

ONTARIO EAST MUNICIPAL CONFERENCE

LEGAL UPDATE: SOCIAL MEDIA

Tony Fleming

Topics

- The problem
- Libel and slander
- Can/should a municipality sue?
- What tools are available to respond?

The Problem

PEOPLE ARE JERKS



The Problem

- You pay staff to manage the affairs of the municipality, not spend their time defending themselves on social media
- Municipalities have a legal obligation to prevent harassment in the workplace
- Municipalities have to retain staff – even without the OHSA obligations
- The Charter of Rights and Freedoms

Libel and Slander

- Libel and Slander Act
- S. 2 Defamatory words in a newspaper or in a broadcast shall be deemed to be published and to constitute libel.
- Slander is spoken defamation:
 - calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication thereof, it is not necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of the plaintiff's office, profession, calling, trade or business, and the plaintiff may recover damages without averment or proof of special damage.

Libel and Slander

“Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory”

Grant v. Torstar Corp., 2009 SCC 61

Libel and Slander

***WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420**

- “The test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment.”



Libel and Slander

- Defence to defamation
 - Justification: rebutting the Plaintiff's claim of false words by proving their truth
 - Qualified/Absolute Privilege: Protects certain type of circumstances (i.e. news journalists) who have a legal, social or moral interest or duty to communicate information to a recipient. There is a presumption of honest, good faith communications – Plaintiff can rebut with evidence of malice.

Libel and Slander

- Defence to defamation continued
 - Fair Comment: protects statements of opinion versus statements of fact. Defendant must establish (a) comment is a matter of public interest; (b) based on fact; (c) recognizable as a comment; (d) capable of being honestly held on the proven facts and (e) are not actuated by malice
 - Responsible Communication: allows publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest (a way to balance the need to protect reputation as well as freedom of speech).

Libel and Slander

Damages

Barrick Gold Corporation v. Lopehandia (Court of Appeal)

- hundreds of defamatory statements about the Plaintiff on internet websites and message boards including allegations of the Plaintiff being involved in arson, murder, and organized crime.
- injunction and damages totaling \$125,000
- defamation on the internet has features which distinguish it, for purposes of damages, from defamation in other media. Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. The anonymity of such communications may itself create a greater risk that the defamatory remarks are believed. The Internet has greater potential to damage the reputation of another.



Libel and Slander

Damages continued

- ***Rutman v. Rabinowitz(Court of Appeal)***
- emails and internet message boards used to make numerous defamatory allegations about the Plaintiff, describing him to be a “thief and a bastard.”
- \$700,000 in damages.
- “serious, sustained, and baseless Internet defamation.”
- The “pernicious effects” of internet defamation distinguishes it from defamation in other mediums when it comes to awarding damages. Simply put, you don’t know what harm has been done to your reputation, as you do not know who has seen the posts.

Libel and Slander

Conclusion

- Defamation is difficult to prove in many circumstances
- There are a number of defences that make an action difficult
- The damages imposed by the courts may be significant dollars, but typically are minimal
- Legal costs to pursue may exceed the value of the award

Municipalities and Defamation

Montague (Township) v. Page [2006]

- Municipality brought a defamation action against a resident who wrote letters criticizing the municipality's first responders' response to a house fire.
- " It is inconsistent with s. 2(b) of the Charter for a governmental entity to sue a private citizen for defamation. In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of civil action for defamation being initiated against them by that government. The risk of a governing body using defamation as a tool to inhibit criticism of institutional governmental activities, and thereby inhibiting free speech, outweighs the risks of allowing such criticism, even if intemperate."

Municipalities and Defamation

Halton Hills (Town) v. Kerouac

- The Municipality and its Director of Parks and Recreation brought an action against an internet-based news site after it published a story calling the Director “corrupt” in connection with his work for the municipality.
- The claim was dismissed against the municipality:
- “There is no countervailing justification to permit governments to sue in defamation. Governments have other, better, ways to protect their reputations. Any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature.”

Municipalities and Defamation

- Should the municipality bring the claim?
 - Generally the answer is no
- The better question is when does a municipality need to bring a claim?
 - When does the defamation cross the line into a workplace issue
 - Is there an expectation that the municipality will intervene?
 - Should you create that expectation?

Municipalities and Defamation

Town of Rainy River and Deborah Ewald v. Paul Olsen (Court of Appeal)

- The Town and Mayor brought a claim arguing that its requirements under the OHS Act to protect staff from violence in the workplace and workplace harassment demanded action.
- The defendant was sending vexatious and harassing emails to the mayor and other staff, and harassed the mayor at her second place of work (not the Town offices).
- The Town sought interim, interlocutory and permanent orders to stop it.
- The Town claimed they had a duty to protect workers pursuant to terms of Act.



Municipalities and Defamation

Rainy River continued

- The Application was dismissed:
- The only evidence of actual harassment occurred at a location that was not considered a 'workplace' under the OHS Act - the mayor's second place of employment
- the policy did not include a provision that protected employees from harassment from non-employees
- There must be a clear nexus between the harassment and the workplace to engage the duty to protect
- Apart from "periodic annoyances" that correspondence from Mr. Olsen provided, there was no evidence that town was not functioning in orderly way in accordance with *Municipal Act* - meetings were held, decisions were made, and town was being administered

Municipalities and Defamation

Rainy River continued

- The court also noted simpler measures should have been attempted to control the respondent's behaviour (besides its letters asking him to cease and desist, and asking police to intervene) such as:
 - a trespass notice;
 - if comments are found on a social media site, reporting them and asking for the website owners to remove them;
 - blocking his emails;
 - returning obnoxious letters without a response;
 - refusal to deal with him unless he is civil, or the mayor could have applied for a peace bond
- Bringing an individual claim for defamation.

Municipalities and Defamation

Intentional Infliction of Mental Suffering

- There is a three-part test to make out this civil claim:
- 1. Was the defendant's conduct flagrant or outrageous?
- 2. Was the defendant's conduct calculated to produce harm?
- 3. Did the defendant's conduct result in the plaintiff's visible and provable illness?

Municipalities and Defamation

Boucher v. Wal-Mart Canada Corp. (Ont. C.A.)

- This case involved an employer who retaliated against an employee for following the rules of employment.
- “Pinnock’s conduct was flagrant and outrageous. He belittled, humiliated and demeaned Boucher continuously and unrelentingly, often in front of co-workers, for nearly six months.
- Pinnock intended to produce the harm that eventually occurred. He wanted to get Boucher to resign. To do so, he wanted to cause her so much emotional distress or mental anguish that she would have no alternative but to quit her job. The evidence of Samantha Russell, which was not challenged in cross-examination, and was reviewed by the trial judge for the jury, supports this element of the tort. Ms. Russell testified that Pinnock was “overjoyed” when Boucher resigned because he had achieved his goal.”



Municipalities and Defamation

Conclusion

- Municipality cannot protect itself from defamation as a corporation
- An employee can protect themselves – but the standard/cost is high
- A municipal corporation can bring a claim for an employee, but the courts are looking for the municipality to exhaust its recourse before seeking an injunction

Social Media

Responding to Negative Social Media

- Criminal Code
- Occupational Health and Safety Act
- Existing tools
- Policies
- By-laws

Social Media

Criminal Harassment (Criminal Code)

264(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(d) engaging in threatening conduct directed at the other person or any member of their family.

Social Media

Criminal Harassment continued

- There are five elements to making out a case for criminal harassment from repeated communications as referenced in s, 264(2)(b):
- Repeated communication
- That the complainant was harassed
- That the defendant knew the complainant was harassed
- That the communications caused the complainants to be fearful for their safety
- That the fear was reasonable in all the circumstances

Social Media

Defamatory Libel (Criminal Code)

298 (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked on any substance; or

(b) by any object signifying a defamatory libel otherwise than by words.

299 A person publishes a libel when he

(a) exhibits it in public;

(b) causes it to be read or seen; or

(c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

300 Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Social Media

Defamatory Libel continued

- Publication to a person other than the one defamed
 - A person “publishes” a libel when he shows or delivers it, or causes it to be shown or delivered, with an intent that it should be read or seen by any other person
- Publication is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule OR is designed to insult the person of or concerning whom it is published
 - must be a grave insult
 - No requirement to prove actual injury
 - Expressed directly or by insinuation or irony in words legibly marked on any substance
- Knowledge that the statements were false (R. v. Lucas)
- “There are two aspects to the *mens rea* issue. First, did the appellants intend to defame the police officer? Secondly, did they know that the statements they published were false?”

Social Media

Occupational Health and Safety Act (OHSA)

32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,

(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;

Social Media

OHSA continued

“workplace” means any land, premises, location or thing at, upon, in or near which a worker works;

“workplace harassment” means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment;

Social Media

OHSA continued

- If the offensive comments are received in the workplace is that sufficient? – unlikely given the “nexus” requirement in Rainy River
- Is it part of the “workplace” to review Facebook or other social media? – unlikely given the “nexus” requirement in Rainy River
- If the offensive comments are published (including social media) about an employee in the context of their work or workplace is that sufficient? – unlikely given the “nexus” requirement in Rainy River

Social Media

OHSA continued

- Ontario Ministry of Labour website speaks to an employer's duties under the OHSA :
- “It is important for employers to address any unwanted behaviours early to minimize the potential for workplace harassment to lead to workplace violence. Employers, therefore, have specific duties with respect to workplace harassment and workplace violence under the [Occupational Health and Safety Act](#).”
- The harassing or violent person may be someone the worker comes into contact with due to the nature of his or her work. This may include, but is not limited to, a client, customer, volunteer, student, patient, etc.”
- This is still tied to the workplace and is activities that are occurring in the workplace

Social Media

OHSA Continued

- What connection to the workplace can be established?
- If the employee believes it is harassment that is not enough
- Comments/correspondence made at the workplace or sent to the workplace may be enough
- If this pattern is then continued through social media is there a sufficient “nexus” established previously to consider the behavior as workplace harassment?
- This is a difficult nexus to establish

Social Media

Existing Tools

- Cease and desist letters
- Block emails
- Advise that no further correspondence will be read or dealt with
- Ask social media site to remove comments
- Litigation
- Trespass notices

Social Media

Trespass to Property Act

2 (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$10,000.

Social Media

Trespass to Property Act Continued

3 (1) Entry on premises may be prohibited by notice to that effect ***

4 (1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only.

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited.

9 (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

Social Media

Trespass and the Charter

- Freedom of expression
- Not all expression is protected
- Most expression is protected – with the exception of violent expression
- Political expression is highly protected
- Any action taken by a municipality to curb expression that is unwanted must ensure that it will not be found to breach the Charter – any such act/law is invalid and unenforceable

Social Media

Existing Tools Conclusion

- Even if the existing techniques are ineffective, they need to be tried
- The Charter demands that any limitation on free speech be as minimally intrusive as possible
- The Courts will want to see that all other options have been attempted (Rainy River)
- Sometimes they work
- More effective with direct communication/in-person harassment – social media is the more difficult issue

Social Media

Policies – Code of Conduct

- Codes of conduct establish behaviour expected of councillors and staff, not the public
- No express authority to establish standards of behaviour of the public
- No express authority to use a code of conduct to modify the behaviour of the public

Social Media

Policies - OHSA

Two ways to approach:

1. Establish in the policy that external comments are not under the control of the municipality and will not be subject to claims of workplace harassment
 - Define the “workplace” to exclude social media
 - The definition of workplace in the Act will prevail and your policy may not be sufficient protection
2. Alternatively – define how social media comments will be addressed under the policy
 - Set the expectation for staff to limit the measures that will be necessary
 - Consider the circumstances where third party comments will be investigated and addressed
 - This is more likely to be enforceable and meet the intent of the Act

Social Media

Policies – OHSa continued

- Hamilton

“Members of the general public, visitors to City facilities, and individuals conducting business with the City of Hamilton, are expected to refrain from Harassment and Discrimination against Employees. If such Harassment and Discrimination occurs, the City will take any reasonable and necessary steps to ensure a Workplace free from Harassment and Discrimination to the extent possible, which may include trespass notices, contacting police, and involvement of Legal Services etc.”

Social Media

Policies – OHSA continued

Coburg

“This policy applies to all municipal representatives of the Town of Coburg and municipal representatives who are being harassed, discriminated against, and/or who are victims of violence by non-Town employees, such as but not limited to, members of the public, contractors, consultants and delivery or service workers.”

Social Media

Policies – OHSA continued

- How does a OHSA policy apply given *Rainy River*?
- The policy needs to address what the Court had problems with:
 - What location is considered a ‘workplace’ under the OHSA
 - the policy must include a provision that protects employees from harassment from non-employees
 - the policy must establish a clear nexus between the harassment and the workplace
 - set out what constitutes behaviour that interferes with the orderly functioning of the municipality – disrupt meetings, interfere with decision making, and interfere with administration

Social Media

Policies – OHSA continued

- the policy also needs to have a suite of tools to address the harassment – so that if they are ineffective there is an argument that an injunction is the only solution available
- the court in Rainy River listed the following:
 - a trespass notice;
 - if comments are found on a social media site, reporting them and asking for the website owners to remove them;
 - blocking emails;
 - returning obnoxious letters without a response;
 - refusal to deal with the harasser unless they are civil;
 - apply for a peace bond;
 - bringing an individual claim for defamation

Social Media

Policies – Social Media

- Establish a social media policy
- Include expectations for public comments – you control your own sites
- For external sites you don't control establish policies as to when the municipality will intervene, or if you will intervene
- Refer back to the harassment policy

Social Media

By-laws

- This is not a recommendation, only a way to stimulate discussion and consideration of options
- WHEREAS section 32.0.1(1) of the OHSA requires an employer to prepare a workplace violence and harassment policy;
- AND WHEREAS section 32.06(1) of the OHSA requires an employer to develop and maintain a written program to implement the policy with respect to workplace harassment required under clause 32.0.1(1)(b);
- AND WHEREAS section 32.0.7(1) requires an employer to protect a worker from workplace harassment by way of investigation and taking appropriate corrective action to stop the harassment and protect the employee or member of council;
- AND WHEREAS employees should not be exposed to harassment from third parties in person or through social media as a result of their employment duties;
- NOW THEREFORE the Council of the Municipality of enacts the following by-law:**Hail Mary**

Social Media

By-laws continued

- Establish an investigation and reporting system so that there is due process
- Non-employees have no duty to participate
- But if an investigation is undertaken can the findings be binding on a third party?
- Can a citizen be made to comply with all corrective actions the employer has ordered?
- **Offence**
- Can a third party who fails to comply with the corrective actions taken under its OHSWA Workplace Violence and Harassment Policy be found guilty of an offence?
- Can such person be forced to pay an administrative penalty?

Social Media

By-laws continued

- Charter of Rights and Freedoms
- When does the protection of the health and safety of staff allow infringement of freedom of expression?
- Who makes that call?
- What evidence is available to enable that decision to be made?
- Is an investigation under OHSA and a finding of harassment sufficient to impose limits?
- If those limits are not adhered to what escalating enforcement steps are reasonable to limit freedom of expression?

Thank you

Tony Fleming is a Partner in the Land Use Planning and Development Group, Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Our municipal clients consult Tony on all aspects of municipal governance and complex land use planning matters. Tony appears frequently before the Local Planning Appeals Tribunal to defend decisions of municipal Councils and Committees of Adjustment. Tony also appears regularly before the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including defending challenges to municipal by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer.

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