SUPREME COURT OF NOVA SCOTIA
Citation: *Candelora v. Feser*, 2020 NSSC 177

Date: 20200605
Docket: Hfx No. 483401
Registry: Halifax

Between:

Dawna Candelora

Applicant

v.

Trevor Feser and Sonia Dadas

Respondents

Restriction on Publication: Sections 5 and 8 *Intimate Images and Cyber-Protection Act*

Decision on Damages

Judge:	The Honourable Justice Joshua M. Arnold
Final Written Submissions:	February 24, 2020
Counsel:	William Leahey, for the Applicant Patrick Eagan, for the Respondents

Introduction

[1] This is a decision on damages under the *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7 (the Act). In *Candelora v. Feser*, 2019 NSSC 370, I held that the defendants, Trevor Feser and Sonia Dadas, had cyber-bullied the plaintiff, Dawna Candelora. I ordered remedies to stop the behaviour with immediate effect on December 17, 2019, as follows:

> [102] In accordance with s. 6 of the Act, being satisfied that the respondents have engaged in cyber-bullying, I order the following:
>
> • Ms. Dadas and Mr. Feser are prohibited from making any further communications that would be cyber-bullying;
>
> • Ms. Dadas and Mr. Feser must take down any communications that are cyber-bullying, including, but not limited to, Facebook postings that refer directly or indirectly to Ms. Candelora or Mr. Leahey;
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> • Ms. Dadas and Mr. Feser must disable access to any communications that are cyber-bullying if such communications cannot be taken down; and
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> • Ms. Dadas and Mr. Feser are prohibited from any communications, directly or indirectly, with Ms. Candelora except through legal counsel or for the purpose of arranging access to the child of the marriage.

[2] The issues of damages and costs were held over for further submissions. This is the decision on damages.

[3] The applicant requests $350,000 in general damages, $250,000 in aggravated damages, and $75,000 in punitive damages, on a joint and several basis.

[4] The respondents say there should be no more than $2000 in nominal damages. They argue that the point of the legislation is to stop the cyber-bullying, and that this has been accomplished, so damages should not be ordered. As I will discuss below, I do not accept this narrow construction of the legislation. I conclude that damages under the Act should be determined with guidance from caselaw in related areas of tort law, including defamation and breach of privacy.

Background

[5] My findings are set out in the previous decision on liability. In summary, there was a custody, access, and child support dispute between the applicant and her former husband, the respondent Mr. Feser. I concluded that he and his wife,

the respondent Ms. Dadas, had conducted a campaign of cyber-bulling against the applicant in order to intimidate her into dropping the legal proceeding. This campaign took the form of a long series of venomous Facebook postings. I granted the application under the Act, prohibiting the respondents from further cyber-bullying, ordering them to take down the posts or otherwise disable access to them, and prohibiting them from communicating with the applicant. I left the issue of damages to be determined.

Issues

[6] The issues to be decided are as follows:

(1) What is the nature of an award for damages under the Act?;

(2) What is the appropriate quantum of damages?

The statute and the nature of a damage award

[7] The authority for a damage award under the Act is found in s.6, which provides, in part:

> ... (3) Where the Court is satisfied that a person has distributed an intimate image without consent or has engaged in cyber-bullying, the Court may
>
> (a) order the person to pay general, special, aggravated or punitive damages to the person depicted in the intimate image or the victim of cyber-bullying; and
>
> (b) order the person to account for profits.
>
> (4) In awarding damages under clause (3)(a), the Court shall not have regard to any order made under clause (3)(b).
>
> (5) An order made under this Section may be interim or final and may include any time limit the Court considers advisable.
>
> (6) The Court may, on application, extend, vary or terminate an order under this Section.
>
> (7) In determining whether to make an order under this Section and what order to make, the Court shall consider the following factors, if relevant:
>
> (a) the content of the intimate image or cyber-bullying;
>
> (b) the manner and repetition of the conduct;
>
> (c) the nature and extent of the harm caused;

> (d) the age and vulnerability of the person depicted in the intimate image distributed without consent or victim of cyber-bullying;
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> (e) the purpose or intention of the person responsible for the distribution of the intimate image without consent or the cyberbullying;
>
> (f) the occasion, context and subject-matter of the conduct;
>
> (g) the extent of the distribution of the intimate image or cyber-bullying;
>
> (h) the truth or falsity of the communication;
>
> (i) the conduct of the person responsible for the distribution of the intimate image or cyber-bullying, including any effort to minimize harm;
>
> (j) the age and maturity of the person responsible for distribution of the intimate image without consent or cyber-bullying;
>
> (k) the technical and operational practicalities and costs of carrying out the order;
>
> (l) the Canadian Charter of Rights and Freedoms; and
>
> (m) any other relevant factor or circumstance.

[8] The damages provisions must be applied in light of the purposes of the Act, which are set out at s. 2:

> Purpose of Act
>
> 2 The purpose of this Act is to
>
> > (a) create civil remedies to deter, prevent and respond to the harms of non-consensual sharing of intimate images and cyber-bullying;
> >
> > (b) uphold and protect the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication; and
> >
> > (c) provide assistance to Nova Scotians in responding to nonconsensual sharing of intimate images and cyber-bullying.

[9] The respondents submit that the purposes of the Act are the same as those of the predecessor legislation, the *Cyber-safety Act*, S.N.S. 2013, c. 2: "to provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying" (*Cyber-safety Act*, s. 2). The *Cyber-safety Act* was struck down by this court for violating ss. 2(b) and 7 of the *Charter of Rights and Freedoms*: *Crouch v. Snell*, 2015 NSSC 340. Moreover, on their face, the purposes of the two acts are different. The new Act is centred on civil remedies, rather than creating a government-based administrative system for suppressing cyber-bullying.

[10] Following on their interpretation of the purposes of the Act, the respondents submit that damages ordered under s. 6(3)(a) should be limited to the level of a quasi-criminal fine. They say damages should not exceed the penalty for contravening an order under the Act, as set out at s. 11:

> Offence
>
> 11 A person who contravenes an order made under this Act, other than an order for payment of damages or accounting of profits, is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both a fine and imprisonment.

[11] Again, the respondents' argument mischaracterizes the purpose of the Act. The Act is not quasi-criminal legislation. Cyber-bullying proceedings are brought by individual applicants, not the state. A finding of wrongdoing does not constitute an offence. There is no principled reason to treat a civil remedy under the Act as if it were a statutory quasi-criminal penalty under such legislation as the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293. The respondents effectively ask the court to substitute the purpose of the prior unconstitutional legislation for the clearly-stated purposes of the current Act, which specifically include the creation of civil remedies. This would be a flagrant error of law.

[12] Additionally, the respondents offer no principled reason for tying damages to the maximum fine for contravening an order. I also reject the respondents' argument that the court should "exercise restraint" in ordering damages and wait to see whether they obey the order to cease the cyber-bullying.

[13] The Act creates a civil damages remedy. I conclude that cyber-bullying should be treated as a tort. As to what damages should follow, the proper starting point is to compare the relevant conduct to similar cases involving related torts. I am not persuaded that the lack of precedents under this specific statutory remedy prevents the court from considering cases dealing with similar behaviour under other civil claims, such as defamation. I agree with the reasoning in *Yenovkian v. Gulian*, 2019 ONSC 7279, where the court treated various torts under the general umbrella of cyber-bulling as being analogous to defamation:

> [190] I likewise adopt the method of looking to the factors applied to decide damage awards for a tort causing harms analogous to those the present plaintiff has suffered for invasion of privacy. The harm arising from the invasion of privacy in the present case is akin to defamation. Accordingly, in arriving at an award of non-pecuniary damages, I am guided by the factors described by Cory J.

> in *Hill v Church of Scientology*, at para. 187, which I am adapting to the tort of publicity placing a person a false light:
>
> a) the nature of the false publicity and the circumstances in which it was made,
>
> b) the nature and position of the victim of the false publicity,
>
> c) the possible effects of the false publicity statement upon the life of the plaintiff, and
>
> d) the actions and motivations of the defendant.

[14] The statutory remedy under the Act has significant overlap with the types of conduct dealt with in *Yenovkian*, including intentional infliction of mental suffering and invasion of privacy, the latter including "placing a person in false light" and "public disclosure of private facts" (see paras. 160-193). This does not mean that the principles that govern defamation litigation are entirely applicable. For instance, the Act does not mirror the right to a jury trial that exists in defamation law. The related torts will inform the approach to setting damages under the Act, but do not determine it.

General damages

[15] Cyber-bullying is actionable *per se.* This is apparent given its definition in s. 3(c) and s. 6(3)(a), which together allow an order for damages without proof of harm.

[16] General damages for defamation can serve several functions, as the court discussed in *Rook v. Halcrow*, 2019 BCSC 2253:

> [27] General damages for defamation can serve three distinct functions:
>
> a) to act as a consolation to the plaintiff for the distress he or she suffers;
>
> b) to repair the harm to his or her reputation; and
>
> c) as a vindication of his or her personal or business reputation.

[17] See also *Turco v. Dunlop*, [1998] B.C.J. No. 2711 (S.C.), at para. 75; and *Rutman v. Rabinowitz*, 2016 ONSC 5864, at paras. 214-215, affirmed 2018 ONCA 80, leave to appeal denied [2018] S.C.C.A. No. 130.

[18] In *Doucette v. Nova Scotia*, 2016 NSSC 25, affirmed in *Marson v. Nova Scotia*, 2017 NSCA 17, Boudreau J. said:

> [109] Damages for defamation are deemed “at large”. They are not susceptible to exact calculation, nor are they restricted to actual loss suffered by the plaintiff (*Musgrave v. Levesque Securities* [2000] N.S.J. No. 109; *Neuls v. Toffoli* (*supra*)). They are meant to compensate for injury to reputation but also insult to reputation.

[19] The factors to be considered in determining general damages for defamation were considered in *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, where Cory J. said, for the majority:

> 182 The factors which should be taken into account in assessing general damages are clearly and concisely set out in *Gatley on Libel and Slander* (8th ed.), supra, at pp. 592‑93, in these words:
>
> SECTION 1. ASSESSMENT OF DAMAGES
>
> 1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

[20] There is no cap on damages for defamation (*Hill* at para. 168).

[21] Justice Hood considered the particular features of internet defamation in *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245, citing the Ontario Court of Appeal decision in *Barrick Gold Corporation v. Lopehandia* (2004), 71 O.R. (3d) 416:

> [43] *Barrick Gold* ... dealt with defamation in the Internet context. Justice Blair said, in paragraph 28, about Internet defamation:
>
> Is there something about defamation on the Internet – ‘cyber libel', as it is sometimes called – that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is ‘Yes'.

> [44] He referred to the principles set out in *Hill*. He then in paragraph 30 quoted from an Australian decision the, "ubiquity, universality and utility" of the Internet. He continued in paragraph 31:
>
> > Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter‑ active, blunt, borderless and far‑ reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed...
>
> [45] He then said in paragraph 34:
>
> > ... Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

[22] In *Doucette*, Boudreau J. noted that internet dissemination "by its very nature is widespread and anonymous, with unknown results" (para. 114).

[23] Defamation is not the only existing tort that can inform the process for determining damages under the Act. As Boudreau J. noted in *Doucette*, defamation principles may carry over into cyber-bullying-related breach of privacy actions. In affirming the decision (at 2017 NSCA 17), the Court of Appeal confirmed the availability of damages for "Breach of Privacy/Intrusion upon seclusion." The court said:

> [27] The trial judge was alive to the potential to award damages for "Breach of Privacy/Intrusion upon seclusion". She discussed the issue of whether there was any need to rely upon an Ontario case, *Jones v. Tsige*, 2012 ONCA 32, which recognized the tort of intrusion upon seclusion. In *Jones* the Court made an award based on the tort of invasion of privacy, or intrusion upon seclusion. That case referenced the fact that one who intentionally intrudes upon the seclusion of another in his private affairs is subject to liability for invasion of privacy if the invasion would be highly offensive to a reasonable person. A reasonable person, in the context of that tort, would find it highly offensive to have records such as health records, or in the context of the present case, confidential policing/corrections information disseminated.
>
> [28] The *Jones* case made it clear that the damages for such a tort were in the category of "symbolic" or "moral" damages where a plaintiff suffered no provable pecuniary loss. Here, the trial judge correctly pointed out that while in

> *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245 it was made clear that the court could award damages for a tort of intrusion upon seclusion, it was not necessary in the present case. She said:
>
> > 175 … I do not need to undertake that analysis. The actions complained of under this heading are, essentially, the same actions underpinning the defamation claim, for which I have already awarded complete damages. The factors noted in par. 87 of *Jones* have already been considered in that award. It would be inappropriate to make further awards. …
>
> [29] I agree with the trial judge's approach on this issue. The approach argued by the appellant would have resulted in double recovery for the same delict. The trial judge's comments make it clear that the intrusion of seclusion was subsumed within the other heads of damages.

[24] In addition, the Ontario Superior Court of Justice recognized a tort of public disclosure of private facts in *Jane Doe 72511 v. N.M.*, 2018 ONSC 6607, [2018] O.J. No. 5741. This was in part a response to Parliament's criminalization of the non-consensual sharing of intimate images (paras. 83-96). The elements are as follows:

> 99 To establish liability, the plaintiff must therefore prove that:
>
> > (a) the defendant publicized an aspect of the plaintiff's private life;
> >
> > (b) the plaintiff did not consent to the publication;
> >
> > (c) The matter publicized or its publication would be highly offensive to a reasonable person; and
> >
> > (d) The publication was not of legitimate concern to the public.

[25] The court in *Jane Doe* cited Cromwell J.A. (as he then was) in *G.(B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, at para. 130, a sexual battery case, and said:

> 132 In these circumstances, I conclude that Jane's damages are much more significant than those that would typically be awarded for intrusion on seclusion or another similar breach of privacy. The internet never forgets. Her dignity and personal autonomy have been, and will continue to be, compromised by N.M.' actions. As stated by Justice Cromwell, the damages award must "demonstrate, both to the victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer".

[26] In *Yenovkian* the Ontario Superior Court recognized the tort of publicity placing the plaintiff in a false light:

[170] With these three torts all recognized in Ontario law, the remaining item in the "four-tort catalogue" of causes of action for invasion of privacy is the third, that is, publicity placing the plaintiff in a false light. I hold that this is the case in which this cause of action should be recognized. It is described in § 652E of the *Restatement* as follows:

> *Publicity Placing Person in False Light*
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[171] I adopt this statement of the elements of the tort. I also note the clarification in the *Restatement*'s commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world.

[172] It also bears noting this cause of action has much in common with the tort of public disclosure of private facts. They share the common elements of 1) publicity, which is 2) highly offensive to a reasonable person. The principal difference between the two is that public disclosure of private facts involves true statements, while "false light" publicity involves false or misleading claims. (Two further elements also distinguish the two causes of action: "false light" invasion of privacy requires that the defendant know or be reckless to the falsity of the information, while public disclosure of private facts involves a requirement that there be no legitimate public concern justifying the disclosure.)

[173] It follows that one who subjects another to highly offensive publicity can be held responsible whether the publicity is true or false. This indeed, is precisely why the tort of publicity placing a person a false light should be recognized. It would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false.

[174] Moreover, it is likely that in the course of creating publicity placing a person in a false light, the wrongdoer will happen to include true, but private, facts about the person whose privacy is invaded...

[27] In coming to general damages for publicity placing the plaintiff in a false light, the court determined the harm suffered was akin to defamation, and so adapted the principles set out in *Hill* (para. 190):

> [190] I likewise adopt the method of looking to the factors applied to decide damage awards for a tort causing harms analogous to those the present plaintiff has suffered for invasion of privacy. The harm arising from the invasion of privacy in the present case is akin to defamation. Accordingly, in arriving at an award of non-pecuniary damages, I am guided by the factors described by Cory J. in *Hill v Church of Scientology*, at para. 187, which I am adapting to the tort of publicity placing a person a false light:
>
> a) the nature of the false publicity and the circumstances in which it was made,
>
> b) the nature and position of the victim of the false publicity,
>
> c) the possible effects of the false publicity statement upon the life of the plaintiff, and
>
> d) the actions and motivations of the defendant.

[28] In contrast to intrusion upon seclusion, general damages for the related torts of public disclosure of private facts and false publicity are uncapped, as the court noted in *Yenovkian*:

> [188] The two *Jane Doe* cases have recognized that the cap on damages for intrusion upon seclusion may not apply to the other forms of invasion of privacy: *Jane Doe 2016* at para. 58; *Jane Doe 2018* at paras. 127-132. In this case, as is in those, the "modest conventional sum" that might vindicate the "intangible" interest at stake in *Jones v. Tsige*, para. 71, would not do justice to the harm the plaintiff has suffered.

[29] Given these authorities, I conclude that the *Hill* principles, with whatever modifications are appropriate, can also be applied to the assessment of general damages under the Act.

Aggravated damages

[30] The framework for considering aggravated damages in the defamation context was discussed in *Hill*, where Cory J. said:

> 188 Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high‑handed or oppressive, thereby

> increasing the plaintiff's humiliation and anxiety arising from the libellous statement...
>
> 189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right‑thinking people arising from the malicious conduct of the defendant.
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> 190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff... The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff...
>
> 191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross‑examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

[31] Nova Scotia courts followed this framework recently in *Doucette* (paras. 134-136) and *Trout Point Lodge* (paras. 39-40, 95). In *Trout Point Lodge*, the fact that defamation happened via the internet was taken as an aggravating factor (para. 94). *Hill* also provides the framework for aggravated damages in breach of privacy actions: *Jane Doe* at para. 135. The conduct of the defendant, including the absence of an apology, up to and including its conduct at trial, can be taken into consideration in assessing aggravated damages: *Nichol v. Royal Canadian Legion, Branch 138 Ashby*, 2011 NSSC 144, at para. 72.

[32] In this case the respondents continued to post about Ms. Candelora in the lead up to, and throughout, the trial. The trial took place between July 23 and July 26, 2019. In an agreed statement of facts dated July 26, 2019, the parties stated:

> All parties agree that Exhibit 4 is a posting to the Facebook Page operated by Trevor Feser and it was first published on July 20th after being created by Mr. Feser himself. This posting was accessible to any member of the public not deliberately blocked from Mr. Feser's Facebook page. It remained accessible by any member of the public not blocked by Mr. Feser until some point between 9 am and 12 noon today, July 26, 2019.

[33] This agreed statement of facts refers to a lengthy Facebook posting made by Mr. Feser that was similar in nature to many of the previous postings made by the respondents, and stated in part:

> Many of you know we are going to court for a 750k cyber civil lawsuit filed by my ex-wife out of pure jealousy and vindictiveness … (Monday civil trial division). She wants to remove our right of expression and our right to be a human. We post under the Canadian charter of rights and expression [sic]. We only wrote the truth of the content per the cyber act [sic].
>
> I left my previous marriage in September 2017, after a long history of mental control and abuse, as well as extreme financial abuse. 20 years working in the oilpatch [sic] and trying to build a life of a house and vehicles, at 39 years old I left with nothing but couple garbage bags, a Traeger and my cigar…. And a massive massive revenue Canada debt… all because of money paid into the family account to cover her gregarious spending and shop-aholic ways, with no taxes or GST paid for almost 4 years… (60 designer purses, Range Rover, BMW 2-seater, crazy jewelry).
>
> …
>
> We shared our stress, our pain, our attacks on Facebook…
>
> She demanded initially 5k in damages in her bogus civil Cyber lawsuit… than after looking at Sonia's financials in her filed affidavit, decided to change it to 750k… yes $750,000 in her latest position against Sonia and I !!!. She's also demanding that we have a lifetime ban from Facebook including all other social media. It only shows how jealous and vindictive and a stalker she is, focused solely on our destruction!
>
> She's a prejudice and a racist, claiming that Sonia is from Turkey or somewhere in the Middle East and that we are going to kidnap my son with [sic] and leave the country to the middle east [sic] with him…

[34] The respondents objected to the imposition of aggravated damages at the original hearing on the basis that "it would be redundant to have aggravated

damages in a cyber-bullying case which by the definition provided by the Applicant is based on maliciousness" (see previous decision on liability at para. 105). Their new counsel has not repeated this argument in their post-trial brief. Cyber-bulling under the Act can be behaviour that is either malicious or reckless. The definition at s. 3(c) states:

> (c) "cyber-bullying" means an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual's health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual's health or wellbeing or was reckless with regard to the risk of harm to another individual's health or well-being... [Emphasis added.]

[35] Accordingly, I do not accept that the availability of aggravated damages would be redundant in a damage claim under the Act.

Punitive damages

[36] The objectives of punitive damages are punishment, deterrence, and denunciation: *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 68. In the defamation context, Cory J. stated in *Hill*:

> 196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high‑handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[37] In *Whiten* the majority noted that terms like "high-handed" do little to aid a court in coming to a dollar figure (para. 70). Binnie J. emphasized the importance of proportionality:

> 74 Eighth, the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)...

[38] The dollar figure must be proportionate to the blameworthiness of the defendant's conduct (*Whiten* at paras. 112-113), the vulnerability of the plaintiff (paras. 114-116), the harm directed at the plaintiff (para. 117), the need for deterrence (paras. 118-122), the need for a penalty above and beyond what the defendant may already have faced (para. 123), and any advantage the defendant wrongfully gained (paras. 124-126).

[39] The principles in *Hill* and *Whiten* guided the Ontario courts in their privacy-based cyber-bullying actions: see *Jane Doe* at paras. 140-142 and *Yenovkian,* at paras. 195-196.

[40] In justifying punitive damages, it is permissible for a court to point to "aggravating" factors so long as the same behaviour is not double-penalized: *Doucette* (C.A.) at para. 39. It can also be appropriate to take into account the tortfeasors' resources when setting a punitive quantum so as to ensure the penalty makes an impact. In *Nazerali v. Mitchell*, 2018 BCCA 104, the court said:

> [92] An award of punitive damages in addition to a large award of compensatory and aggravated damages may be justified when a defendant is a person of significant means. In *Hill*, Cory J. observed:
>
> > [199] Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous. [Emphasis in *Nazerali*.]
>
> [93] It follows in my view that in determining the appropriate quantum of punitive damages, it will be appropriate for the judge to take into account the resources of the defendant, and the anticipated impact of the awards already made for compensatory damages...

[41] In *Whiten* the majority said, "the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational" (para. 71).

Caselaw

[42] While caselaw is instructive on the issue of damages, the court's first concern is what is warranted on the facts of the case. Justice Cory stated, in *Hill*:

> 187 At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself". The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

[43] Justice Hood stated in *Trout Point Lodge* that "[i]t is important that each case of defamation must be looked at on its own facts and the awards given in other decisions are, therefore, not of much assistance" (para. 42).

Defamation Cases: Nova Scotia

[44] These cases inform the range of damages common to Nova Scotia courts in recent years.

[45] In *Trout Point Lodge* a newspaper in Louisiana had erroneously tied the Lodge and its owners to a corrupt politician, alleging the business was near-bankrupt and that the owners were perjurers and con men. Though the newspaper retracted the story, the defendant continued to make the allegations on his blog. Vulgar language and homophobic slurs proliferated through "many, many" postings over the course of several months, up to the hearing (para. 24). Sexually explicit doctored photographs of the plaintiffs were posted alongside "extremely derogatory and homophobic comments of the most outrageous kind" (paras. 58 and 77). The plaintiffs claimed for defamation, invasion of privacy, injurious falsehood, intentional interference with contractual relations, intentional interference with economic relations, intentional infliction of emotional and mental distress, and assault. They obtained default judgment. Justice Hood awarded damages in defamation only, including $75,000 in general damages to the corporate plaintiff, recognizing the harm done to its reputation could be "very difficult" to change (para. 87); $100,000 in general damages to each of the individual plaintiffs (para. 91); and $50,000 in aggravated damages to each of the individual plaintiffs, taking note of the fact that the defamation occurred online, and the defendant was attempting to intimidate them to prevent them from pursuing their rights in court (para. 96). Justice Hood also awarded $25,000 in punitive damages to each of the individual plaintiffs, in light of the fact the

defamation continued after judgment had been entered against him and the defendant boasted they would be immune to an enforcement of the judgment on jurisdictional grounds (para. 101). In total, then, the damages awarded to each individual plaintiff was $175,000.

[46] The respondents object to the comparison to *Trout Point Lodge* on the basis that, *inter alia*, Mr. Feser and Ms. Dadas' postings were on Facebook where they allegedly would not be readily accessible to a person searching Ms. Candelora's name (on Google, for instance). There was no evidence, expert or otherwise, to substantiate this claim, and I do not give it any weight. In the liability decision I rejected this theory, holding that the postings were tantamount to publication and finding no basis to treat that publication as less serious simply because it was on Facebook.

[47] In *Nichol v. Royal Canadian Legion, Ashby Branch No. 138*, 2011 NSSC 144, the legion's long-time barman was wrongfully terminated and defamed as a thief. There were two instances of defamatory conduct. The first was in a letter that the Legion was obliged to send to Human Resources Development Canada, regarding Mr. Nichol's application for benefits, in which the Legion stated that Mr. Nichol's conduct was "clearly unauthorized and may be considered fraudulent" (paras. 77-79). The second was a statement in a Legion audit committee memo, repeated verbally at an annual general meeting of up to 100 members, suggesting Mr. Nichol had misappropriated funds. There was no finding of malice; in fact, evidence presented at trial (though not expressly accepted) indicated they tempered their language so as not to accuse Mr. Nichol of definite wrongdoing. However, the defamatory meaning was not saved by defences of justification or qualified privilege (paras. 86-95). In these circumstances, Bourgeois J. (as she then was) awarded general damages of $45,000 (para. 102). As to aggravated and punitive damages, she said:

> [103] The above being said, although the Court has obviously found fault with how the Defendant Legion treated Mr. Nichol, I am unable to conclude from the evidence that any of the officers or agents of the Defendant harboured actual malice towards him, or were "motivated by an unjustifiable intention to hurt" him. (*Hill, supra*) As such, I decline to award aggravated damages.
>
> [104] Further, I am unable to conclude from the evidence that the conduct of the Defendant Legion was so malicious, high‑handed or oppressive, that the Court's sense of decency is offended. As such, I decline to award punitive damages.

[48] In *Doucette* a provincial firearms inspector running a background check in connection with the plaintiff's firearms license application took it upon himself to inform the plaintiff's potential employer of his theory that the plaintiff had taken part in an armed robbery. The official later apologized, though he seemed to show little genuine remorse (paras. 145-148). As the plaintiff was entering the security field, this set back her career, though the evidence did not establish that it permanently harmed her prospects (para. 129). The court awarded $35,000 in general damages (para. 133) and $15,000 in aggravated damages due to the "reckless" and "appalling" disregard for the plaintiff's reputation and dignity (paras. 140-158).

Defamation Cases: Internet & Social Media

[49] A recent case with a similar fact pattern is *Rook v. Halcrow*. Following a breakup, the defendant's ex-girlfriend engaged in a "relentless [and] extensive" (para. 3) smear campaign consisting of numerous online posts over the course of a year. The posts alleged the plaintiff was a drunk and a cheater, and would spread sexually transmitted diseases without informing his partner. Some of these posts were on social media (Instagram), and some were on websites (paras. 8-13). She was found to have acted with malice (para. 34). As to quantum of damages, the court said:

> [41] Turning to the case at bar, Ms. Halcrow mounted a campaign against the Mr. Rook that was as relentless as it was extensive. As I said, she was motivated by malice. The timing of the postings was tied to the relationship break-up, its recommencement and its second break-up.
>
> [42] In my view, an appropriate award of general damages is $175,000 general damages and $25,000 aggravated damages. The plaintiff has not claimed punitive damages.

[50] The respondents offer no compelling basis on which to distinguish the present case from *Rook v. Halcrow*, beyond the objection that Ms. Candelora did not provide evidence of reputational harm.

[51] Also relevant is *Simon v. Poirier*, 2019 YKSC 56. In the context of an acrimonious separation, the defendant posted two defamatory statements on Facebook to the effect that the plaintiff had lied in court, had assaulted him, was unprofessional in her job as a social worker, was unfaithful, and had a reputation for being "easy" (para. 35). With respect to general damages, the court concluded:

> [52] Having regard to all the circumstances of this case, including that:
>
> - the defamation consists of the publication of two Facebook posts containing a number of false statements with respect to the plaintiff, which were distributed instantly to a number of people;
>
> - the posts were seen by family members, friends, neighbours and co-workers of the plaintiff, as well as other unknown individuals living in and outside the Yukon;
>
> - Whitehorse is a relatively small community;
>
> - the posts were published in the context of an acrimonious separation;
>
> - the posts had a personal impact on the plaintiff;
>
> - the plaintiff suffered some negative professional consequences due, at least in part, to the defendant's posts on Facebook; and
>
> - there is no evidence that the defendant apologized or retracted his defamatory words.
>
> [53] On balance, I find that an award of general damages of $20,000 is appropriate in the circumstances.

[52] The court also ordered aggravated damages of $10,000 (para. 60), finding that "the defendant acted with malice as he was motivated by an unjustifiable intention to injure the plaintiff" and "that as a result of taking their acrimonious separation and family matter onto the public stage, the defendant increased the plaintiff's humiliation and anxiety arising from the libellous statement" (para. 59). The court did not award punitive damages, in view of proportionality "and considering the award of general and aggravated damages" (para. 61).

[53] *Wilson v. Wilson*, 2019 ONSC 5726, was another case in the context of a divorce. The defendant made a series of Facebook posts over six months accusing the plaintiff of breaking court orders, stealing, and having a sexual relationship with his adult daughter (para. 4). The court awarded general damages only:

> [30] The nature of the defamation in this case is serious. However, the context in which the comments arose, namely upon a marital separation, and the outrageousness of the incest allegation on its face (that he would be sexually involved with his 43 year old daughter), render it less likely to be believed. Although the plaintiff was understandably upset and angered by the various statements made, it is of relevance that none of the persons who provided evidence to the court believed the statements to be true.
>
> [31] The libel alleged was restricted to posts on Ms. Wilson's Facebook page. I have no evidence of how many friends she had on Facebook, whether her

> comments were shared beyond her Facebook page, or otherwise the audience the comments may have reached. However, that the defamation took place over several months is an aggravating factor.
>
> [32] The plaintiff argued that his reputation was particularly important to his employment and that the defamation had adversely affected him in that regard. However, there was no independent evidence to substantiate that those with whom he might be expected to deal had refused, or that his position was one of particular trust or standing that would likely to be affected by the statements made by the defendants.
>
> [33] Having regard to all of these factors, an appropriate award of general damages against the defendant Lisa Wilson is $15,000.

[54] The court held that the "context and content of the defamation, although serious, does not rise to the level of maliciousness, oppressiveness or high-handedness required to award punitive damages" (para. 36). There was no reference to aggravated damages.

[55] In *Nassri v. Homsi*, 2017 ONSC 4554, the plaintiff was a reformed criminal working for a charity managed by the defendant. Believing the defendant was misappropriating funds, the plaintiff confronted him about it. The defendant then began a "campaign of threats and intimidation", alleging that the plaintiff had stolen from the charity (para. 6). This included an online post to people in the charity field falsely accusing the plaintiff of stealing, and two Facebook posts using the charity's profile that attached articles of the plaintiff's criminal past. The defendant continued the campaign after receiving notice under the Ontario *Libel and Slander Act* asking that the defamatory posting be removed and that an apology be posted (paras. 6-10). While the only cause of action was defamation, the defendant also harassed the plaintiff with threatening phone calls, home visits, and property damage (paras. 11-12). With respect to damages, the court concluded:

> [32] I regard this as a serious and significant matter. We cannot allow people to misuse their fellow citizens as has been done here. People have a right to live without the fear of being lied about and harassed with malice as has occurred in this case.
>
> [33] On the other hand damages are not elastic or open ended in their scope.
>
> [34] In the circumstances I award damages, as follows:
>
> (1) for the defamation: $50,000;
>
> (2) for the factors that have served to aggravate that harm: $20,000;

> (3) the recklessness and lack of concern demonstrated throughout but particularly in involving others (the parents of the plaintiff) attracts further disapproval of the Court and the recognition that punitive damages are called for: $20,000.

[56] *Nassri* involved similar conduct to the present case. Both situations involve Facebook postings, and both defamers refused to apologize or retract their comments when warned. The content of the defamatory statements was serious in both cases. While Ms. Candelora faced many more posts than Mr. Nassri, the latter was defamed using an organization's Facebook account (para. 26). Distinguishing factors may be the motivation and vulnerability of the plaintiffs. Mr. Feser and Ms. Dadas' attempt to dissuade Ms. Candelora from pursuing litigation is arguably more serious than the *Nassri* defendant's motive of dissuading whistleblowing or reporting. On the other hand, the plaintiff in *Nassri* was arguably more vulnerable to the defamation on account of his criminal past (para. 21).

[57] In *Pritchard v. Van Nes*, 2016 BCSC 686, during a dispute between neighbours, the defendant made Facebook posts alleging that the plaintiff, a teacher, was videotaping the defendant's children in their backyard for sexual purposes. The post attracted 57 comments and was shared with the plaintiff's principal before being deleted 27.5 hours later (paras. 2-4, 21-31). The evidence was that the deletion did not stop the posts from spreading (para. 32). The defendant argued that she should not be held responsible for third party comments on her posts (para. 41), but the court rejected this claim after a review of the law on third party defamatory material (paras. 91-119). There was no apology prior to trial (para. 39). As to damages, the court concluded:

> [131] I do not find that the claim of malice has been made out. Taken in its entirety, the evidence of the defendant's actions – her self-centred, unneighbourly conduct; her failure to respond reasonably to the plaintiff's various complaints, particularly regarding her dog; and her thoughtless Facebook posts – point just as much to narcissism as to animosity. 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.
>
> [132] The defendant, as I see it, appears to have thoughtlessly taken to a social medium to give vent to her feelings, making reckless statements without any regard to the consequences. She certainly ought to have anticipated the potential impact of her remarks; whether she actually did so has not been proven.
>
> [133] The defendant's subsequent actions bear none of the indicia of malice discussed at para. 191 of Hill: she removed the posts relatively quickly, probably

> when the gravity of the situation became apparent to her through the police presence at the plaintiff's home; she did not seek to publicize the proceedings, giving rise to further dissemination of the defamation; she did not file a defence.
>
> [134] Aggravated damages are not in order, but given the seriousness of the allegations and the extent of the harm suffered, a significant award of general damages is. I award the plaintiff general damages for defamation of $50,000.
>
> [135] I further find this an appropriate case for an award of punitive damages, as a means of rebuking the plaintiff for her thoughtless, reckless behaviour. She acted without any consideration for the devastating nature of her remarks. With regard to the factors enunciated by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 13, a punitive damages award must be proportionate to the defendant's blameworthiness, which in this case is high; the defendant's vulnerability, which is also high; the harm suffered by the plaintiff, which has been considerable; and the need to publically denounce the defendant and thus bring to the notice of the public the dangers of ill-considered remarks being made in social media and the serious consequences of such conduct.
>
> [136] I award the plaintiff additional punitive damages of $15,000.

[58] The nature of the allegation appeared to be the most important factor in *Pritchard*, as the court noted a teacher cannot quickly recover from allegations of paedophilia once the suspicion has been cast (see para. 122). Comparatively, while Ms. Candelora suffered a more drawn-out defamation campaign, the defamatory allegations against her were less serious.

[59] In *Zhong v. Wu*, 2019 ONSC 7088, the defamation consisted of a number of posts against the plaintiff, a prominent man in Toronto's Chinese community, on WeChat, a social media platform. The defendant posted dozens of public messages containing allegations against the plaintiff of "fraud, embezzlement, bribery, corruption, sexual assault and being a sexual predator", as well as other statements whose sting came from the context, including "allegations that Mr. Zhong owns many luxury homes and cars and that he is womanizer, has strong sexual urges and is promiscuous" (para. 18). When served with defamation notice, the defendant made further posts about the plaintiff and the defamation action (paras. 10-11). In considering damages, the court said:

> [39] Although I found Mr. Wu acted with malice, it was not among the more serious or pronounced forms of malice. Mr. Wu offered no apology. Mr. Wu is an ordinary person, a construction worker. He holds no position of status or public influence that would lend weight to the false statements he has made.
>
> [40] There is no claim for income loss. Nor it [*sic*] there any evidence of actual reputational harm. For example:

> there is no evidence the defamatory communications ever came up in any client or community meetings
>
> Mr. Zhong has not lost any friendships and
>
> there is no evidence anyone told Mr. Zhong that they no longer trust him because of the defamatory statements.
>
> [41] Thus, of the three basic factors, there was personal distress and hurt but no evidence of medical or mental health issues or any effect on the plaintiff's day-to-day life. There is no evidence of any harm to the plaintiff's reputation (recognizing that damages are presumed). There is a need, given that the posts were defamatory and posted online for about four months, for vindication of the plaintiff's reputation. I must keep in mind, however, that this judgement (finding Mr. Wu liable for making false statements about Mr. Zhong) is itself strong vindication of Mr. Zhong's reputation in the community.
>
> [42] Taking all of this into account I must conclude that the factors underpinning cases in which large damage awards of the kind sought by the plaintiff have been made, are not present here. In my view, an award of $35,000 is an appropriate award for general compensatory damages.
>
> [43] In my view, this is not a case warranting punitive damages. The court's disapproval of the defendant's conduct (and the objective of deterrence) are sufficiently recognized by the compensatory award and my award as to costs.

[60] The Court awarded $35,000 in general damages and fully indemnified the plaintiff for the costs of the action.

[61] The applicant cites *Magno v. Balita*, 2018 ONSC 3230, though there is little resemblance between the cases on the facts. The plaintiff, a prominent Filipino businessman now residing in Canada, was defamed in a Toronto-area Filipino newspaper. Thirty-five defamatory articles were published (in print and online) over 13 months, referring to the plaintiff as "an arrogant gasbag, a shameless bully, a habitual liar, a fraudster, etc" (para. 9). Publication continued after service of the statement of claim (para. 10). The court ordered general and aggravated damages totalling $300,000, and punitive damages of $110,000 jointly and severally against the media group, the publisher, and the writer (paras. 2, 66-76). The court characterized the conduct in *Magno* as an "all out cyber attack" by the newspaper, which was prominent in the Filipino community (para. 73).

[62] The applicant also cites *Nazerali* which is likewise a departure from the facts in this case. The defendants published a series of chapters online stating the plaintiff, an international businessman of good repute, did business with the Mafia, sold arms to the Mujahideen, and was helping to finance Al Quaeda. These

assertions could not be proven at trial. Malice was inferred, the trial judge describing the defendants' "indecent and pitiless desire to wound" (paras. 90-91). General damages were set at $400,000, aggravated damages at $200,000 (reduced from the $500,000 ordered by the trial judge), and punitive damages at $250,000 (para. 99). The prominence of the plaintiff, the seriousness of the allegations, and the "devastating" impact the publication had on his business operations set *Nazerali* apart from the case at bar.

[63] Another decision noted by the applicant is *Rutman* where several former business associates had settled litigation arising from a business dispute. The appellants were not satisfied with the settlement, and commenced an internet defamation campaign against the respondent designed to damage his personal and professional reputations. The trial judge awarded general damages of $200,000, aggravated damages of $200,000, and punitive damages of $250,000. While the factual background is quite distinct from that in the present case, the Ontario Court of Appeal's remarks in dismissing the appeal (2018 ONCA 80; leave to appeal denied, [2018] S.C.C.A. No. 130) are of value:

> [81] Rabinowitz next argues that the total compensatory damages award in this case is "incoherent" because it is inconsistent with the quantum of compensatory damages awarded in allegedly similar cases. We reject this argument for two reasons.
>
> [82] First, as the courts have repeatedly emphasized, libel cases are particularly fact-sensitive and, in that sense, each is unique. In fashioning his damages awards, the trial judge appreciated that, for this reason, a comparison with awards in other libel cases was of little assistance.
>
> [83] This conclusion accords with the jurisprudence in libel cases. In *Hill*, at para. 190, the Supreme Court held:
>
> > The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. <u>It follows that there is little to be gained from a detailed comparison of libel awards</u>. [Emphasis by Ont. C.A.]
>
> See, to the same effect, *Botiuk*, at para. 105.
>
> [84] Second, and in any event, although Rabinowitz relies on several libel cases in which the amount of the compensatory damages awarded was lower than that awarded here, other libel cases reveal compensatory damages awards in amounts higher than those awarded by this trial judge. The variability in the amount of

> compensatory damages awarded in Canadian libel cases does not mean that the award in this case is "incoherent", as Rabinowitz argues. Rather, it underscores the highly fact-sensitive and unique nature of each libel case. Given all the factors at play here, including Rabinowitz's admitted misconduct, the nature of the defamatory statements, and their impact on Rutman, no other libel case is especially instructive, let alone controlling, on the issue of the quantification of damages.

[64] The fact-specific nature of cases of this kind must be remembered in assessing damages.

Cyber-bullying Cases

[65] In *Jane Doe* the plaintiff sued after her former boyfriend posted an intimate video of them online. The video received more than 60,000 views before being taken down at its source, though by that time it had been re-posted to at least 10 different websites (paras. 5-6). When confronted, the defendant threatened to post additional intimate content if she took any legal steps (para. 122). As noted earlier, the defendant was held liable under the tort of "public disclosure of private facts" (paras. 83-101). The court awarded $75,000 in general damages, $25,000 in aggravated damages, and $25,000 in punitive damages in respect of this cause of action (para. 139).

[66] *Yenovkian* originated as a family law application, but led to cross-claims in nuisance, harassment, intentional infliction of mental suffering, and invasion of privacy after "years of cyberbullying" by the husband (para. 2). Through webpages, a YouTube channel, and an online petition, he accused his wife of, *inter alia*, kidnapping, fraud, and abuse. These were posted online and sent to his wife's family, friends, business contacts, and church associates (para. 47). Throughout the proceedings, he sent her abusive emails calling her a child abuser and a liar (para. 39). His conduct persisted throughout the proceeding and despite several court orders (paras. 40-42). In awarding general damages, the court said:

> [193] On the tort of invasion of privacy (false light and public disclosure of private facts), I award damages of $100,000, considering the conduct here and the range in the cases identified in *Rutman v. Rabinowitz*, 2018 ONCA 80 and *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, and the increased potential for harm given that the publicity is by way of the internet, which is "instantaneous, seamless, interactive, blunt, borderless and far-reaching": *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (Ont. C.A.) at para. 31. I find that third parties have commented on the websites and signed the petitions in both the UK and the US, and that Mr. Yenovkian has sent targeting e-mails and caused the

> distribution of flyers in the UK driving people to the websites in addition to the mere fact of publication.

[67] The court also awarded punitive damages of $150,000 (paras. 194-202).

Positions of the parties

[68] Ms. Candelora seeks general damages of $350,000, aggravated damages of $200,000, and punitive damages of $75,000, jointly and severally against the respondents.

[69] The respondents say there should be no more than nominal general damages of $2000, and no aggravated or punitive damages ordered.

Analysis

[70] As noted earlier, s. 6(7) of the Act sets out considerations to be taken into account in making a remedial order under the Act:

> s.6(7) In determining whether to make an order under this Section and what order to make, the Court shall consider the following factors, if relevant:
>
> (a) the content of the intimate image or cyber-bullying;
>
> (b) the manner and repetition of the conduct;
>
> (c) the nature and extent of the harm caused;
>
> (d) the age and vulnerability of the person depicted in the intimate image distributed without consent or victim of cyber-bullying;
>
> (e) the purpose or intention of the person responsible for the distribution of the intimate image without consent or the cyberbullying;
>
> (f) the occasion, context and subject-matter of the conduct;
>
> (g) the extent of the distribution of the intimate image or cyber-bullying;
>
> (h) the truth or falsity of the communication;
>
> (i) the conduct of the person responsible for the distribution of the intimate image or cyber-bullying, including any effort to minimize harm;
>
> (j) the age and maturity of the person responsible for distribution of the intimate image without consent or cyber-bullying;
>
> (k) the technical and operational practicalities and costs of carrying out the order;
>
> (l) the *Canadian Charter of Rights and Freedoms*; and

> (m) any other relevant factor or circumstance.

[71] Respondents' counsel attempted to place before the court a range of materials apparently generated since the hearing and the order, including medical evidence respecting Ms. Dadas, blog posts by Ms. Candelora, the results of Google searches, and undated "apology letters" directed to the court. I have disregarded this material. I have also disregarded respondents' counsel's speculation about Ms. Candelora's state of mind. (Counsel also attached an e-mailed offer to settle from March 2019, which I have ignored for the purposes of this decision, without prejudice to the possibility that it may be relevant to costs.) This purported evidence and accompanying submissions are irrelevant to the issues in this decision. Counsel provides no basis for the submission that "post-judgment conduct of the respondents, and the applicant, is relevant to damages" (Letter to the court, February 21, 2020).

[72] Given the considerations identified in s. 6(7) of the Act, and the general guidance provided by the relevant caselaw, the following aspects of the respondents' behaviour in this case, as previously identified in the liability decision, are particularly significant to the issue of damages:

> (1) the duration and extent of the cyber-bullying, which was prolific and repeated; I concluded that the respondents' Facebook postings were public, not limited to a narrower group of individuals, and were tantamount to publication (paras. 76, 51-56, 93-95);
>
> (2) the postings were offensive and designed to intimidate and humiliate Ms. Candelora (para.70). They included disclosure of sensitive personal facts such as "information relating to Ms. Candelora's tax returns, personal expenditures, and other personal information, in an effort to embarrass and humiliate her" (para. 62);
>
> (3) the respondents' refusal to stop posting after receiving notice from Ms. Candelora's counsel (para. 59);
>
> (4) Ms. Dadas' intention to intimidate Ms. Candelora into changing the course of the custody and child support proceedings, which amounted to "maliciously attempting to cause harm to Ms. Candelora's health or well-being, or being reckless with regard to the risk to Ms. Candelora's health or well-being" (paras. 59-60, 63, 66); and

> (5) the respondents' disregard for the authority of the court, as demonstrated by their indifference toward Justice Chiasson's ruling (para. 10) and Ms. Dadas' assertions they could escape consequences on account of her dual citizenship (para. 7), their lack of contrition, and their repeated assertions that they would continue to post defamatory statements until litigation against them ceased.

[73] The victim's situation, while serious, was not as dire as those in some if the cases discussed above. Ms. Candelora is a chronologically mature person. She was not unusually vulnerable to cyber-bullying (liability decision at para. 73). No intimate images were involved. Additionally, the applicant was not living in physical proximity to the respondents. I found that the respondents' conduct "harmed Ms. Candelora's well-being, both mental and physical" (para. 72), given her evidence that they caused her psychological stress which affected her ability to work and exacerbated a pre-existing medical condition (paras. 40, 57).

[74] The respondents suggested that Ms. Candelora consented to their activities by forwarding the affidavits to *Frank Magazine*. I rejected this submission in the liability hearing (liability decision at para. 90). The evidence indicated that the magazine contacted Ms. Candelora. She understood that they intended to report on a criminal complaint for uttering threats Mr. Feser had brought against her, and her evidence was that her counsel sent the materials to *Frank* in order to tell her side of the story. The magazine subsequently published three stories, of which Ms. Candelora said she was happy with the third (see liability decision at paras. 32, 37-39). I made no specific finding that the respondents had approached *Frank* first, as Ms. Candelora believed. I concluded that forwarding the affidavits to *Frank* was an ill-advised damage control strategy, but did not impact the respondents' liability (para. 100). Similarly, although the applicant argues that it should be treated as an aggravating factor, I am not convinced that this aspect of the facts should have a substantial effect on damages. This was a public legal proceeding, and *Frank* could have accessed the materials publicly. Given that the evidence did not lead me to make any specific findings about the circumstances in which the respondents might have approached *Frank*, I am not prepared to increase damages as a result. Similarly, I am not prepared to reduce damages on account of the applicant's decision to provide the publication with the affidavits.

General Damages

[75] As to general damages, I am satisfied that the behaviour of the respondents, while flagrant and serious, was less egregious than that in *Rook v. Halcrow* ($175,000), *Trout Point Lodge* ($100,000), *Yenovkian v. Gulian* ($150,000) or *Jane Doe* ($75,000). It was more continuous and serious than that in *Doucette* ($35,000) or Nichol ($45,000), and more frequent than in *Simon v. Poirier* ($20,000). The suggestion in *Wilson* that the allegation was not plausible, leading to lower damages ($15,000), has no relevance here. In terms of gravity, it is on a similar level to that in *Nassri* ($50,000), though the situations are not factually similar.

[76] I order general damages in the amount of $50,000.

Aggravated Damages

[77] In addition to the nature of the statements themselves, the persistence and deliberation of the respondents' conduct, their baseless claims that they were entitled to do what they were doing, their determination to harass and intimidate the applicant even after being asked to desist by her counsel, and their intention to intimidate her into changing her legal position in the custody and support proceeding, are factors that call for aggravated damages. I found that the respondents still had posts about Ms. Candelora publicly available during the trial (liability decision at para. 76).

[78] The respondents suggest that damages – whether aggravated or general is not clear – should be reduced or denied based on various irrelevant facts, including their alleged "silence" since the trial and Ms. Candelora's alleged lack of serious long-term distress resulting from their actions. They say her emotional distress and anxiety would not justify damages under the "persistently troubling but not totally disabling injury" standard set out in *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.). That case has no relevance here.

[79] I order aggravated damages of $20,000.

Punitive Damages

[80] I also conclude that punitive damages are warranted in order to occasion respect for the justice system. One repeated aspect of the respondents' postings was their assertion that they were beyond the reach of the courts and their disregard for court orders. This is a denunciatory, non-compensatory purpose, and calls for a distinct punitive award.

[81] I order punitive damages of $15,000.

Joint and several

[82] Damages shall be joint and several against the two respondents.

Costs

[83] While counsel have made submissions on costs in their briefs, I believe a proper consideration of costs must be done in view of the decision on damages. As such, if the parties are unable to agree on costs, I will receive any further written submissions within 30 days of the release of this decision.

Arnold, J.