

Irresponsible Comments and Extraordinary Remedies: A Review of the Ontario Superior Court of Justice's Decision in *Soliman v Bordman*

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By Alfred Pepushaj and

Overview

In *Soliman v Bordman*, [2021 ONSC 7023](#), Justice Perell of the Ontario Superior Court of Justice granted summary judgement against Daniel Bordman for making defamatory statements against Walied Soliman, a prominent Canadian lawyer. This is an important decision regarding the defences of fair comment and responsible communication. This decision is also notable in that Justice Perell granted injunctive remedies that go beyond what is typically ordered in defamation cases.

Background

Dating back to 2019, Mr. Bordman, an online commentator who runs popular social media accounts, made several statements about Mr. Soliman, a highly regarded lawyer in Canada. Mr. Bordman made various defamatory statements about Mr. Soliman which he disseminated widely on his YouTube channel and social media accounts. Mr. Soliman initiated a defamation action and brought a motion for summary judgement against Mr. Bordman.

Elements of Defamation

To succeed in a defamation claim, a plaintiff must plead and prove the following:

1. the defendant made a statement orally or in writing to at least one other person besides the plaintiff;
2. the words of the statement are defamatory in that they tend to lower the plaintiff's reputation in the eyes of a reasonable person; and
3. the statement refers to the plaintiff.

In this case, there was no question that the elements of defamation had been established. Mr. Bordman did not deny that he made the defamatory statements, which referred to Mr. Soliman, and that he published them on YouTube and his social media accounts. The onus, therefore, shifted to him to prove that he had a defence available.

Defences

Mr. Bordman relied on the defences of justification, fair comment, and responsible communication. However, Mr. Bordman later abandoned the defence of justification (*i.e.*, that the words complained of were true).

(a) Fair Comment

In order to establish the defence of fair comment, the defendant has to establish that the statement was:

1. a comment or opinion and not a statement of fact, although the comment or opinion could include inferences of fact;
2. a matter of public interest;
3. a comment or opinion based upon true facts;
4. objectively fair in the sense that any person could honestly express the comment or opinion based on the proved facts; and
5. made without malice.

In this case, Justice Perell had no issue in finding that Mr. Bordman's comments were about a matter of public interest, as Mr. Soliman is a prominent lawyer and public figure with influence in provincial politics. However, Justice Perell found that Mr. Bordman failed to establish the defence of fair comment because the statements "were not expressed as comments or opinions but were uttered to be taken as true facts."

Even if Mr. Bordman's statements were comments or opinions, Justice Perell held that the statements were not based upon true facts, meaning the defence of fair comment was not available. Justice Perell also found that Mr. Bordman's "opinions were not objectively fair because no person could honestly express them based on the proved facts".

(b) Responsible Communication

Mr. Bordman also relied on the defence of responsible communication. For this defence to succeed, the defendant must be established that:

1. the impugned statement is a matter of public interest; and
2. the publication of the statement was responsible in that
 1. reasonable steps were taken to ensure the overall accuracy of any factual assertions; and
 2. reasonable steps were taken to ensure the fairness of the publication of the statements.

In this case, Mr. Bordman failed to establish the defence of responsible communication. While his statements were about a matter of public interest, Mr. Bordman failed to take reasonable steps to ensure their accuracy. Rather, he relied on "Internet gossip and innuendo" and failed to give Mr. Soliman an opportunity to comment. Further, Justice Perell found the statements were made maliciously as Mr. Bordman had demonstrated reckless disregard or indifference to the truth. As Justice Perell succinctly concluded, "Mr. Bordman was not a responsible journalist."

Remedies

(a) Damages

The remedies available to a plaintiff who has been defamed may include (a) general damages; (b) special or pecuniary damages that are causally connected to the defamatory statements; (c) aggravated damages; (d) punitive damages; and (e) injunctive relief. When assessing the quantum of damages, courts may consider the following factors:

1. the plaintiff's position and standing;
2. the nature and seriousness of the defamatory statements;
3. the mode and extent of publication;
4. the absence or refusal of any retraction or apology;

5. the whole conduct and motive of the defendant from publication through judgment; and
6. any evidence of aggravating or mitigating circumstances.

In this case, Justice Perell considered the context of the defamation lawsuit, and stated:

In contemporary times, where the mode of communication is the Internet this is a factor that intensifies the harm caused by the publication of the defamation because of the anonymous, interactive, and worldwide reach of an Internet communication and its insidious potential to persuade its audience of false information; defamation through the Internet is a particularly egregious type of defamation.

Justice Perell also noted the importance of reputation for professionals, writing:

The reputation of a lawyer and other professionals such as accountants, medical practitioners, engineers, is paramount to his or her livelihood and statements attributing, dishonesty, untrustworthiness, villainy, or immorality will cause serious harm to the professional's reputation and livelihood.

In this case, Mr. Soliman's reputation was important, and although his reputation remained intact, Justice Perell found that Mr. Soliman and his family suffered "distress, hurt, humiliation, and embarrassment from the defamatory statements continuing to be available in the cyberspace of the Internet." In light of the above and after a review of case law awarding general damages for defamation, Justice Perell awarded general and aggravated damages in the amount of \$500,000 to Mr. Soliman.

(b) Injunction

A permanent injunction preventing the defendant from making further defamatory statements may be ordered where:

1. there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or
2. there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible.

Justice Perell found it necessary to order an injunction against Mr. Bordman that went beyond what is typically ordered, including "an absolute prohibition on Mr. Bordman making any statements about Mr. Soliman and not just defamatory statements." Justice Perell ordered:

1. that Mr. Bordman to remove any media he controls and attempt to have removed any media controlled by others that he has published in the public domain that refers to Mr. Soliman; and
2. that Mr. Bordman, or anyone acting on his behalf, on his direction, or in conjunction with him, from disseminating, posting on the internet, publishing, or broadcasting in any manner either directly or indirectly, any statements concerning Mr. Soliman other than an apology, the text of which must be approved by Mr. Soliman.

Justice Perell explained this extraordinary remedy as follows:

[...] Mr. Bordman's response to the libel notice and to the lawsuit against him demonstrates that insofar as Mr. Soliman is concerned Mr. Bordman does not have the ability to differentiate between non-defamatory statements and defamatory ones or the ability to differentiate between defamatory statements and defamatory statements that are defensible as fair comment or responsible communication. Insofar as Mr. Soliman is concerned, Mr. Bordman before and during the litigation has demonstrated that he is not a responsible journalist of any type. If I were to only enjoin Mr. Bordman from making defamatory statements about Mr. Soliman, there

would just be another run of litigation or contentious contempt motions about whether the comment was defamatory or a fair comment. This is in neither party's interest.

Takeaways

This case will serve as an important decision for individuals who may be the target of persistent online harassment campaigns, even if the target is a public figure like Mr. Soliman. As this case illustrates, courts may also be willing to award significant damages, as well as equitable remedies like injunctions, in defamation actions where the defendant makes egregious and persistent defamatory statements online and does not make an effort to fact-check those statements prior to publication.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Alfred Pepushaj

Toronto
416.619.6293

Email:
apepushaj@weirfoulds.com

Alfred Pepushaj is an Associate in the Commercial Litigation Practice Group at WeirFoulds LLP. He focuses on complex corporate and commercial litigation, including fraud, contract breaches, and shareholder disputes, as well as trusts and estates litigation involving will challenges, fiduciary breaches, and contested asset distributions.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035

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