

Online Reviews, Freedom of Expression and Anti-SLAPP Legislation: *910938 Ontario Inc v Moore*

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Consider a time when you had a terrible customer service experience while shopping, going to the dentist, or grabbing a bite to eat with some friends. Perhaps you felt sufficiently motivated to post a negative on-line review to inform others of your experience, and identified the individual who had unjustifiably ruined your experience.

Susan Moore, and her daughter, Sandra Moore, did so and promptly found themselves the targets of a defamation lawsuit launched by the subject of their post.

910938 Ontario Inc v Moore, 2020 ONSC 4553, involved a “vicious on-line review” of a Mississauga Plumbing Mart store and Mr. Noonan, as principal of the company. After a heated altercation at the store, the Moores posted two reviews on-line. These reviews described the attitudes of the employees as being “something out of a sci-fi thriller” and identified one employee as morbidly obese and the other as “obviously slow”, both “living in a wasteland of stupidity”. The reviews also alleged misogynistic attitudes on behalf of the employees, and that their store is simply a front for an illegal business.

The matter wound up in court in June 2020. In the opening paragraphs of his decision, Mr. Justice D.E. Harris noted the interplay between the proliferation of online reviews and the potential anonymity granted to the reviewers.

[1] The internet has conferred upon us all the role of professional critic. Our opinions on any manner of topics can be expressed and published on-line for the edification of all. This includes the rating of virtually everything: restaurants, hotels, businesses of all types, music, books, movies, people themselves. The lawyers who argued this case are rated on-line.

[2] On-line critics benefit from being protected by ostensible anonymity. They are just a name in cyberspace, often a pseudonym. This shield contributes to the not infrequent slide of postings into less than civil discourse. The reduced threat of personal exposure can embolden the commentary. That is what happened in this case.

In the matter at hand, after the Plaintiff wrote to the Moores announcing an intention to sue them for defamation, the reviews were taken down by the defendants a few days later and it could not be determined by direct evidence how many people aside from the Plaintiff read the posts.

In dismissing the defamation action against the Moores, Justice Harris turned to what is known as “Anti-SLAPP Legislation” enacted by the Ontario Government in 2015, under section 137.1 of the *Courts of Justice Act*. SLAPP is an acronym for “Strategic Lawsuit Against Public Participation”, and serves to balance the right to freedom of expression and to ensure that the courts are not bogged down with frivolous and inconsequential defamation actions in our evolving on-line world. The heading for the section in the statute describes its very purpose: “Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings).”

Ontario's Anti-SLAPP legislation provides that a defamation lawsuit shall be dismissed where the content of the expression relates to a matter of public interest. However, the lawsuit shall not be dismissed when the plaintiff can show:

- there are grounds to believe the proceeding has substantial merit,
- there are grounds to believe the defendant has no valid defence, and
- the harm suffered by the plaintiff is sufficiently serious, such that the public interest in protecting freedom of expression, is outweighed by the public interest in permitting the lawsuit to continue.

Justice Harris discussed each factor in turn. First, he determined that the content of the Moore's on-line reviews certainly constitute "expressions", and are sufficiently of the "public interest" as a critique of the store, its management and the services offered. While much of the reviews were a personal attack, Justice Harris refused to parse out sections of the reviews, as the focus is on the communication as a whole, and not the individual words themselves. While the expression was "wrapped in personal vitriol", there was a core of criticism in the reviews, making them the subject of public interest.

Next, Justice Harris held that the lawsuit had substantial merit based on the defamation test as set out by the Supreme Court of Canada in *Grant v Torstar*, 2009 SCC 61. In a successful defamation lawsuit, the Plaintiff has to establish three elements:

- the Plaintiff's reputation was lowered in the eyes of a reasonable person,
- the words are referring to the Plaintiff, and
- the words were communicated to at least one other person than the Plaintiff.

All three components were satisfied here. Since the Moores had not pled any defence to the defamation claim in the context of the SLAPP motion hearing, there were no grounds to believe the Moores had a valid defence.

Justice Harris then considered the final component; is the harm suffered by the Plaintiff sufficiently serious to allow the lawsuit to proceed, and outweigh the fundamental *Charter* protection of freedom of expression? In considering the harm suffered, he noted that there were few existing reviews for the store, the before and after ratings did not significantly change, and people would realize it is a personal attack by someone with a vendetta, and not pay much credence to the review. As such, there was very little harm, if any, suffered by the Plaintiff.

While the Moores were victorious in having the defamation action dismissed, it is clear that Justice Harris did not condone the reviews which they had posted. As His Honour noted, "the proliferation of this form of expression does not justify defamatory review posts. It does, however, counsel caution to ensure that defamation 'chill' does not settle in". In the result, Justice Harris refused to order any costs payable by the Plaintiff to the Moores, since there was no finding of bad faith or an improper purpose in commencing the lawsuit. The Plaintiff was provoked by the defamatory reviews, and understandably wished to take action.

Ultimately, the Moores were fortunate that the Plaintiff was unable to show that any damage had been caused by the reviews, and the Court found that the need to protect expression clearly outweighed the relatively minimal harm to the Plaintiffs' reputation. Although the defamation action was dismissed, Justice Harris' decision shows that negative on-line reviews may constitute defamatory expression in certain circumstances. The public interest in fundamental freedom of expression may not always outweigh the public interest in protecting a Plaintiff's reputation and from the possibility of suffering harm. Due consideration and care should therefore be taken before unleashing one's vitriol through the quasi-anonymity of an online review.

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