



LAW COMMISSION OF ONTARIO
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Defamation Law in the Internet Age

Presentation to CIAJ 2019 Annual Conference

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<http://www.lco-cdo.org/defamation>

A New Defamation Paradigm

- Defamation law protects reputation from harm caused by false speech

- Reputation  Free Expression

- Impact of the internet:

- New types of/forums for speech
 - No publishing standards
 - Anonymous speech
 - Expanded capacity for reputational harm
 - Transnational arena for speech
- Overriding concern: limitations of the court system and access to justice

Aspects of Internet Speech

Challenges for Defamation Law

Geographically indeterminate



When should courts assert jurisdiction? How to enforce domestic law?

Easily and instantly republished



What good is a limitation period? What good is a court order? (whack-a-mole problem)

Hosted by internet platforms



What responsibility should intermediaries have for defamation on their platform?

Often anonymous



How does a plaintiff know who to sue or enforce a court order?

Informal, casual



How do we determine defamatory meaning?

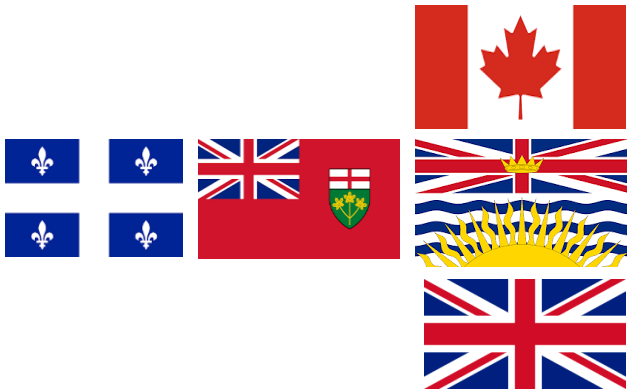
Permanent, ongoing harm



How useful is a damages award?

Defamation Law Reform

- Law dates from 17th century
- Recent reforms:



Series of SCC decisions since 2008

Anti-SLAPP legislation in Québec, Ontario and British Columbia

England & Wales - *Defamation Act 2013*

- Reform initiatives underway in Ontario, Australia, Scotland, Ireland and Northern Ireland
- Reform must go beyond “rearranging deckchairs on the Titanic”.

Concerns re Intermediary Liability

Intermediaries are liable as **publishers** of third party defamation where they have **knowledge** of and **control** over the defamation but don't remove it.

Is the law:

Legitimate?

- Platforms are responsible for determining the legality of third party content

Workable?

- How are platforms to know whether a post is defamatory?

Predictable?

- Endless technological variations on platform involvement with content

Consistent with Corporate Social Responsibility?

- Platforms are encouraged to take a “hands off” approach to content

Protective of Free Expression?

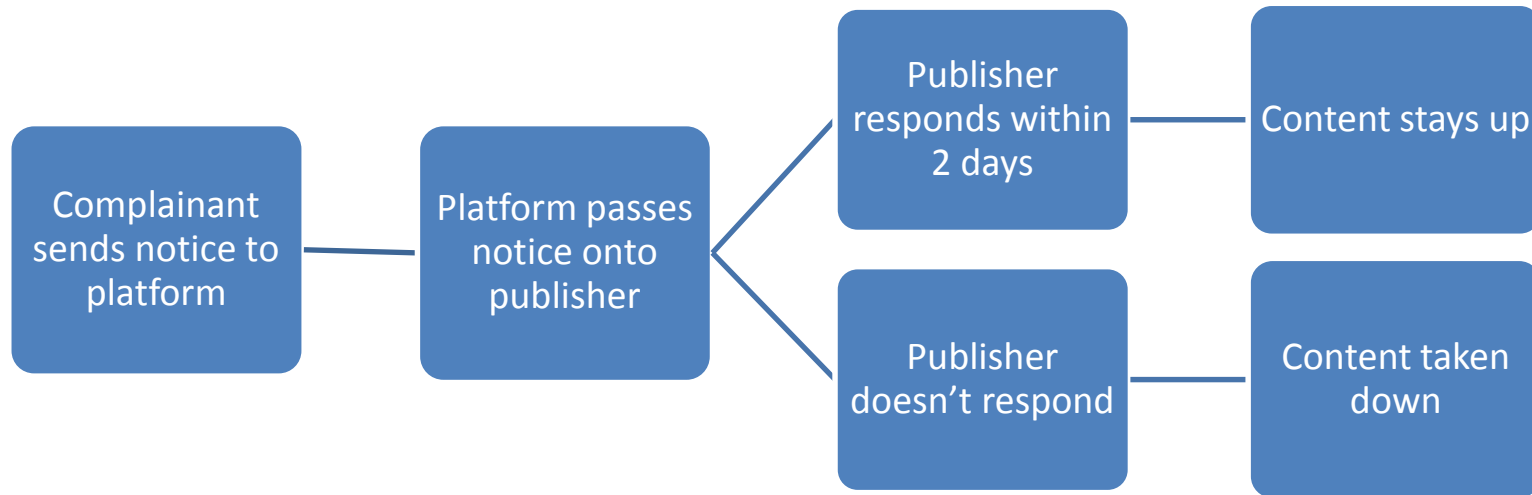
- Platforms have an incentive to remove controversial content

Approaches to Intermediary Liability

	Liability	Regulation	Drawbacks
US	Statutory immunity	None	No effective remedy for online defamation
EU	Safe-harbour from liability in damages <i>if</i> regulation met	If actual knowledge of illegal information, must remove post expeditiously	Discourages content moderation Encourages over-removal of content Platform = quasi-judicial decision-maker
UK	If poster identifiable, statutory immunity If poster not identifiable = safe-harbour from liability <i>if</i> regulation met	If notice received, must pass on to poster. Unless poster willing to be identified, must remove post	No takedown remedy where poster identifiable No safeguard against abuse Voluntary, complex and not used in practice
Australia	Common law	None (government reform underway)	Discourages content moderation Encourages over-removal of content Platform = quasi-judicial decision-maker
Ontario-Suggested	Statutory immunity from liability in damages	If notice received, must pass on to poster. Unless poster responds, must remove post	No damages remedy against platform

Suggested Notice and Takedown Remedy

(Professors Emily Laidlaw and Hilary Young)



- Platforms do *not* assess merits of complaints
- If platforms don't comply?
 - Statutory fine
 - No liability in defamation law

LCO's Final Report

- Will make recommendations on intermediary liability and a host of other problems in defamation law
- Anticipated release in January 2020