a mandate to promote law reform, advance access to justice, and stimulate public debate. In its multi-year defamation law project, the LCO is reconsidering the purpose and function of defamation law in light of transformative technological change.

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

SUE GRATTON

The Law Commission of Ontario (LCO) is proud to introduce this special issue of the Osgoode Hall Law Journal, featuring papers inspired by the LCO's law reform project, *Defamation Law in the Internet Age*, and the international conference held as part of the project, *Defamation Law and the Internet: Where Do We Go From Here?* The LCO is Ontario's leading law reform agency, with a mandate to promote law reform, advance access to justice, and stimulate public debate. In its multi-year defamation law project, the LCO is reconsidering the purpose and function of defamation law in light of transformative technological change.

Defamation law regulates false speech for the purpose of protecting reputation. The internet has generated new and widely-used forums for speech, including social media sites, blogs, internet platforms and digital media. These developments are widely considered positive in promoting free speech, freedom of the press, and other democratic and legal values. At the same time, there can be no doubt that online defamation has become a pressing issue, in Canada and around the world. In this setting, it has become increasingly unclear whether and to what extent defamation's traditional doctrines, rules and remedies remain relevant.

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The LCO's goal is to reconsider how law should address the problem of online reputational harm in a modern society shaped by the constitutional entrenchment of freedom of expression, a commitment to human rights, increasing concerns about privacy, the effects of social media, the impact of global internet intermediaries (such as Google and Facebook) and the proliferation of digital communications. Drawing on extensive public consultations and research, the LCO will issue a final report with recommendations addressing these issues. The LCO's project webpage, including our project consultation paper, is available at www.lco-cdo.org/defamation.

As part of the public consultations process, the conference, *Defamation Law and the Internet: Where Do We Go From Here?* was organized by the LCO and conference co-chairs, Professors Jamie Cameron and Hilary Young. Held on May 3, 2018, the conference brought together leading scholars and legal experts from a variety of disciplines and jurisdictions to address the collision between defamation law and the internet. Twenty-one speakers and moderators from around the world engaged with about 150 attendees, live and by webcast. Simultaneously, a rich virtual discussion took place on Twitter. The conference was unique in giving participants an opportunity to participate directly in the law reform process.

From my perspective as Project Head of the defamation law project, the conference was a heady experience of collaborative inquiry. Speakers and audience members alike were willing to venture past familiar doctrinal terrain and test innovative ideas. The two morning panels were important to ground the discussion by reviewing the values underpinning defamation law and the harms it is intended to address. These panels also explored the contemporary technological and social conditions in which defamation law now operates. And panelists began to consider possibilities for law reform that would meet these values and address these harms in a fashion suitable for the internet age. The afternoon panels honed in on two particularly challenging issues: the role of internet intermediaries in the transmission of defamatory online content and the possibility of online dispute resolution as an alternative to courts for at least some online defamation. In each of these panels, the discussion was creative but pragmatic, involving a multidisciplinary look at possible precedents and models for reform. A lunchtime panel focused discussion on three frontline issues of particular interest to practitioners: jurisdiction over online defamation cases, anonymous posters and the debate around "unpublishing" undesirable content. The result was an abundance of important insights and suggestions for reform that will be invaluable to the LCO in developing our recommendations for

Ontario law reform and should also inform the law reform conversation beyond this jurisdiction.

Among the myriad of insights, I want to note four key themes.¹

First, there was a general consensus that technology has a substantive impact on how defamation law operates in the context of online communications and that this must inform defamation law reform. For example, more than one speaker noted the greater opportunity for counter-speech in response to some online communications. This is arguably significant to the analysis of defamatory meaning and from a remedial perspective. Another example is the unprecedented role of internet intermediaries in facilitating online communications. Participants discussed a range of ideas for involving intermediaries in addressing online defamation, in particular the notice-and-notice-plus proposal presented by Emily Laidlaw and Hilary Young.² Although the LCO is committed to developing recommendations that are technology-neutral, a solid understanding of the technology remains pivotal to the analysis.³

Second, over the course of the five panels, it became clear that there is an appetite for fundamental, rather than incremental, law reform. Speakers mined civil law, European Union law and law throughout the Commonwealth in coming up with ideas for reform. Some suggested that the traditional presumptions of harm, fault and falsity should be reversed, and several were in favour of a serious harm threshold as exists in England and Wales in the *Defamation Act, 2013*.⁴

Third, multiple speakers noted the increasing overlap in doctrinal categories such as defamation, privacy and data protection. This is evident in judicial decisions and the academic literature. However, it is also evident “on the ground”, in the way that young people experience reputational harm.⁵ That being said, in his presentation Andrew Kenyon argued for a functional distinction between defamation and privacy as protecting different aspects of reputation:

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1. Daithí Mac Síthigh, “Where Do We Go from Here? Reflections on the LCO’s Consultation and Conference” (2019) 56 Osgoode Hall LJ 1.
 2. Emily B. Laidlaw & Hilary Young, “Intermediary Internet Liability in Defamation” (2019) 56 Osgoode Hall LJ 112.
 3. Law Commission of Ontario, “Defamation Law in the Internet Age” (2017) Consultation Paper, online: < <http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf>>.
 4. *Defamation Act, 2013* (UK), c 26 s 2.
 5. Jane Bailey & Valerie Steeves, “Defamation Law in the Age of the Internet: Young People’s Perspectives” (2017) Law Commission of Ontario Commissioned Paper, online: < <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf>>.

evaluation based on false facts (defamation) versus evaluation based on private information (privacy).⁶

Fourth, a concern for access to justice was pervasive throughout the day. Almost all speakers indicated a willingness to look beyond the court system to a variety of informal responses to online defamation. This idea took several forms. Some (Andrew Scott) suggested that discursive remedies might be incentivized prior to the litigation process.⁷ Others (Emily Laidlaw, Ethan Katsh, Darren Thompson) proposed an online resolution dispute process.⁸ Bailey emphasized the potential value of community and school-based responses to online defamation among youth.⁹

The conference proceedings and the papers making up this special issue of the OHLJ have been tremendously helpful to the LCO in advancing our thinking on the issues in our project. We applaud everyone who participated in this event and thank them for their extraordinary contribution to the law reform process.

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6. Andrew T. Kenyon, “Defamation, Privacy and Aspects of Reputation” (2019) 56 Osgoode Hall LJ 59.
 7. Andrew Scott, “O! they have lived long on the alms-basket of words” (2019) 56 Osgoode Hall LJ 80.
 8. Emily B. Laidlaw, “Re-Imaging Resolution of Online Defamation Disputes” (2019) 56 Osgoode Hall LJ 162.
 9. *Supra* note 5.