

KEEPING CURRENT

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Damages in a defamation action

By Stephen Thiele

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Reputational harm is serious. It can have devastating impacts on the person whose reputation has been diminished. In the law of defamation, courts grant monetary awards to plaintiffs who suffered reputation harm for the purpose of permitting the plaintiff to restore their reputation. The kinds of damages awarded are general damages, aggravated damages and punitive damages. Special damages, such as loss of profit or loss of income, might also be available if such losses were caused by the defamation. Although the amount of damages that a court will award varies on a case-by-case basis, courts seek to ensure consistency in the amounts of damages awarded by considering awards granted in other cases.

In [*Carnegie v. Descalchuk, 2022 ABKB 720*](#), the court reviewed the principles that govern an award of damages in a defamation action that involved repeated defamatory posts made about the adult plaintiff by counterclaim, C, and her daughter, on the defendant by counterclaim's, D's, Facebook social media page, on TikTok and on YouTube.

C and D had met at a karate club in 2014. C, her husband and daughter were members of the club. A year later, the relationship between the parties soured and they became involved in a series of disputes that required multiple court attendances and the issuing of Restraining Orders because of repeated online harassment. C admitted that in 2016, she had posted online that D was dangerous and a liar, and that people should not hire him, rent to him or allow children around him.

D also posted statements online about the plaintiff and her daughter which resulted in humiliating rumours and gossip. C alleged that D had created a Facebook group called "Crack Whores Are on the Loose", and that D had referred to her as a "crack whore" and targeted her daughter. D's online postings about C and her daughter continued notwithstanding the Restraining Orders, including a consent mutual Restraining Order granted by the court in 2018. The online postings extended over six years. As a result, D was arrested twice for breaching the restraining orders against him.

C testified that the postings injured her feelings and had significant psychological impacts on her and her daughter, including humiliation, increased anxiety, depression and other symptoms. In addition, C testified that as a result of the postings she decreased her volunteer activity within the town of 3,000 people where she lived. However, there was evidence to show that C and her family were held in high regard in their community despite the defendant's negative online postings. In 2019, C's family were awarded the Outstanding Resident Award for their positive contributions to their small community. There was also no evidence that the plaintiff, who sold jelly at farmers' markets and online, suffered any financial harm to her small business.

In the result, the court found that C's evidence was credible, while D's evidence was unreliable and not credible. D was found to have tailored his evidence to inflict further distress on C. C's counterclaim was successful and she and her daughter were entitled to general damages, aggravated damages and punitive damages.

Under Alberta law, a statutory presumption exists that when defamation is proved there are damages. This is the same as the common law.

In defamation, general damages, which are the most common form of damages, are intended to compensate a plaintiff for reputational loss and injury to a plaintiff's feelings. General damages are intended to permit a plaintiff to restore their reputation.

As explained in [Rutman v. Rabinowitz, 2018 ONCA 80](#), the assessment of damages in each case must account for:

a) a myriad of idiosyncratic factors particular to the case;

b) the misconduct at issue; and
c) the conduct of the litigation.

In [Hill v. Church of Scientology of Toronto, 1995 CanLII 59 \(SCC\)](#), the court listed the following factors that needed to be taken into account when assessing general damages in a defamation case:

- 1) the plaintiff's conduct;
- 2) the plaintiff's position and standing;
- 3) the nature of the defamatory statement;
- 4) the mode and extent of the publication;
- 5) the absence or refusal of any retraction or apology; and
- 6) the conduct of the defendant from the time the defamation was published to the finding of the court.

The court noted that it has also been held that where defamatory material is published in retaliation to a prior defamation by a plaintiff, lower damages to the plaintiff will be awarded: see [Burnstein v. Times Newspapers Ltd., \[2000\] EWCA Civ. 338](#).

Accordingly, C's conduct in posting critical comments about D online was a potential factor that needed to be taken into account. However, C's online comments were made prior to the mutual Restraining Order granted in 2018 and there was no evidence of any further postings by C. C's positive standing in the community also had to be taken into account, including the fact that there was no evidence that she had suffered any business loss because of D's campaign, which included the posting of materials that the court held were offensive, demeaning and misogynistic.

The fact that the defamation was posted online was also significant to an assessment of damages.



Defamations that are posted online are considered to be a serious aggravating factor in an award since online statements can circulate indefinitely.

In [Crookes v. Newton, 2011 SCC 47](#), the Supreme Court of Canada explained that the internet permits for the endless replication of defamatory messages.

In addition, D refused to issue an apology or retract the comments attributed to him and he was adamant that he would continue his campaign against C in the future.

With respect to aggravated damages, these kinds of damages are awarded where a defendant has engaged in insulting, high-handed, spiteful, malicious or oppressive conduct that increases a plaintiff's distress. Aggravated damages are compensatory in nature and take into account a defendant's entire conduct both before publication and throughout a proceeding. In this case, the court found that D had acted with malice and that his conduct was particularly outrageous and malicious.

With respect to punitive damages, the purpose of punitive damages is to punish a defendant whose conduct offends the court's sense of decency. They are awarded where a defendant's conduct is malicious, high-handed or oppressive and are generally only awarded where the combined award of general damages and aggravated damages is insufficient to achieve the goals of punishment and deterrence. As determined in [Walker v. CFTO Ltd., 1987 CanLII 126 \(ONCA\)](#), punitive damages are intended to act as a deterrent against future similar conduct. In this case, D was engaged in a vindictive online campaign against C. D included C's daughter in the campaign and had no appreciation for his conduct.

In conclusion, the court awarded C \$15,000 in general damages and \$15,000 in aggravated damages, and her daughter \$7,500 in general damages. No punitive damages were awarded.

This case demonstrates that a defamation action may not produce a significant damages award. Each case, of course, will be different and the facts must be carefully considered in order to assess the potential damages that might be awarded to a plaintiff. Where a plaintiff is unable to demonstrate a high degree of reputational loss, an award of damages may not be significant. This will particularly be the case where the plaintiff maintains a high standing in the community. Nevertheless, in the circumstances of this case, one might question whether C and her daughter should have received a higher award.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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