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Can you defame someone just by hitting "reply" to an email?

Pierre Lebel didn't like that Miranda Dyck was following his daughter on Twitter. Mr. Lebel sent an email to Andre Picotte (and several others). Mr. Lebel asked Mr. Picotte to email Ms. Dyck asking that she un-follow Mr. Lebel's daughter.

Mr. Picotte hit "reply," and wrote just two simple letters: "ok." A few minutes later he wrote again to Mr. Lebel, asking for Ms. Dyck's email address and for proof that she was, in fact, following Mr. Lebel's daughter on Twitter.

This email exchange apparently came to Ms. Dyck's attention. She didn't like it either, and sued Mr. Lebel, Mr. Picotte, a third defendant and their employer for defamatory libel.

Mr. Picotte brought a motion to strike under Ontario's Rule 21.01(1)(b). He argued that, in replying to an email, he should not be held to have "published" or "republished" anything in the original email to a third party, including anything that might have been defamatory of Ms. Dyck.

In the recent decision of *Dyck v The Canadian Association of Professional Employees*, Justice Robert Smith agreed.

The motion to strike proceeded on the basis of the pleadings (including the emails, which were incorporated by reference).

It is an essential element of the tort of defamation that the defamatory statement actually be communicated to someone other than the plaintiff.

Justice Smith found that even if Mr. Lebel's original email contained statements that were allegedly defamatory, a mere "reply" sent back to Mr. Lebel which included the text of his original email, that email could not constitute "publishing" or "republishing" of the material.

Ms. Dyck had conceded this point. However, he argued that, in pleading that "It is unknown whether the Lebel emails have been republished further", she had meant to plead that Mr. Picotte had (possibly) BCCed other individuals, although she was unaware of who those people may be. Applying the Court of Appeal's decision in *Guergis v Novak*, the Court held that Ms. Dyck had to, but could not, could not make out a *prima facie* case that the statement was made to a named person and could not produce uncontradicted evidence of publication to a named person.

This case illustrates simply the application of classic defamation principles to the electronic age.

Courts have long held that defamatory statements that are merely “sent back” to their original author will not satisfy an essential requirement that the statements be published (or re-published) to a third party (i.e. other than the author and the plaintiff). It should be no surprise that a reply email which includes the original will be treated the same way.

It is less clear whether a court would have found the action untenable if Mr. Picotte had hit “reply all,” sending the original email again to all of its original recipients. Publication (and republication) on the internet is context-specific (as the Supreme Court of Canada confirmed in *Crookes v Newton*).

We may hit “reply all” dozens of times a day, and may often be unaware of all of the content in an email chain reproduced below our own new message. This is a context in which Courts should continue to narrow the scope for inadvertent republication, at least where we don’t explicitly endorse the messages below.

With notes from Kate Costin