

Ontario Court of Appeal Upholds Doctor's Damages for Defamatory Postings on RateMDs.com

Damages | Defamation | Litigation | Litigation & Dispute Resolution | Ontario Court of Appeal

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In response to a series of negative and untruthful online reviews, a medical doctor sued the author of the posts for defamation and was awarded damages of \$50,000 and \$50,000 for costs, in a decision affirmed by the Ontario Court of Appeal: *Zoutman v. Graham*, 2020 ONCA 767 (CanLII).

The Plaintiff Doctor was a physician specializing in infectious diseases. The Defendant's brother had died following a medical operation in 2001. The Defendant and his brother's estate subsequently brought a medical malpractice action against the Doctor, which was dismissed by a jury.

After the malpractice action was dismissed, a number of derogatory comments were posted about the Doctor on RateMDs.com, a rating web site for medical doctors. The posts included inflammatory statements, such as calling the Doctor a "dingbat, rude, conceited, thin-skinned," and insulting his physical appearance. The Doctor was described as "dangerous" and "delusional."

According to the terms of use of RateMDs.com, only actual patients are supposed to post reviews of any doctors. The Defendant admitted to posting two derogatory reviews on RateMDs.com but denied being the author of a number of other postings. After the Defendant refused to remove any of the postings including the two he admitted to writing, the Doctor sued the Defendant for defamation.

In 2019, a summary judgment motion brought by the Doctor was heard by the Honourable Mr. Justice Mew, concurrently with an anti-SLAPP motion brought by the Defendant, which sought to dismiss the defamation action on the basis that the postings were expressions relating to a matter of public interest.

Justice Mew [dismissed](#) the anti-SLAPP motion and awarded the Doctor damages as set out above. Justice Mew also granted to the Doctor a permanent injunction preventing the Defendant from engaging in similar behaviour in the future.

In accordance with the Supreme Court of Canada's decision in *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII) at para. 28, a successful defamation claim generally requires a plaintiff to prove three things:

- (1) that 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;
- (2) that the words in fact referred to the plaintiff; and
- (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

In Justice Mew's view, there was no question that the statements in issue would lower the Doctor's reputation as he was accused of reckless and untrustworthy behaviour, and "epitomiz[ing] all that is wrong with the health care system in this country." Further, Justice Mew found as a fact that the Defendant had posted all the disputed reviews on RateMDs.com based on the consistent style and wording of the posts, which left no doubt that the Defendant was the common author.

Justice Mew [found](#) that there was evidence that at least one other person had reviewed the RateMDs.com site and he drew an inference of publication from that and other findings of facts.

On appeal, Justice Mew's damages award was upheld.

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With regard to the anti-SLAPP motion, the Court of Appeal also agreed with Justice Mew's conclusion that since the Defendant denied authorship of ten of the twelve postings at issue, he could not have succeeded in his motion to have the Doctor's entire action dismissed. The Court of Appeal further agreed that the "public interest" requirement had not been established. Amongst other reasons, since the Defendant was never a patient of the Doctor, the postings which portrayed himself as such (a requirement for postings on RateMDs.com) were false. Statements unsubstantiated by facts, or which are the product of plain falsehoods, are not protected as expressions of public interest. Not only did the Defendant refuse to remove the postings which he acknowledged writing, he persisted in posting further comments while "masquerading as a patient."

The Defendant also argued that the Doctor had failed to prove that the words complained of were "published" since there was no evidence from anyone other than the Doctor about the extent to which, if at all, persons other than he or his lawyers had viewed the Internet postings.

However, the Court of Appeal found no palpable and overriding error in Justice Mew's finding that the Defendant was the author of all the defamatory postings and that there was evidence of publication as a result. It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person, particularly in the case of Internet postings which are available through hyperlinks and Google searches. If a plaintiff proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, they will establish a prima facie case. In the case at hand, the Doctor established publication based on the totality of the circumstances reviewed by Justice Mew.

The Court of Appeal further agreed with the finding that the Defendant had acted out of malice in making the postings which vitiated any possible defence of fair comment.

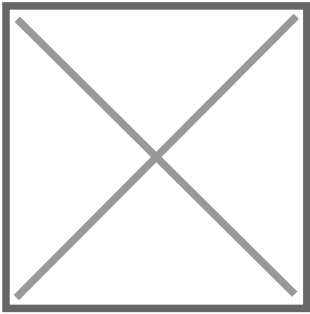
Lastly, the Defendant argued that the Doctor had not identified any tangible injury or harm resulting from the Internet comments. Rather, the Defendant argued, the Doctor's career had continued to flourish. However, it was not necessary for the Doctor to prove that he had suffered quantifiable damages. In libel cases, damages are presumed from the very publication of the false statement and an injured plaintiff bears no obligation to prove actual loss or injury: *Rutman v. Rabinowitz*, 2018 ONCA 80, at para. 62. Aggravated damages may be awarded where a defendant is guilty of "insulting, highhanded, spiteful, malicious or oppressive conduct" which has increased the mental distress and humiliation suffered by the plaintiff: *Ironsides v. Delazzari*, 2014 ONSC 999 (CanLII), at para. 56. Justice Mew followed these principles and his decision was entitled to deference by the appellate court.

One can understand the temptation to post negative online comments about a person or business about which they have legitimate concerns or complaints. However, care should be taken before posting any online comments out of revenge in order to obtain satisfaction for some personal resentment or grudge. This decision demonstrates that online postings may be subjected to a claim for damages if they are objectively false and made with malice.

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