



Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

FORUM

VOLUME 11 ISSUE 4

The Lawyers Newsletter for Business Professionals

APRIL 2020



CAN YOU SUE OVER A BAD REVIEW?

Catherine Ramnarine & Mukta Balroop



Navigating customer feedback in the social media age can be a minefield. A single tweet from reality television star Kylie Jenner declaring that she was no longer using the social media app Snapchat caused its stock price to plummet, wiping out USD1.3 billion of its market value in just one day. Entire documentaries, like last year's *Yelp focussed Billion Dollar Bully*, have been dedicated to dissecting the impact that negative customer reviews can have on businesses. And even locally we have seen negative reviews, like the one left on Facebook by a customer dissatisfied with a cake that she ordered, go massively viral. Some businesses are able to successfully navigate the social media storm, while others are not so fortunate. Where a negative customer review amounts to defamation, then the business may have legal options. In this Article we will look at the legal remedies available to businesses, and in particular recent developments in the law governing the availability of injunctions against social media posts.

Defamation occurs when someone publishes a statement about someone else that (among other things) tends to discredit them in their trade or profession. It is not every negative review that can result in a successful defamation claim. The words used in the statement must be defamatory. For example, a customer simply stating that they didn't like a product or service would not be enough. The person who made the statement can also defend a defamation claim on the basis that the statement was true, amounted to fair comment on a matter of public interest or was privileged.

A business has several options when faced with a potentially defamatory review or post. The first is to simply ignore it – though from a marketing perspective this might be a bad idea. A second option could be to report the post to the

social media platform with the hope that they take it down. However, this runs the risk that the post could simply be reposted, with the added stinger that the business is trying to repress negative reviews. A third option is to respond to the post professionally and attempt to resolve it off-line. In some cases, repeated, negative posts unfairly made about a sole trader may constitute harassment under the Offences Against the Person (Amendment) (Harassment) Act and a report could be lodged with the cybercrime unit of the TTPS.

Another option, depending on the seriousness of the defamatory content, could be to file a lawsuit. This option is not without commercial and reputational risk as it could amount to “burning the house to roast the pig” and generate more negative attention than the post itself would otherwise have done. Legal action can also be time consuming and expensive, as it may take months or even years for the matter to go to Trial and for a Court to make a final ruling on whether a post was defamatory or not.

If a business decides that legal recourse is its best option, one interim step that it can take is to apply for an interlocutory injunction against the publisher of the post. This would require them to take the post down and refrain from reposting it until the Court is able to make a final ruling at Trial. This situation recently arose in a local lawsuit involving a hospital.

In that case, a patient underwent a CT scan at the hospital's premises. She fell unwell shortly afterward and suspected that her symptoms were caused by the CT scan. She subsequently published a series of posts on Facebook, in which she alleged that she had suffered radiation poisoning at the hospital and insinuated that the chairman of the hospital was responsible. She also repeated these allegations on placards that she publicly displayed outside the hospital.

Both the hospital and its chairman sued for defamation and applied to the Court for an interlocutory injunction. The Court refused to grant the injunction based on a rule from an old English case, **Bonnard v Perryman [1891] 2 Ch 269**. The rule in *Bonnard Perryman's* case was that injunctions in defamation claims would be refused unless the allegations were clearly untrue or there was no face value basis or support for publishing them. This was partly because of the great importance attached to freedom of expression, and the fear that injunctions could be abused to stifle public criticism.

The Claimants appealed to the Court of Appeal. The Court of Appeal found that while freedom of expression was still of paramount

CONTENTS

- Can You Sue Over A Bad Review?
- Hush Yuh Mouth! A Primer On Non-Disclosure Agreements (NDAs)

(cont'd from page 1)