

"VENTING" ON FACEBOOK LEADS TO \$65,000 DEFAMATION JUDGMENT AND LIABILITY FOR 3RD PARTY COMMENTS

Posted on May 4, 2016

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Introduction

Given the increasingly ubiquitous nature of social media platforms and their increasing role as the communication methods of choice for many, it is perhaps unsurprising that some of the more interesting developments in the law of defamation are emerging from this space.

The B.C. Supreme Court's recent decision in *Pritchard v. Van Nes* (2016 BCSC 686) serves not only as a reminder that a poster of defamatory comments on social media can be held liable for the damage caused by those comments, but also as an indication that courts are prepared to hold them liable for the damage caused by further sharing or republication of those comments, as well as for the damage caused by additional defamatory comments made by third parties who post in response thereto. The rapid integration of social media into many facets of daily life as well as its ability to generate discourse in a "viral" manner, necessitate a corresponding increase in attention to the manner in which one conducts their communication online.

As evidenced by the court's \$65,000 damage award in *Pritchard*, approaching social media postings with casual disregard for their truth or potential impact on others can have very serious monetary consequences.

Factual background

The Plaintiff was, at least prior to his unfortunate feature as the subject of a series of Facebook posts by the Defendant and her friends, a well-liked and respected middle school music teacher in BC. The Plaintiff and his household had a strained relationship with the Defendant, their next door neighbour, owing to a series of ongoing quarrels and incidents of "unneighbourly conduct" by the Defendant involving various noise, pet, and vehicle related disputes.

Events came to a head when friction arose as the result of the Defendants' parking of a pickup truck in a manner that impeded access to the Plaintiff's driveway. This dispute escalated to the point that the Defendant began screaming and swearing at the Plaintiff's son. On June 9, 2014, two days after this angry encounter, the Defendant chose to "vent" her frustrations on Facebook.

Before discussing the nature of the Defendant's Facebook postings, it is worth emphasizing from the outset, as indeed the court did at the 5th paragraph of a 139 paragraph judgment, that the Defendant's allegations on Facebook concerning the Plaintiff's behaviour and the attacks on his character were held to be completely false and unjustified.

In her Facebook postings, the Defendant claimed, among other things, that the Plaintiff had videotaped her and her children under the pretense of recording her dog, that a mirror which hung on the exterior of the Plaintiff's house was some sort of surveillance device and that the Plaintiff had asked the city of Abbotsford to move the Defendant's children's play centre closer to his property line (implying that his goal was to move their children closer to his property line so that they could be observed). The Defendant insinuated that the Plaintiff was a paedophile and expressed purported concern that he worked for the Abbotsford school district.

At the time of the posting, the Defendant had over 2,000 Facebook "friends", and her Facebook privacy settings were set to "public", which meant that her posts were visible to the entire Facebook community. In the 21 hours following the Defendant's "venting", 57 additional posts were made in reply thereto (9 were made by the Defendant herself, and the remaining 48 were made by 36 of her friends). At least one other person "shared" the Defendant's post on his own Facebook page and sent an email to the Plaintiff's school principal purporting to warn him that the Plaintiff was a potential paedophile. The court pointed out that several of these reply posts urged the Defendant to generate attention for her posts from the local police and media. Many of them referred derogatorily to the Plaintiff and some threatened to confront him.

The Plaintiff and his family became aware of the Facebook posts on June 10, 2014. After filing a police complaint, the Plaintiff commenced an action against the Defendant, seeking damages for nuisance and defamation. The Defendant failed to defend the claim, and the Plaintiff subsequently obtained default judgment, with damages to be assessed. Notwithstanding that the Defendant had not defended the claim, in the context of the assessment of damages, the Defendant was granted leave to cross-examine witnesses and make closing submissions to the court.

The Plaintiff testified that the Defendant's posts has caused him irreparable and significant harm, that his future prospects for employment were now slim, and that he had lost his joy in teaching. He also testified to the reversal of the community's behaviour towards him: at least one family pulled their children from the school's music program, neighbours expressed their suspicions directly to his family, and unknown persons vandalized their car and property. Overall, the court found that the Plaintiff's evidence demonstrated that the Facebook posts profoundly and negatively impacted his quality of life.

Perhaps unsurprisingly, the court found the Defendant liable for damages in connection with the publication of her own defamatory remarks. However, the court also proceeded to consider her liability both for the

republication of her defamatory comments by others, and for the defamatory comments of others made in response to her own postings.

Liability for Republication of the Defendant's Comments by Third Parties

In his reasons, Justice Saunders analyzed the existing law of liability for republication of defamatory comments. He noted that while the general rule is that a person is responsible only for his or her own defamatory publications, and not for their repetition by others, exceptions exist, including where a defendant intends or authorizes another to publish a defamatory communication on his or her behalf, or where the repetition is the natural and probable result of the defendant's own publication.

Justice Saunders proceeded to note that distribution of comments, photos, videos, and links amongst users is fundamental to Facebook's use and that its architecture facilitates distribution through sharing, replying, commenting, and "liking" functions. He further noted that the particular nature of Facebook as a social media platform and its structure meant that anyone posting remarks to a Facebook page must appreciate that some degree of dissemination, at minimum, and possibly widespread dissemination, might follow, ultimately finding that the Defendant must be taken to have implicitly authorized the republication of her posts both within the social media environment and through other forms of communication such as email.

As a result of this analysis, the court held that the Defendant was liable for the republication of her defamatory comments by others on Facebook, as well as for the republication by email that took place when one of her Facebook friends emailed her Facebook comments to the Plaintiff's principal.

Liability for further defamatory comments made by third parties

In addition to finding the Defendant liable for her own defamatory comments and for their republication by third parties, the court also considered the Defendant's liability for defamatory comments made by third parties in response to her original comments. Justice Saunders acknowledged that liability for a third-party's defamatory comments made on one's personal account, whether on Facebook or another internet-based platform, was still an emerging legal issue in Canadian law.

After canvassing jurisprudence on this principle, Justice Saunders held that a defendant can be held liable for a third party's defamatory material when three elements are present:

- 1) actual knowledge of the defamatory material posted by the third party;
- 2) a deliberate act that can include inaction in the face of actual knowledge; and
- 3) power and control over the defamatory content.

The court found as a matter of fact that the Defendant had acquired knowledge of the defamatory comments of her friends, and noted that she had control of her Facebook page but failed to act by way of deleting those comments (or if she was unable to do so, deleting her posts as a whole). Justice Saunders found the Defendant liable for the comments of third parties on this basis, but went even further and noted that that in these circumstances there ought not to be a legal requirement for the Defendant to have actual knowledge of the existence of defamatory comments made by her "friends" as a precondition to liability. Rather, his view was that the circumstances were such that she ought to have anticipated such posts would be made, given that the nature of the medium and the content of the Defendant's initial posts created a reasonable expectation of further defamatory statements being made.

Damages

The court acknowledged the devastation that an accusation of paedophilic behaviour could wreak on a teacher's reputation, career, and individual dignity, and noted that this impact would likely continue into the future. Considering these factors, the court found a \$50,000 damages award appropriate. Further, to dissuade similar thoughtless and reckless behaviour, and as a rebuke against the defendant, the court found it appropriate to award an additional \$15,000 in punitive damages.

Although largely successful in the outcome, the Plaintiff was unable to convince that court that the Defendant's conduct was motivated by actual malice, so as to warrant an even higher amount of general damages. In a memorable line from the judgment, Justice Saunders commented that:

"Her belief that the decorative mirror hung on the exterior of the plaintiff's house was some sort of surveillance device was simply ridiculous, speaking, to be blunt, more of stupidity than malice."

Conclusion

While the statements at issue in *Pritchard v. Van Nes* were undeniably devastating comments that caused serious damage to the Plaintiff, they are also, unfortunately, comments of a type that are all too frequently seen online on social media, forums, comment sections, and in other venues that provide for similar online interaction. It is no answer to suggest that one was merely "venting". All too often individuals approach their online social interaction with a casual, unfiltered mindset, posting first, and thinking second. This case serves as a reminder that courts understand the potentially devastating impact of online defamation, and are prepared to grant monetary compensation in response thereto.

This case also highlights that liability will not necessarily be limited to the comments that an individual makes him or herself. When defamatory comments are made in a social media setting and are sufficiently inflammatory, it invites discourse with others and all the attendant risks that this discourse carries with it,

including potential liability for republication of the original comments by others, as well as liability for comments made by third parties in response thereto.

by Rohan Hill and Bill Olaguera, Articled Student

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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