

MUD SPLATTERS AND COMMON SENSE

JEANANNE KIRWIN, Q.C.

The blank white page and the faceless screen of a computer monitor seem equally dispassionate. But they are not. When our words vent an opinion and appear on a page with a “send” function linking to social media, the consequences can be decidedly less benign.

A few years ago, I met a client who owned a home improvement company. He was troubled by a single online review of his business that was unflattering and untrue; a review that ruined both the perfect rating score of his company and his sleep. He had several options:

- Contact the customer, explain his version of the facts and ask her to retract the review. Although the review was anonymous, my client knew who had likely posted it. He called her, but she said she would withdraw her criticism only if he would reduce his invoice.
- Contact the site that published the review and request a retraction. When the businessman pursued this avenue, the review site remained adamant; its credibility depended upon its neutrality. It did not monitor reviews except for profanity. Some sites have dispute resolution mechanisms for balancing the reputations of businesses (that are built over the years and can be destroyed in minutes) and the honest (rather than untrue or vindictive) views of users.
- Contact the ISP—Internet Service Provider—of the reviewer’s website and launch a complaint. The facts of this case did not involve copyright infringement, so he could not invoke the statutory provisions allowing copyright owners to require ISPs to notify website owners of copyright issues. He tried contacting the ISP anyway but received no response.

- Sue for defamation. Defamation includes both written (libel) and verbal (slander) communication that tends to lower public esteem of the person or other subjects of the statement. The law of defamation is ancient, technical and due for reform. My client was not interested in suing. Not only are lawsuits expensive; they are public. If he sued, the unflattering post could become even more publicized than it already was. As I explained to this client, and to borrow an analogy, insults are like mud splatters. It is often cleaner to let a splatter dry and flick it off than to try removing it immediately when the only effect will be quite literally to rub it in more deeply.

The law had no ready solution for my client. The poor review eventually became subsumed in other positive ones, flicked away like a dry flake of mud.

In another case, I represented a business owner whose competitor was posting fake poor reviews. In turn, the business owner retaliated with ill-advised Facebook messages. The dispute was resolved when both parties retracted their words. The parties could have saved the expense of lawyers if they had used common sense and used their words judiciously.

The potential scope of the damage is far-reaching when defamatory comments are made online. Where such defamation adversely affects a victim’s employment or has broken his business prospects or the vilification is already so public there is no downside to the publicity of litigation, victims have sued and won. Recent Canadian cases show that in a variety of social media situations, including Facebook, defamation actions can be successful and significant damage awards can be made.



“
There is a difference between a fair and legally justified expression of opinion backed with an accurate depiction of the facts, and malicious retaliation and untrue allegations. For social media users: stick to the truth, and ensure your opinions are clearly framed that way.
 ”

There is a difference between a fair and legally justified expression of opinion backed with an accurate depiction of the facts, and malicious retaliation and untrue allegations. For social media users: stick to the truth, and ensure your opinions are clearly framed that way. For targets of unfair social media attacks: know that solutions exist but can be hard-won and possibly illusory. In all cases, may common sense prevail. ■

Jeananne Kirwin, Q.C., a lawyer in Edmonton, practices in the areas of intellectual property and corporate/commercial law with an emphasis on trademark and copyright registration and enforcement (kirwinllp.com).