SUPREME COURT OF YUKON

Citation: *McKee v Melew*,
2025 YKSC 48

Date: 20250808
S.C. No. 24-A0005
Registry: Whitehorse

BETWEEN:

GEORGINA MCKEE

PLAINTIFF

AND

YONIS MELEW

DEFENDANT

S.C. No. 23-A0156
Registry: Whitehorse

BETWEEN:

KAITLYN SPURVEY

PLAINTIFF

AND

YONIS MELEW

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs Luke S. Faught

No one appearing for the Defendant

REASONS FOR DECISION
(Summary trial application)

Overview

[1] This is an application for summary trial by the plaintiffs, Kaitlyn Spurvey and Georgina McKee, in this consolidated action for a declaration that the defendant Yonis Melew has defamed both of them by repeatedly posting statements on a Facebook page referring to them as "'Black-haters" and "cold-blooded racists", as well as for damages, costs, interest, and a permanent injunction.

[2] Mr. Melew did not appear for this hearing despite being properly served. There were no additional materials filed since the plaintiffs' successful application for an interlocutory injunction: the plaintiffs rely on the same facts and arguments made in that application as well as the legal analysis in the decision granting the application (*Spurvey v Melew*, 2024 YKSC 6 ("*Spurvey*")).

[3] The plaintiff Spurvey seeks $50,000 and the plaintiff McKee seeks $55,000 in general damages (plus costs and interest) to compensate them for their distress, the harm to their reputations – personal and professional - and to vindicate their reputations. Ms. Spurvey seeks $20,000 and Ms. McKee seeks $25,000 in aggravated damages for various reasons, including that Mr. Melew was motivated by actual malice that increased the injuries to the plaintiffs.

[4] The plaintiffs further seek an order for a permanent injunction preventing Mr. Melew from publishing any defamatory statement referencing them, on the basis that the defendant is likely to continue to publish defamatory words about the plaintiffs and/or there is a reasonable possibility the plaintiffs will not recover damages, given the difficulties of enforcing a judgment.

Background

[5] The plaintiffs Kaitlyn Spurvey and Georgina McKee were respectively the manager and director at Connective Support Society ("Connective") in Whitehorse. Connective is a community based non-profit organization that, among other things, operates an emergency shelter in Whitehorse providing temporary housing and support services to vulnerable community members.

[6] Yonis Melew was a support worker at Connective until July 17, 2023. He began a social media campaign about Connective on his Facebook page, "Canadiansforfairtreatment", established and managed by him. This page is accessible to the public. Mr. Melew describes himself on the page as a civil rights activist, advocating for the rights of Black and Indigenous people in the Yukon.

[7] Between July 2023 and February 2024, Yonis Melew posted statements on the page, referencing the plaintiffs by name, calling them Black-haters and cold-blooded racists. Their full names, their place of work and their photographs were included in almost every post. As of February 1, 2024, Ms. Spurvey deposed in her affidavit that more than 28 posts on the page named her; and Ms. McKee deposed that more than 36 posts on the page named her. Thirteen of those posts allegedly defamed both women, four posts allegedly defamed Ms. McKee alone and one post defamed Ms. Spurvey alone. Nine further posts appeared on the page between February 14 and February 21, 2024, with all but one describing both women as "Black-Haters, Cold blooded racists".

[8] Since February 2024, there have been no new posts on the page related to Ms. Spurvey and Ms. McKee.

[9] This Court granted an interlocutory injunction on March 1, 2024, preventing Mr. Melew from publishing any statements referencing the plaintiffs that include a reference to Black-hating, racism or fascism. Mr. Melew did not take down the defamatory posts he had already published until June 2024.

Issues

[10] The issues to be determined are:

a) was sufficient notice provided to the defendant?

b) is this an appropriate matter for a summary trial?

c) are the defendant's publications defamatory?

d) if defamatory, what is the law of general damages?

e) what is the law on aggravated damages?

f) what is the appropriate amount of general and aggravated damages, costs and interest?

g) should a permanent injunction be issued?

Analysis

a) Was sufficient notice provided to the defendant?

[11] The defendant was duly served with this application and some of the materials by email, as permitted by the order for substitutional service, on September 9, 2024. Additional materials the plaintiffs sought to rely on, including affidavits from the previous hearing, appearance day orders setting out timelines for filing of materials for the applications, the notice of hearing, and the outline were attempted to be served personally on him at his last known address (also provided to the Court) on December 6, 2024, December 11, 2024, December 13, 2024, and December 18, 2024. The sheriff

or deputy sheriffs were unable to gain access to Mr. Melew's apartment building. Further attempts were made to serve the same materials on Mr. Melew personally by an employee of the Commissionaires on January 9, 2025, January 11, 2025, January 15, 2025, and January 19, 2025. On his fifth attempt on January 22, 2025, he gained access inside the building and left the package outside of Mr. Melew's apartment door. An affidavit of service sworn by Pushpinder Singh, an employee of the Commissionaires of Victoria, the Islands and Yukon, setting out this information was filed with the Court. Mr. Melew was also served by email with all the materials on February 12, 2025.

[12] Mr. Melew has not appeared in court, nor has he responded to any materials served on him and filed with the Court since March 1, 2024. As a result of his failure to engage with the court process, this application proceeded in his absence.

***b) Is this an appropriate matter for summary trial*?**

[13] Summary trial applications can contribute to improved access to justice. The Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, described accessibility as "proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure" (at para. 28). Alternative processes to a full trial must be fair and just, allowing "a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found" (at para. 28).

[14] Rule 19(1) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*") allows a party to an action to apply to the Court for judgment either on an issue or generally, in an action where a defence has been filed. On the hearing of such an application, the court may grant judgment in favour of any party, either on an issue or

generally, unless the court is unable, on the whole of the evidence on the application, to find the facts necessary to decide the issues of fact or law, or is of the opinion that it would be unjust to decide the issues on the application.

[15] The Yukon jurisprudence has interpreted summary trial requirements to mean that a summary trial application may **not** be successful where:

> i) the litigation is extensive and the summary trial hearing itself will take considerable time;
>
> ii) the unsuitability of a summary determination of the issues is relatively obvious, e.g. where credibility is a crucial issue;
>
> iii) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> iv) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.
>
> *O'Murchu v Deweert*, 2020 YKSC 24 at para. 14, quoting from *Inspiration Management Ltd. v McDermid St. Lawrence Ltd.* (1989), 36 BCLR (2d) 202 (CA) at para. 28).

[16] This case is suitable for summary trial. The facts are ascertainable through affidavit evidence as they relate to written postings on Facebook, which were attached as exhibits to the affidavits, including dates. The interlocutory application for injunction, which required a determination of whether the posts were defamatory and whether there were any viable defences, was able to be decided on the basis of the affidavit evidence.

[17] This current litigation is not extensive – the facts are the same as they were on the interlocutory application, and the summary trial itself took approximately one hour. Credibility is not a crucial issue, as the defendant admitted making the Facebook posts

and they speak for themselves. There is no unnecessary complexity or a waste of time and effort in proceeding with the summary trial. Most of the briefs of authority prepared by the plaintiffs related to damages. Only one additional affidavit since the interlocutory proceeding was required, to update the Court on the posts made since September 2024, the date of the previously filed affidavit accompanying the notice of application. There are no additional issues left to be determined at trial: the summary trial will be determinative of all issues in dispute.

[18] The material filed for the application for interlocutory injunction is relied on heavily by plaintiffs' counsel, as well as this Court, in the analysis of this case. I note that unlike in this summary trial proceeding, where nothing was filed by the defendant, Mr. Melew not only filed a statement of defence and other affidavit material in response to the injunction application, but he was also present at the hearing and made submissions on his own behalf. He was granted additional time after the hearing to file more affidavit evidence, based on submissions he made at the hearing. That new affidavit evidence was reviewed and analyzed thoroughly by the Court before a decision was reached. At the interlocutory injunction application hearing, Mr. Melew raised the defence of fair comment to the allegation of defamation. The law was analyzed and applied to the facts of this case in that decision.

c) Are the defendant's publications defamatory?

[19] The Supreme Court of Canada in *Grant v Torstar Corp*., 2009 SCC 61 ("*Grant*") at para. 28, wrote that to succeed in a defamation action, the plaintiffs must prove the following on a balance of probabilities:

> (1) the impugned words were defamatory, in the sense they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

(2) the words in fact referred to the plaintiff; and

(3) the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[20] Defamation is a strict liability tort, meaning that the plaintiff need not show that the defendant intended to do harm or was careless. Once these elements are proved, falsity and damage are presumed. The onus then shifts to the defendant for a defence against liability (*Grant* at para. 29). Defences include absolute privilege, meaning that the occasion on which the statement was made, such as in Parliament or during legal proceedings, protects the statement from a finding that it is defamatory. Qualified privilege means that the privilege can be defeated by proof that the defendant acted with malice: that is, words in documents such as reference letters and credit reports will be privileged, unless malice is proved. The policy reasons for absolute and qualified privilege are that false and defamatory words may contribute positively to the aims of society – recognizing there are some occasions in which society benefits from free and unrestricted communications.

[21] A further defence of 'fair comment' exists where the words at issue are a statement of opinion, as long as the defendant is able to prove the following:

i) the comment is on a matter of public interest;

ii) the comment must be based on fact;

iii) the comment must be recognizable as comment, although it can include inferences of fact;

iv) the comment must meet the test of whether any person could honestly express that opinion on the proved facts; and

v) the defendant was not actuated by express malice (*Grant* at para. 31).

[22] A further defence is one of justification – that is, that the statement was true.

[23] I refer first to my findings on defamation at para. 20 in *Spurvey,* the application for an interlocutory injunction. To summarize, the words Black-hater and cold-blooded racist would tend to lower the reputation of the plaintiffs in the eyes of a reasonable person; the words are used to describe both plaintiffs, evident from the posts containing their names and photographs; these words were posted on a publicly accessible Facebook page. The words are manifestly defamatory.

[24] Although Mr. Melew did not file any materials in response to this application for summary trial, meaning I am not required to consider any defences, out of an abundance of caution and to ensure fairness, I will refer to the defence of fair comment raised at the hearing for the interlocutory injunction. The additional affidavit evidence filed after the hearing with the Court's permission were to support his assertion that these statements were comments based on fact. After a careful review of all of them, I found that none of the posts, including the additional ones provided by the defendant, contained any factual background or context that would allow an audience to make up their own mind about the comment. "The words are presented as facts, so they cannot be subject to the fair comment defence" (*Spurvey* at para. 41).

[25] Further, the Facebook postings do not attract privilege – absolute or qualified. Finally, there is no factual basis to support a justification defence.

[26] As a result, I find that the Facebook postings referencing the plaintiffs as Black-haters and cold-blooded racists are defamatory.

d) Law of general damages in a defamation action

[27] The purpose of a general damages award is to compensate the plaintiff for loss of reputation in the eyes of the community, for injury to one's sense of self or feelings, and in order to vindicate the plaintiffs' reputation (*Walker v CTFO Ltd* (1987), 37 DLR (4th) 224 (ONCA). The court should consider i) the conduct of the plaintiffs, ii) the plaintiffs' position and standing, iii) the importance of the plaintiffs' reputation in their field of employment, iv) the nature of the libel, v) the mode and extent of publication, vi) the absence or refusal of any retraction or apology, and vii) the whole conduct of the defendant from the time of the publication to the time of judgment: *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 ("*Hill*") at para 182 quoting from *Gatley on Libel and Slander* (8th) By Philip Lewis. London: Sweet & Maxwell, 1981 at 592-93.

[28] While there is a fine balance between freedom of speech and the protection of reputation, "once the scales have been tipped through defamation, a plaintiff is entitled to be compensated not only for the injury caused by the damage to his integrity within his broad community but also for the suffering occasioned by the defamation" *(Leenen v Canadian Broadcasting Corporation*, [2000] O.J. No. 1359 para. 205). The use of social media to disseminate the defamatory statements can give rise to a higher award (*Barrick Gold v Lopehandia* (2004), 239 DLR (4th) 577 (ONCA) at paras. 31 and 34).

e) Law of aggravated damages in a defamation action

[29] Aggravated damages can only be awarded where there is a finding that the defendant was motivated by actual malice that increased the injury to the plaintiff (*Hill* at para. 190). They are intended to provide additional compensation where the defendant has caused additional harm to the plaintiff as a result of particularly high-handed or

oppressive conduct (*Hill* at para. 188). The aggravating conduct must be known to the plaintiff, and the damages arising are to compensate the plaintiff for additional "salt that the relevant defendant has rubbed in the wound" (*Henry v News Group Newspapers Ltd.* [2011] EWHC 1058 at para. 7 (QB)).

[30] In considering whether malice has existed for the purpose of awarding aggravated damages, the court may consider: the conduct of the defendant through the history of the matter, up to trial; conduct after the publication that reveals actual malice, even if such malice did not exist at the time of publication; whether the defendant increased publication of the libel to maximize the publicity of the defamation; and whether the defendant has caused increased mental distress or humiliation.

f) What is the appropriate amount of general and aggravated damages, costs and interest?

[31] Here, the plaintiffs were carrying out their employment obligations at Connective as manager and director, respectively. Both of them have worked within the social services context for most of their professional lives, assisting disadvantaged and marginalized community members. Their reputations as professionals within this community are important, and personal attacks of racism on a publicly accessible Facebook page of an ostensible civil rights activist dedicated to ensuring fair treatment to marginalized people including Black and Indigenous people, for a period of at least seven months, is particularly troubling. There was no retraction or apology by Mr. Melew and in fact he showed an aggressive defiance in response to initial requests to remove the posts, an ongoing insistence on his right to continue to post these statements, a repetition of the statements in the filed Statement of Defence, and a refusal to comply with a court order for three months that enjoined him from publishing. He also regularly

evaded service, advised the Court he did not receive materials despite evidence to the contrary, failed to reply to emails at the address provided by him, and repeatedly failed to appear in court.

[32] The plaintiffs have also provided significant detail in their affidavits of the personal suffering they have each endured as a result of the posts, including negative effects on their work relationships, fears for their personal safety, loss of privacy, isolation, public humiliation, and restrictions on their freedom of movement.

[33] While every defamation case is different on its facts and as noted in *Emeny v Tomaszewski*, 2019 ONSC 3298 ("*Emeny*"), a comparative analysis is not always determinative, some of the cases provided by counsel do provide some guidance.

[34] In the only Yukon case, *Gagnon v Firth*, 2017 YKSC 26 ("*Gagnon*"), the defamation consisted of at least 16 publicized statements over a period of five months by the defendant to the mainstream media while on a cross-Canada run to raise awareness for missing and murdered Indigenous women, that the plaintiff had murdered his wife, the defendant's sister, and an Indigenous woman. There were mainstream national and regional media publications, as well as publications on more specialized internet sites, all of which shared the statements online. The Court awarded $45,000 in general damages, $10,000 in aggravated damages, and $5,483.28 in costs.

[35] In *DeLuca v Foodbenders*, 2023 ONSC 6465 ("*DeLuca*"), the defendant who owned a restaurant and was a supporter of Palestinian people, and the plaintiff who was an advocate against antisemitism and supported Zionism and the Black Lives Matter movement had a short history of online arguments about the defendant's post #zionistsnotwelcome (at her restaurant). The postings were on their own respective

Facebook and Instagram pages until the defendant began posting directly on the plaintiff's page, naming the plaintiff and calling him a terrorist who would harm Palestinian children. Later posts called the plaintiff a racist, a vicious hater of Palestinians and a killer who was trying to cancel her. The first post was up for 24 hours, and the next posts were removed within two hours of the defendant's lawyer advising her they were defamatory. Nevertheless, multiple people saw these posts and the defendant did not apologize. The plaintiff, who was a professional interior designer with a public profile and who experienced significant personal suffering, including death threats, was awarded $75,000 in general and aggravated damages. The court wrote that the award was "primarily to address Mr. DeLuca's injured feelings and to provide consolation and public vindication, which are necessary because of the Defendants' failure to apologize and retract" (at para. 162).

[36] In some cases, such as *Emeny*, courts have found that posting and distributing information on the internet gives rise to additional damages. Courts have referenced Professor Jamie Cameron's blog[1]:

> the internet is a juggernaut – a virtual space where any and all can send and post material almost at will, and in doing so deploy any number of sites and mechanisms to leverage internet voice. Reputation and the distinctive online damage it may sustain – by virtue of the speed, scope, impact and longevity of the internet's reach – are caught in a vortex of freedom that is spiraling at all time and places and in all directions (*Emeny* at para. 29).

In *Emeny,* the Internet defamation of a high-profile comedian by the posts stating that he drugged women contributed to the court's award of general damages in the amount

[1] "Networking the Law of Defamation" Ryerson University Centre for Free Expression (May 24, 2018), (online: https://cfe.ryerson.ca/blog/2018/05/networking-law-defamation),

of $250,000. Similarly in *Gagnon*, this Court observed that "[d]efamation takes on new scales in the day and age of the Internet. Once published, one can never be assured that these allegations will ever be totally removed from the Internet" (at para. 15).

[37] However, the Court in *DeLuca* disagreed, saying that social media posts of individuals do not have the same impact on a plaintiff's reputation that investigative journalism from a credible source would have (at para. 134). A subjective statement is less likely to damage a person's reputation.

[38] In this case, I accept that social media posts by an individual who is not part of the established or authorized media does not have the same credibility or impact. There is also no evidence of the number of views of the posts and no indication of how widespread they were. In this case, the internet posting does not give rise to additional damages.

[39] Particular statements about aggravated damages include the court in *Sommer v Goldi*, 2022 ONSC 3830 at para. 38-40, in which there was serious and prolonged campaign of online defamation, intending to malign the plaintiff in his capacity as a lawyer and in his chosen specialization, and driving him out of one of his chosen fields of work. The Court wrote in awarding him $100,000 in aggravated damages:

> [w]hen put on notice of the plaintiff's claims, the defendants did not remove the defamatory posts from the internet. They left them up. And they continued their campaign. Then they conducted themselves in the litigation in a manner designed to prolong delay in the litigation. They evaded service and continued to do so after they had been compelled before the court by a bench warrant (at para. 38).

[40] Malice is the intention to harm the plaintiff in a way that increases the injury to them. In this case, malice is evident not only by the defendant's multiple posts, but also

by his conduct in refusing to remove the posts before the commencement of litigation, his response repeating the defamatory information, his ongoing refusal to remove the posts after a court order, his repeating the content of the posts in the statement of defence and affidavit material, his evasion of service, his failure to respond to counsel's multiple requests to approve a court order, and his failure to attend court when required.

[41] Given all of the evidence, the tests for awarding damages, the evidence filed, the conduct of the defendant throughout the litigation, I award general damages to Ms. Spurvey in the amount of $50,000 and to Ms. McKee of $55,000. The difference is because of the difference in their positions and in the number of posts about each of them. I award aggravated damages to each of them of $10,000. This is reduced from what has been asked because of my finding on the effect of the social media posts from an alternative source.

[42] In the absence of submissions on costs or a bill of costs, I award $5,000. I also award pre- and post-judgment interest as permitted by the *Judicature Act,* RSY 2002, c. 128.

g) Should a permanent injunction be issued?

[43] The interlocutory injunction is in effect until the outcome of the trial. The plaintiffs seek a permanent injunction against the defendant in order to prevent him from publishing any defamatory statement about the plaintiffs, including but not limited to any references to them as someone who is Black-hating, racist, or fascist.

[44] A permanent injunction is available i) where it is likely the defendant will continue to publish defamatory words about the plaintiff, or ii) where there is a real possibility the

plaintiff will not recover damages, given the difficulties of enforcing a judgment (*Emeny* at para 60).

[45] The plaintiffs say either basis is satisfied here. The likelihood of the defendant continuing to publish is supported by his failure to remove the posts after an interlocutory injunction was ordered, his failure to comply with court *Rules*, including failures to appear, and his assertions in his statement of defence and affidavits filed in 2024 that he has the right to continue to post. The plaintiffs also say that his pattern of evading service, of failing to comply with court requirements, and of failing to communicate make it extremely unlikely they will be able to recover damages.

[46] Given the plaintiff's non-attendance at court since March 1, 2024, the fact that he has not posted anything new about the plaintiffs since February 2024 and that he removed all the posts as of June 2024, I find the likelihood of his continuing to publish against the plaintiffs is low. However, I agree with counsel for the plaintiffs that his evasiveness, lack of attendance, and lack of cooperation with court process, directions and orders make it extremely unlikely that damages will be recoverable through the enforcement of the judgment. As a result, I will issue the permanent injunction as requested.

Conclusion

[47] The defendant has defamed the plaintiffs by calling them Black-haters, cold-blooded racists in his online posts on his Facebook page Canadiansforfairtreatment.

[48] Ms. Spurvey is awarded $50,000 in general damages.

[49] Ms. McKee is awarded $55,000 in general damages.

[50] Ms. Spurvey and Ms. McKee are each awarded $10,000 in aggravated damages.

[51] Costs of $5,000 are awarded.

[52] Pre- and post-judgment interest in accordance with ss. 35 and 36 of the *Judicature Act*, RSY 2002, c. 128, is awarded.

[53] A permanent injunction is granted enjoining the Defendant, his agent, servants or any others acting on his behalf from publishing or causing to be published by any means, any defamatory statements referring to Kaitlyn Spurvey or Georgina McKee by name, pseudonym, address, photograph, or by any other means of identifying them, including but not limited to, any references to Kaitlyn Spurvey or Georgina McKee as a person who is Black-hating, racist or fascist.

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DUNCAN C.J.