

L E G A L E Y E

by Michael Bergman

Caution to the talebearer

Filmmakers are justifiably concerned that their projects not become a source of expense and damaging litigation. One source which may call for the courtroom affects the activities of most film creative personnel, and that is defamation.

Defamation is bound up with the legal policy of protecting individual reputations. It takes the form of an oral or written statement designed to bring an individual into disrepute, contempt or ridicule. The law of defamation seeks to recompense persons whose character and reputation are wrongly impugned.

In English Canada defamation is divided into two categories, slander and libel. This distinction does not exist in the civil law of Quebec. Traditionally a slander is constituted of oral statements which impute the commission of a crime, incompetency, a "loathsome" disease or even

unchastity. Libel consists of written defamatory statements. Technically the distinction between the two has been blurred such that film, television and radio broadcasts containing defamatory statements are considered as libelous. There is no absolute definition of defamation. Statements may be classified as defamatory or not in different times, societies, contexts, and even with regard to different types of individuals. Even the precise words and their tendencies can fall both ways. Would a phrase such as "How are you, you old horse-thief?" be interpreted as a jovial salutation or an innuendo?

Only a living person may be defamed. There is no recourse to the estate of a deceased against defamation unless provided by local statute. Even fictitious persons such as corporations may be defamed although the scope may be somewhat limited (can a corporation have a "loathsome

disease"?). In all cases defamation must be aimed at an individual who can be identified even if that individual is not named. There is no defamation in simply thinking a nasty thought. The defamation must be communicated even if only to a single individual, and the extent of communication will affect the amount of damages.

The law considers the stringent safeguard against defamation so important that liability for defamation depends not on the intention of the defamer but on the fact of defamation. This is significant for plaintiff in a court-case, will have a less onerous burden of proof to establish the redress he seeks. This strict liability is mitigated to some extent in the case of distributors of defamatory statements; that is, persons or entities who are not the originators of the material but simply communicators or publishers. For these distributors the defence of due care and caution or legitimate ignorance may abide.

A defamatory statement may not necessarily be actionable at law. One of the principal concerns in the law of defamation has been the development of several important defences. The defendant may demonstrate that the defamation was justified either because it was true, for the public benefit or fair comment. The truth speaks for itself if the defamatory statement was not false; if a man has no character to injure, derogatory statements are no more than that. The public benefit is a notion based on freedom of speech. In this defence the concept of some greater public good being served by even a defamatory statement takes precedence over the individual interests the law seeks to protect. Fair comment consists of reasonable assessments of another's comment or activities.

Privilege, whether absolute or relative, is another form of defence. This consists of such matters as statements in the House of Commons or in court proceedings or in reports thereof. The comments between a solicitor and his client is another example. These are defences which recognize that there are certain forums where completely free and uninhibited discussion must take place.

The filmmaker, and particularly the scriptwriter, will be concerned to assure that the content of a production does not cross the boundary line of defamation where scenes relate or reflect on the conduct of real persons. A degree of fairness and propriety that will be the uppermost considerations. It is evident that public figures by virtue of their office

must suffer the criticism that a democratic society considers fair play in politics or by virtue of living in the public eye. Nevertheless, even for public officials, there are limits on the degree of vituperative conjecture that can be made.

Defamation gives rise to two recourses, either damages or injunction. Damages is a sum of money awarded to repair the harm or loss. In many ways the amount is a discretionary matter depending on the extent of communication, the character of the defamed individual and the defamatory statement itself. Injunction is the issue of an order by the court preventing the repeat communication of the defamatory statements or even ordering the destruction or impounding of materials containing same. The violation of such a court order can give rise to a fine or imprisonment.

Needless to say, these recourses, if imposed, could have drastic results on a feature film. It is for this reason that all principal contracts signed for a movie will include warranties that its content will not contain any defamatory material. This is true of not only personnel contracts but completion guarantees and investment agreements. In fulfilling their contractual obligations, per-

sons such as screenwriters and directors will want to be quite cautious that they do not violate this obligation. They can be forced into a court proceeding to take up the producer's defence should the producer be sued for defamation. Creative personnel should also be most reluctant to carry out instructions which may tend to create or perpetuate defamatory statements since their personal liability can be the consequence. This onerous responsibility should also be considered in light of the fact that what may be defamatory in one country may not be in another. Creative personnel will have to display judgment according to a common worldwide denominator to adequately protect themselves.

If any further prod is needed to incite caution one should remember that there is such an animal as criminal defamation, a crime provided for in the Criminal Code.

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