

KEEPING CURRENT

May 9, 2022

Could full indemnity costs become the norm in defamation actions?

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

Stephen Thiele
Partner
416.865.6651
sthiele@grllp.com

As the use of social media platforms continues to grow, there is a correspondingly growing danger that the misuse of these platforms can cause devastating damage to innocent people who become targets of relentless and vicious online campaigns whose sole purpose is to destroy their reputations. Legislators have been slow to provide protection to innocent victims whose reputations come under attack on multiple websites or multiple online forums. Hosts of websites, online forums or social media platforms are virtually free from government oversight and the worldwide nature of the internet can make it virtually impossible to stop someone from victimizing an innocent person and causing them reputational harm. At common law, the courts possess various tools and powers to minimize the harm suffered by a victim through the granting of injunctions, the making of declarations to remove offending material from the internet, and the awarding of substantial damages.

In the recent case of [Cyr v. Leblanc](#),

[2022 ONSC 2555 \(CanLII\)](#), the court indicated that the costs award presented another way in which to deter people from using the internet to attack the reputations of innocent victims.

Cyr involved a defamation action over multiple statements that had been published by the defendant on several websites about the plaintiff. The plaintiff had met the defendant briefly at an adult learning centre in 2015 and had never seen her since.

However, four years later, the plaintiff became aware of untrue statements being published about her on the internet. The plaintiff discovered that the defendant was the author of the statements. Among other things, the statements accused the plaintiff of being a racist, uttering racial slurs, and harassing and threatening the defendant's colleagues.

The statements were published multiple times on at least 10 different websites. While the plaintiff sought the defendant's

co-operation in removing the internet postings, the court described that this only escalated the attacks being made against her. The plaintiff ultimately hired a lawyer to seek the removal of the offensive statements. The lawyer's request prompted the defendant to respond through a self-identified "Disability Defence Attorney at Law" who stated that the plaintiff's allegations were "bogus and unfounded" and who made reference to non-existent court proceedings between the parties in Brampton and Toronto. A search of the Lawyer's Directory maintained on the Law Society of Ontario's website showed that the defendant's purported lawyer was not a lawyer at all.

In turn, the plaintiff started a defamation action against the defendant. No defence was served or filed and thus the plaintiff noted the defendant in default. The defendant then brought a motion to set aside the noting in default. This motion was dismissed because the defendant did not show up in court on her own motion. This permitted the plaintiff to schedule a hearing for her unliquidated damages to be assessed by the court.

In pursuing her damages, the plaintiff described that the defendant's actions had caused her to fear for her safety and her reputation and to feel significant stress and humiliation. She had been contacted by friends about the statements circulated on the internet and was told by co-workers that they had seen online statements about her.

The court found that the statements about the plaintiff were defamatory and that the plaintiff had met her burden for a successful defamation action.

The plaintiff was able to show that:

- a) the impugned words were

defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

- b) the words referred to the plaintiff; and

- c) the words were published (i.e. communicated) to at least one person other than the plaintiff.

The defendant was held responsible for the defamatory statements because under [rule 19.02\(1\) of the Rules of Civil Procedure](#) the defendant, who had been noted in default, was deemed to have admitted the allegations in the plaintiff's claim.

With respect to the damages, the court listed the following factors, as found in [Awan v. Levant, 2014 ONSC 6890](#), that were to be considered in assessing damages for a defamation claim:

- a) the plaintiff's position and standing in the community;

- b) the nature and seriousness of the defamatory statements;

- c) the mode and extent of publication;

- d) the absence or refusal of any retraction or apology;

- e) the whole conduct and motive of the defendant from publication; and

- f) any aggravating or mitigating circumstances.

The fact that the defendant's statements were



made on the internet was significant to the assessment because of the potential widespread distribution of the statements and the potential for the statements to impact the plaintiff's employment and community activities. As the court described at paragraph 37 of its decision: "The internet is used frequently by prospective employers to screen potential employees."

The court concluded that the plaintiff was entitled to \$75,000 damages, plus \$25,000 for punitive damages and \$25,000 for aggravated damages.

Punitive damages are awarded for a defendant's malicious, oppressive and high-handed conduct. The purpose of punitive damages is to punish the defendant: see [Hill v. Church of Scientology, 1995 CanLII 59 \(SCC\) at paragraph 196](#).

Aggravated damages are awarded for high-handed conduct that increases the humiliation suffered by a plaintiff as a result of defamatory statements: see [Hill, at paragraph 188](#).

The defendant was further directed to remove the impugned statements and internet postings and enjoined from publishing, disseminating or broadcasting defamatory words about the plaintiff in the future as well.

With respect to costs, the court was required to consider the scale of costs that should be awarded to the plaintiff.

Canada is a "loser pays" jurisdiction. This means that the winning party in a civil action is entitled to recover its costs against the losing party.

In Ontario, under [section 131 of the Courts of Justice Act](#), the awards of the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court.

The most common costs award is partial indemnity costs. As a rule of thumb, this means that a winning party is entitled to receive 60% of their legal costs from the losing party, plus disbursements and taxes.

A court can also award substantial indemnity costs, which represents 90% of a winning party's legal costs, plus disbursements and taxes. In general, substantial indemnity costs are only awarded sparingly.

Lastly, a court can award full indemnity costs or 100% of a winning party's costs, plus disbursements and taxes.

While the plaintiff sought substantial indemnity costs, the court was prepared to award full indemnity costs for the following reason:

The internet is being used to spread misinformation or to attack persons in an anonymous manner. The situation is out of control, little effort being made to address this serious problem. Plaintiffs are put to additional expense in these types of cases and do so to protect their reputation in the community. This should attract full indemnity costs in the circumstances.

In the result, the plaintiff was awarded costs in the amount of \$9,435, on the substantial indemnity scale as requested. The court noted that the defendant had attempted to blame accomplices for the impugned statements, used a fictitious lawyer to respond to the plaintiff's lawyer and caused the plaintiff to incur additional expenses during the litigation.

The use of the internet and social media continue to produce a litany of defamation litigation. The negative impacts of false

statements about innocent victims are devastating and lasting. Although significant damage awards can provide adequate compensation for an innocent victim's loss of reputation, it is arguable that an innocent victim should not be out-of-pocket for having to seek a judicial remedy to protect their reputation in circumstances where they have been a victim of relentless online campaign of defamatory terror. Accordingly, the *Cyr* decision may start a trend toward the seeking of full indemnity costs by innocent victims of egregious, vicious and reprehensible online attacks that cause them unjustified reputational harm.

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.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)