

## Defaming of Character

By Spreading False Information Potentially Damaging to Personal Reputation

### Helpful Guide to Understanding the Law of Defamation Including Libel and Slander



Defamation involves untruths that, when told and spread, may injure a person's reputation and thereby cause harm to employment, relationships, friendships, and even one's own confidence, self-esteem, and trust of others. For these reasons, the law bears heavily upon persons who speak falsely about other persons. Defamation can arise from one of two methods. Libel involves disparagement by written words and slander involves disparagement by spoken words. In Ontario, the common law as well as the *Libel and Slander Act, R.S.O. 1990, c. L.12* apply to legal cases involving defamation.

A legal case involving defamation often involves the key question of whether a statement was actually made; and if so, whether the statement was defamatory. In law, the definition of defamation is very broad. Accordingly, once shown that a statement was made, a lawsuit then considers whether the statement was defamatory.

What constitutes as a defamatory statement was recently defined in the case of *Grochowski v. Young*, [2019 ONSC 326](#), while citing the Court of Appeal decision in *Canadian Broadcasting Corp. v. Color Your World Corp.*, [1998 CanLII 1983](#) at paragraph 14, where it is stated:

[18] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The statement is judged by the standard of the ordinary, right-thinking members of society. Hence the test is an objective one.



It is important to note that the definition of what is defamatory omits the requirement that the words were actually defamatory; accordingly, a successful defamation case may result merely by demonstrating that general members of society would find the words defamatory rather than a need to demonstrate that the actual person, or persons, to whom the words were passed actually believed the words and experienced diminished views of the person whom the defamatory words were about. For this reason, a successful defamation case may arise despite the fact that the words were passed to a person who disbelieves the words and is devoid of any reduction in regard to the reputation of the person about whom the words were spoken or published. A defamation case is without need of actual harm as per *O'Malley v. O'Callaghan*, [1992 CanLII 6090](#) (AB QB).

Additionally, an intent to cause harm to the reputation of another is unnecessary to a defamation lawsuit per *Stopforth v. Goyer*, [1979 CanLII 1661](#) (ON CA); *Grochowski*:

[19] Defamation is, for the most part, a strict liability tort and a defendant is liable whether or not he or she intended to make any statement or one which carried a defamatory imputation, or whether or not the defendant intended or reasonably believed it would not convey a false meaning, or refer to the plaintiff or cause him any damage. The innocence, good faith, motive, belief, reasonableness or intention of the defendant is generally irrelevant to the question of liability. However, it must be shown that the defendant acted intentionally or negligently in publishing the remarks to a third person.



With the above said, one must bear in mind that not all untrue and unflattering words are deemed defamatory. In a defamation case, the context of the situation in which the words were passed in addition to the words themselves are considered. A heated debate wherein one person states that the another person is an "*idiot*" while in the presence of other persons is unlikely to found a successful legal case as 'right-thinking members of society' would likely recognize the inflammatory nature of the debate with a corresponding disregard to the statement and therefore lack of any lowering of reputation (Klar, Lewis: *Tort Law* (3d) at 675). Additionally, the 'right thinking ordinary person' is imperfect and remains imperfect; *Bou Malhab v. Diffusion Métromédia CMR inc.*, [\[2011\] 1 S.C.R. 214](#):



[41] Although the ordinary person reacts like a sensible person who, like the reasonable person, respects fundamental rights, care must be taken not to idealize the ordinary person and consider him or her to be impervious to all negligent, racist or discriminatory comments, as the effect of this would be to sterilize the action in defamation. As the Superior Court stated in *Hervieux-Payette v. Société Saint-Jean-Baptiste de Montréal*, [1997 CanLII 8276](#) (QC CS), [1998] R.J.Q. 131 (reversed by the Court of Appeal on other grounds, 2002 CanLII 8266)), [TRANSLATION] “[t]his ordinary person is neither an encyclopedist nor an ignoramus” (p. 143). As I have noted, in assessing injury in an action in defamation, the ordinary person is only an expedient used to identify damage to reputation. Judges must therefore avoid limiting themselves to an inflexible test that would prevent them from recognizing actual damage to reputation where it occurs.

### Spread of Rumours by Repeat

What a person says without knowing the truth of the matter or without bearing knowledge to the original information poses significant risk of defamation whereas the law of defamation applies to those who spread a falsehood. A person is inexcused from liability and is without the defence of 'someone else said it first'; *Wan v. Lau*, [2016 ONSC 127](#):

[32] A person who publishes defamatory words is not insulated from liability because he is repeating words said by another person:

Our... law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided in its circulation. He must answer for it just as if he had started it himself.

### Justification



Truth of defamatory words provides a justified reason for uttering or publishing words that are defamatory. Essentially, while the words may defame in the sense that the words, "*lower the plaintiff in the estimation of right-thinking members of society*", where the words are true, such 'lowering' occurs due to the genuine conduct of the Plaintiff rather than the telling of the conduct by the Defendant. On this

basis, the spreading of truthful rumours may be lawful from the 'defamation' point of view; however, do see 'breach of privacy' concerns, among other things). It is necessary to note that when mounting a justification defence on the basis of truth, such must be pleaded at the outset. Furthermore, it is the 'sting of words' beyond just the actual words that must be proven true; *Garrett v. Mikalachki*, 2000 CarswellOnt 1298:

130 The defendants did not plead justification which is a prerequisite to relying on a defence that the words were true: *Manitoba Free Press Co. v. Martin* (1892), [21 S.C.R. 518](#) (S.C.C.).

131 In any event, such a defence would fail here because the burden is on the defendants to prove that the sting of the words is true and they have not done so.

### Defence as Fairness of Comment

To make out a 'defence as fairness of comment', or justification, a Defendant will need to make out five elements per *Grochowski*:

[24] The defendant has the burden to establish these five elements for the defence of fair comment to apply:

- (1) a comment, not a statement of fact;
- (2) made on accurate facts;
- (3) on a matter of public interest;
- (4) fairly made; and
- (5) made without malice.

### Qualified Privilege

In certain circumstances, there may exist an occasion where a person bears a duty or right to issue a document or utter a statement that is defamatory of another person. Such occasions may involve a council meeting, court action, election campaign, among other things. In such circumstances, a 'qualified privilege' exists whereby documents or statements may be defamatory without risk of liability by virtue of the balancing of the right to freedom of speech and opinion versus the right of protection from defamation.

The *O'Malley* case articulates well the elements required to establish the defence of qualified privilege as well as the limitations to such a qualified privilege whereas if defamatory statements go outside the bounds of the limitations, any otherwise available defence of qualified privilege is negated:

[40] The defence of qualified privilege allows a person to make defamatory and untrue statements about another without incurring liability under the law of defamation, provided that the statements are made in good faith and in the absence of malice. Gatley, at p. 185, states:

There are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made.

The occasions giving rise to a qualified privilege are numerous and are generally the result of a legal, social or moral duty on the publisher of the communications. It is clear that it is the occasion and not the statement that gives rise to the privilege (Brown, p. 472). Moreover, in determining whether a communication is so privileged, the alleged libel will be analyzed, having regard to the parties involved and the circumstances in which it was published. Other considerations have been found to be (per Lamont J.A. in *Sapiro v. Leader Publishing Co.*, [1926 CanLII 130](#) (SK CA), [1926] 2 W.W.R. 268, 20 Sask. L.R. 449 (C.A.), at p. 453 [Sask. L.R.]):



... the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and ... whether or not what has been published was germane and reasonably appropriate to the occasion.

Per the Supreme Court in *Botiuk v. Toronto Free Press Publications Ltd.*, [\[1995\] 3 S.C.R. 3](#) at paragraph 79:

"[w]here an occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff".



Accordingly, where the Defendant speaks or writes *mala fide*, the qualified privilege fails and liability may apply. It is notable that the burden of proof that words were *mala fide* is placed upon the Plaintiff. This results in a shifting back and forth of various burdens. Initially, the Plaintiff must simply prove that words were spoken that, "... *lower the plaintiff in the estimation of right-thinking members of society ...*", per *Grochowski* case as above. The Defendant would then bear the burden of proving that such words were true and therefore permissible; however, if such words were untrue yet arising within a 'qualified privilege' occasion, the Defendant receives a 'free pass' unless the *mala fide* utterance is proven by the Plaintiff; per *Hill v. Church of Scientology of Toronto*, [\[1995\] 2 S.C.R. 1130](#):

144 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

145 Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, supra, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, 1956 CanLII 124 (ON CA), [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, supra, at pp. 323-24, and *Netupsky v. Craig*, 1972 CanLII 19 (SCC), [1973] S.C.R. 55, at pp. 61-62.

146 Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, supra, at pp. 13-193 and 13-194; *Salmond and Heuston on the Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at pp. 320-21 in *Adam v. Ward*, supra:

. . . the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.



147 In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in *Douglas v. Tucker*, 1951 CanLII 54 (SCC), [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a charge of fraud which had been adjourned until after the election. This Court held that the defendant had an interest in responding to the plaintiff's denial, thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 286).

#### Definition of Occasions

What constitutes as a 'qualified privilege occasion' was well defined in the matter of *David Robinson and Marilyn Roberson v. Ontario Society for the Prevention of Cruelty to Animals*, 2012 ONSC 3647 as:

[11] The law concerning the defence of qualified privilege against a claim of libel can be summarized as follows: certain defamatory statements receive a limited and conditional immunity if they serve "the common convenience and welfare of society."<sup>1</sup> The defence of qualified privilege is thus premised upon the need of the intended audience to receive frank and uninhibited communication concerning a particular subject.<sup>2</sup> The circumstances in which the defence arises are referred to as occasions of qualified privilege. The privilege attaches to the occasion and is limited in the response to that occasion. The determination of whether an occasion of qualified privilege exists depends upon whether the person publishing the statement has an interest or duty, legal, social, moral or personal, to publish the information and further, whether the person or persons to whom it is addressed have a corresponding duty or interest in receiving the information.<sup>3</sup>





1 *Grant v. Torstar Corp.* [2009 SCC 61](#) (CanLII), [2009] S.C.J. No. 61 at page 30

2 *Reynolds v. Times Newspaper Ltd.* [1999] 3 W.L.R. 1010 at 1017 [H.L.]

3 *Hill v. Church of Scientology of Toronto* 1995 CanLII 59 (SCC), [1995] S.C.J. No. 64 at para. 163

[12] The categories of qualified privilege are not exhaustive. Each claim must be assessed on an objective standard and in the context of the particular circumstances. A pre-existing relationship between the parties, though not essential, is most common. Qualified privilege will more readily be recognized in circumstances involving established relationships given that the defence is premised on a reciprocal duty to inform and to be informed.<sup>4</sup> Once invoked, qualified privilege creates a presumption against malice on the part of the defendant. The existence of malice, as a dominant and improper motive, defeats the defence. In this context, malice is defined as a desire to injure the plaintiff, intentional dishonesty, reckless disregard for the truth, or any ulterior motive that conflicts with the interest or duty created by the occasion.<sup>5</sup>

4 *Kearns v. Bar Council* [2003] All E.R. 534 at p. 547 (C.A.)

5 *Cusson v. Quan* [2007 ONCA 771](#) (CanLII), [2007] OJ No. 4348 (Ont.C.A.) revd on other grounds 2009 SCC 62 (CanLII), [2009] SCJ No. 62 (S.C.C.)

#### Proof of Malice

The Plaintiff may seek to prove malice in a number of ways including express malice where the words are plainly and obviously of a malicious intent. Malice can also be proven by showing that the Defendant holds a personal vendetta against the Plaintiff and that a reckless disregard for truth may be sufficient in establishing malice; *Todd v. Everett*, [2014 ONSC 1322](#):



[11] Certainly if there was evidence from which a trier of fact could draw the inference that the Defendant acted with reckless disregard for the truth or the Defendant's actions were motivated by a personal vendetta against the Plaintiff that would be a basis for a finding of malice. The issue raised on this appeal is whether there was any evidence to this effect or any other evidence that would justify a finding of malice.

### Disregard for the Truth

[12] On this point the Deputy Judge found as follows:

[The Defendant] had a total disregard for the truth and indeed had a total disregard for the consequences ... He had every opportunity to verify the truth and chose not to ... It would have been a simple task to verify the truth by speaking to the plaintiff or Mr. Currie but he chose not to ... All these incidents occurred without a tittle of evidence to support the allegations.

It is important to take heed that 'proof of malice' requires demonstrating that a 'belief of truth' regarding was false or reckless. Malice requires more than mere carelessness whereas 'belief of truth' about a fact may be honestly held despite carelessness in coming to the belief per *Botiuk*:

96 A distinction in law exists between "carelessness" with regard to the truth, which does not amount to actual malice, and "recklessness", which does. In *The Law of Defamation in Canada*, supra, R. E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):

... a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.



97 The author then puts forward the reasons of Lord Diplock in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), as representative (though not definitively) of the Canadian position. In that case Lord Diplock wrote at p. 150:

. . . what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. . . But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more. [Emphasis added.]

Whether the carelessness of a defamer rises to the level of recklessness requires a 'reasonable expectation' review of the conduct involved including the sophistication of the defamer and whether the defamer ought to diligently review a document or make adequate inquiries so to ensure truth prior to issuing or signing a document. This reasonable expectation in determining accuracy applies especially so to legal professionals when signing Declarations or Affidavit documents containing potentially defaming information; per *Botiuk*:



98 This proposition does indeed seem to be generally representative of the Canadian position on the matter. However, when the defendants are lawyers who must be presumed to be reasonably familiar with both the law of libel and the legal consequences flowing from the signing of a document, their actions will be more closely scrutinized than would those of a lay person. That is to say, actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer with all the resulting legal consequences of reckless behaviour. That is the very situation presented in this case.

99 The appellant lawyers signed a Lawyers' Declaration which stated that they had "familiarized" themselves with the Report and that it "correctly and accurately" reflected the state of affairs during and after the Kosygin demonstration. Yet, several of them had not even read it. Most of them did not know anything about the preparation of Botiuk's account. Some neither talked to Botiuk before signing the Lawyers' Declaration nor discussed it with the others. As lawyers, they should have known how significant the impact of the Lawyers' Declaration would be on Botiuk. They were duty-bound to take reasonable steps to investigate and ensure that the document was correct.

100 In the Maksymec Reply, Maksymec referred to the Lawyers' Declaration as the basis for the statement that the various lawyers, including the appellants, gave generously of their time and assistance before and during the Vannini inquiry and that they had agreed not to charge for their work. Although the appellants knew that in reality they had contributed very little and that there could not have been any such agreement, they did nothing to correct the inaccurate impression left by the Maksymec Reply and raised no objection to Maksymec's subsequent use of the Lawyers' Declaration.

101 Although it is not determinative, the conduct of the appellant lawyers prior to and during the trial can properly be taken into consideration as an indication of their general attitude toward Botiuk. None of them apologized to him or retracted what was written in the Lawyers' Declaration. Rather, as the trial progressed and the true situation was revealed, each continued to maintain that the plaintiff was wrong. As the trial judge found, the appellants Zarowsky and Bardyn manifested hostility towards the plaintiff during their testimony, particularly in relation to the extent of Botiuk's participation at the inquiry. Despite the overwhelming evidence on this point, most of the lawyers were reluctant to acknowledge how little each of them had done and, conversely, how much Botiuk had given of his time and energy.

102 The appellants must have, or at the very least should have, realized that the endorsement of eight prominent lawyers would have a devastating effect on Botiuk's reputation. The evidence indicates that after the publication of the Lawyers' Declaration, public opinion in the community swung decisively against Botiuk. Witnesses testified that they became convinced that the rumours might actually be true after they had read the document.

### Response to Defaming

It may be quite appropriate to respond to defamatory statements by publishing the defamatory statements so to enable clarifying public debate; *Whitehead v. Sarachman*, [2012 ONSC 6641](#) at paragraph 70:

*... Mis-statements, overstatements and excessive language may be exposed and corrected through public debate, often in a more timely and effective manner than through the slow process of a civil action. ...*

Also, per *Nixon v. O'Callaghan*, [1926 CanLII 421](#) (ON CA):

*The law justifies a man in repelling a libellous charge by a denial or an explanation. ...*

Furthermore, limited qualified privilege attaches to the response to defamatory statements as was stated in *O'Malley v. O'Callaghan*, [1992 CanLII 6090](#) :



[41] In this case, the conclusion that the four occasions were subject to a qualified privilege arises from several factors. First, the defendant was at all material times defending himself, his staff and the Calgary Herald from allegations of bias in their coverage of the abortion debate. This factor of defence or response has been integral in characterizing certain statements as privileged. Gatley, p. 218, states:

... a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published *bona fide* and are fairly relevant to the accusations made.

### General Damage

As it is nearly impossible to accurately ascertain an exact monetary value for damage to reputation, awards in defamation cases are general and 'at-large', meaning at the discretion of judge or jury (Klar, Lewis: *Tort Law (3d)* at 710). The basis for awarding general damages was recently stated in *Grochowski v. Young*, [2019 ONSC 326](#):

[27] General damages are presumed in defamation cases from the very publication of the false statement and are awarded at large. They need not be established by proof of actual loss. General damages serve three functions: 1) to act as a consolation for distress suffered from the publication of the statement; 2) to repair harm to reputation; and 3) as a vindication of reputation. A successful plaintiff is entitled to receive an award of general damages that will be sufficient to provide suitable compensation, consolation and vindication on the basis of all of the circumstances.

Also per *Grochowski*, the factors for consideration when reviewing quantum of general damages include whether the defamatory statement was genuinely believed as actually true rather than ultimately false and whether the statement was expressed from a place of "*hatred, ridicule and contempt and to destroy ... reputation*":

[83] I am mindful that defamatory statements occupy a continuum ranging from a defamatory statement made in the *bona fide* belief, though wrongly held, that the statement is true all the way to a defamatory statement made, knowing that it is untrue and made with the express intent to bring the plaintiff into hatred, ridicule and contempt and to destroy the plaintiff's reputation in society. Each libel case is unique and damages flow from the confluence of many factors and must be done with restraint and knowing that general damages are not based on any provable or measurable loss.

Furthermore, where multiple persons took part in the defamatory statements, whereas one person may write the defamatory statement, another may repeat the defamatory statement, and another may endorse or approve the defamatory statement, all such persons become jointly and severally liable for the defamatory statement. Such was said in *Hill* at paragraph 176:

... It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. It would thus be inappropriate and wrong in law to have a jury attempt to apportion liability either for general or for special damages between the joint tortfeasors Manning and Scientology. See *Lawson v. Burns*, [1976] 6 W.W.R. 362 (B.C.S.C.), at pp. 368-69; Gatley on Libel and Slander (8th ed.), supra, at p. 600. However, this comment does not apply to aggravated damages, which are assessed on the basis of the particular malice of each joint tortfeasor.

### Vocational Profession

Additionally, the profession or vocation of the person defamed may give rise to a higher damages award. This occurred in *Hill* as was cited and restated in the recent case of *McNairn v. Murphy*, [2017 ONSC 1678](#) where a lawyer was the target of the defamation:



[35] The reputation of a lawyer is of paramount importance; to clients, to the members of the legal profession to the judiciary and to the public. A good reputation is a cornerstone of the lawyer's professional life. In *Hill v. The Church of Scientology*, [1995 CanLII 59 \(SCC\)](#), [\[1995\] 2 S.C.R. 1130](#), the Supreme Court of Canada remarked upon the potentially insidious effect of the defamatory allegations of criminal behaviour on a lawyer.

[39] General damages in defamation cases are to be assumed from the very publication of false statements and are awarded at large. McNairn need not show a loss. In *Mina Mar Group Inc. v. Divine*, [2011 ONSC 1172](#), Justice Perrell noted that general damages in defamation cases can serve three functions;

a) to console the plaintiff for the distress suffered in the publication of the defence

b) to repair the harm to the plaintiff's reputation including, where relevant, business reputation and

c) to vindicate the plaintiff's reputation.

[40] He identified the following six factors in determining general damages:

a) the plaintiff's position and standing;

b) the nature and seriousness of the defamatory statements;

c) the mode in extent of the publication;

d) the absence or refusal to retract the defamatory statement or to apologize for;

e) the conduct and motive of the defendant;

f) the presence of aggravating or mitigating circumstances





[43] Aggravated damages may be awarded in defamation cases in circumstances where the defendant's conduct has been particularly high-handed, malicious or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the defamatory statement.

[44] Like a general damages that are compensatory nature, the assessment of aggravated damages requires a consideration of the entire conduct of the defendant prior to the publication of the defamatory statement and continuing through to the inclusion of trial. For aggravated damages to be awarded there must be a finding that the defendant was motivated by actual malice which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.

[45] Factors relevant to an assessment of aggravated damages include:

a) whether the defendant retracted the defamatory statement tendered apology;

b) whether there was a repetition of the defamatory statement;

c) whether the defendant's conduct was calculated to deter the plaintiff from proceeding with the defamation action;

d) whether the defendant conducted a prolonged or hostile cross-examination or pleaded a justification which the defendant knew was bound to fail;

e) the general manner in which the defendant presented his case; and

f) the conduct of the defendant at the time of the publication of the defamatory statement.

Such was also stated in the case of *Rutman v. Rabinowitz*, [2018 ONCA 80](#) which involved the defamation of a chartered accountant.



[66] The injurious effects of defamatory statements regarding a professional are particularly acute. *Hill*, which involved libelous statements about a young lawyer who went on to achieve great professional success, is a case in point. As the Supreme Court stressed, at paras. 180-181, a lawyer's reputation is of paramount importance. Clients, colleagues and the courts depend on the lawyer's integrity, and "[a]nything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer." The defamed lawyer has no way of knowing what members of the public, colleagues and others may have been affected by the defendant's defamatory allegations or of being certain who may have accepted the false allegations of wrongdoing levied against him.

[67] These comments are apposite here. The importance of a reputation for integrity and trustworthiness is not confined to lawyers. It applies equally to other professions and callings, including chartered accountants and tax advisors like Rutman: *Botiuk*, at paras. 91-92.

### **Punitive Damages**

Furthermore, where the defamation was malicious and harmful, significant aggravated damages and punitive damages may be awarded per *Hill*:

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.