

IS “TRUTH TELLING” ONLINE STILL REASONABLE? A COMPARATIVE APPROACH TO EXTRA-TERRITORIALITY AND DEFAMATION ANALYSIS IN THE DIGITAL AGE

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“On the Internet, we constantly live in a twilight between fact and fiction.”

Over a decade ago, Justice Blair of Ontario’s Court of Appeal queried:

Is there something about defamation on the Internet that distinguishes it...from defamation in another medium? My response to that question is “Yes.”¹

Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed.

This predicament, extensively dealt with by Canadian courts, both summarizes and foretells this presentation’s proposal to conceptually reorient cyber defamation analysis towards a civilian approach, whose hallmark flexibility and adaptability lends itself particularly well to the disruptions of the digital age. Indeed, harnessing the ordinary rules of negligence, and—in principle—foregoing defences, the civilian construction is chiefly interested in the contextual reasonableness of the impugned expression (rather than in its truth or falsity strictly speaking), in contradistinction to its somewhat categorical common law counterpart. At a high level of abstraction, what matters in this analysis is not the truthfulness of the statements but rather the unreasonable character of the expression under the circumstances and the injury that the statement causes. It is therefore recommended that defamation law evolve towards a “negligence standard” in common law parlance. This evolution would require the plaintiff to make a showing of the contextual unreasonableness of impugned speech, an analysis which subsumes truthfulness and obviates the need for defences.

As courts struggle to strike equipose between protecting privacy and reputation with the value of freedom of expression, the civilian approach to defamation offers a framework that can better balance the Internet’s proclivity to exacerbate the reputational harms of statements made online.

Moreover, and compounding the importance of revisiting defamation online, a cyber-publication in one jurisdiction may of course be read and subsequently reposted anywhere in the world, thereby potentially causing reputational harm transcending traditional or national parameters. Canadian courts have grappled with the challenge of enforcing local rights infringed by conduct flowing from outside the country, wary of losing the ability to enforce local norms and policy by rectifying

¹ *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 28, 239 DLR (4th) 577 [*Barrick*].

harm felt in Canada but originating elsewhere. The courts' preoccupation with the potential for judicial helplessness in 'Internet cases' is evidenced by the notably liberalized jurisdiction test in *Goldhar v. Haaretz.com*. The Court, it stands to reason, endeavors to inject flexibility into the existing test and to adapt the steps set out to the complexity of an increasingly multi-jurisdictional landscape. It is therefore essential to at least summarily touch upon the jurisdiction question, alongside that of intermediaries, if we are to have a true contextual understanding of cyber defamation as recommended herein.