Supreme Court

New South Wales

Case Name:	Tavakoli v Imisides (No 4)
Medium Neutral Citation:	[2019] NSWSC 717
Hearing Date(s):	4 December 2018
Date of Orders:	24 June 2019
Decision Date:	24 June 2019
Jurisdiction:	Common Law
Before:	Rothman J
Decision:	(1) The first defendant shall pay the plaintiff $530,000 as damages for the defamation published and referred to in these reasons for judgment as the first Google review; (2) The first defendant shall pay the plaintiff's costs of and incidental to the proceedings on an indemnity basis; (3) Neither defendant shall create a website of or concerning the plaintiff; (4) The first defendant shall not publish or allow to remain published her Google review, first published on or about 1 September 2017; (5) Neither defendant shall publish, re-publish or allow to remain published any matter containing imputations in or to the effect of those contained in the Google review and prescribed in [40] of the Statement of Claim, filed in these proceedings on 15 September 2017, being: (a) any allegation that the plaintiff charged the first

defendant for a buccal fat procedure that he did not perform;

(b) any allegation that the plaintiff acted improperly in relation to a buccal fat procedure for the first defendant;

(c) any allegation that the plaintiff acted incompetently in relation to a buccal fat procedure for the first defendant;

(6) The first defendant shall pay to the plaintiff interest at 4% per annum on $530,000 from 1 September 2017 until the date of judgment and thereafter at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW), r 36.7 for post-judgment interest;

(7) The first defendant shall pay to the plaintiff interest on the costs at the rate prescribed in the costs agreement between the plaintiff and his legal representatives or at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW), r 36.7, for post-judgment interest, whichever is the lesser rate.

Catchwords:

DEFAMATION – assessment of damage – plastic surgeon – continuing malicious vilification – aggravated damages – injunctive relief made permanent – one award for non-economic damages, including aggravated damages – interest – discussion on interest

TORT – Injurious falsehood – elements – injunctive relief – malice – permanent injunctive relief granted

COSTS – Defamation – indemnity costs awarded

Legislation Cited:

Defamation Act 2005 (NSW), ss 34, 35, 37
New South Wales Government Gazette, No 66, 29 June 2018, at 3970
Uniform Civil Procedure Rules 2005 (NSW), r 36.7

Cases Cited:

ABC v O'Neill (2006) 227 CLR 57; [2006] HCA 46
Al Muderis v Duncan (No 3) [2017] NSWSC 726
Bauer Media Pty Ltd v Wilson (No 2) (2018) 361 ALR 642; [2018] VSCA 154
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31

	Cerutti & Anor v Crestside Pty Ltd & Anor [2016] 1 Qd R 89; [2014] QCA 33 Crampton v Nugawela (1996) 41 NSWLR 176 at 193; [1996] NSWSC 651 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22 Favell v Queensland Newspapers Pty Limited (2005) 79 ALJR 1716; [2005] HCA 52 Gardiner v John Fairfax & Sons (1942) 42 SR (NSW) 171 Greek Herald Pty Ltd v Nikolopoulos & Ors (2002) 54 NSWLR 165; [2002] NSWCA 41 John Fairfax Publications Pty Ltd v Rivkin (2003) 77 ALJR 1657; [2003] HCA 50 Lewis v Daily Telegraph Ltd [1964] AC 234 Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632 at 646; [1979] HCA 3 Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632; [1979] HCA 3 Nevill v Fine Arts and General Insurance Co [1897] AC 68 Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388; [2001] HCA 69 Ratcliffe v Evans [1892] 2 QB 524 Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57 Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52 Saunders v Nationwide News Pty Ltd [2005] NSWCA 404 Swimsure (Laboratories) Pty Limited v McDonald (1979) 2 NSWLR 796 Wilson v Bauer Media Pty Ltd [2017] VSC 521
Category:	Principal judgment
Parties:	Kourosh Tavakoli (Plaintiff) Cynthia Imisides (First Defendant) Mark Imisides (Second Defendant)
Representation:	Counsel: S Chrysanthou / H Elachkar (Plaintiff) Self-represented (Second Defendant) Solicitors: Kennedys (Australasia) Pty Ltd (Plaintiff)

Self-represented (Second Defendant)

File Number(s): 2017/244451

JUDGMENT

1 **HIS HONOUR:** The plaintiff, Dr Kourosh Tavakoli, sued Cynthia and Mark Imisides, respectively the first and second defendant, for defamation and injurious falsehood. During the course of the proceedings in Court, the plaintiff and the second defendant resolved their litigation and orders were made giving effect to that resolution.

2 In the course of the proceedings, the second defendant, Mark Imisides, was inaccurately referred to in the transcript as the first defendant. The first defendant did not appear at the hearing. The Court, otherwise constituted, issued interlocutory orders relating to allegations published by, at least, the first defendant that restrained the publication of certain imputations.

3 The imputations arise from a Google review that alleged that the plaintiff charged the first defendant for a buccal fat procedure that he did not perform; that the plaintiff acted improperly in relation to a buccal fat procedure for the first defendant; and the plaintiff acted incompetently in relation to a buccal fat procedure for the first defendant. Those allegations have been shown to be plainly untrue.

4 The plaintiff seeks to have the interlocutory orders made permanent and seeks damages for the defamatory imputations. On 17 November 2017, judgment was entered against the first defendant in favour of the plaintiff, with damages to be assessed. As a consequence of that judgment and the resolution between the plaintiff and the second defendant, at the hearing of the proceedings, all that remains for the Court is to assess damage for the defamatory publication and to determine whether, in the exercise of the Court's discretion, the interlocutory orders should be made permanent.

5 It is appropriate to note that the terms of the consent orders issued in relation to the second defendant, Mark Imisides, included permanent injunctions in the form of the temporary injunctions already issued, the necessary changes being

made. It should also be noted, to the second defendant's credit, that at no stage during the course of the proceedings were those injunctions opposed.

Facts

6 While the second defendant filed a Defence denying some, at least, of the plaintiff's claims, the first defendant filed no Defence and the orders made by the Court, to which earlier reference has been made, were made in the absence of a Defence filed by the first defendant and in the absence of the first defendant. These damages and further orders are issued in like circumstances.

7 The earlier interlocutory injunctions, issued by Wilson J and McCallum J (as her Honour then was), are the subject of reasons for judgment, which the Court, as presently constituted, need not repeat or recite. A Statement of Claim was filed by the plaintiff on 15 September 2017 and, in relation to the first defendant, as earlier stated, is not denied. The effect of the threatened publication has already been outlined.

8 The claim for damages in defamation arose against the second defendant for a publication made over the telephone on 21 July 2017, in circumstances where it was not published to a significant group of listeners, beyond the plaintiff himself. On the other hand, the claim in defamation and injurious falsehood against the first defendant, Cynthia Imisides, relates to the publication of a Google review from which the ordinary reasonable reader would accept that the following imputations arose:

(a) the plaintiff is an incompetent plastic surgeon, in that the rhinoplasty he performed on the first defendant was unsuccessful;

(b) the plaintiff is cruel in his dealings as a doctor, in that he does not provide assistance to his patients who are unhappy with their results post-surgery; and

(c) the plaintiff is a bully in that he intimidates patients that raise a legitimate complaint about his work by using his lawyers to threaten them.

9 The foregoing imputations are taken from the Statement of Claim at [40]. The publication in which those imputations are found was, as earlier stated, a Google review of and concerning the plaintiff. The content of that review is set

out as an Annexure to the Statement of Claim and is otherwise the subject of evidence.

10 It is uncontroversial, in the circumstances of these proceedings, that the first defendant was the author of the publication; that it was published on the Internet from about 1 September 2017; and was downloaded and/or read by persons unknown to the plaintiff on or after that date. Further, the evidence before the Court was that the first defendant informed the second defendant that she had been charged for the operation in circumstances where no operation was, in fact, performed. That allegation was not related to the surgery performed on the first defendant's nose.

11 The plaintiff relies on the Affidavit of the plaintiff himself, affirmed 23 February 2018; the Affidavit of Sheeva Roushanak, the wife of the plaintiff and his Business Manager in terms of his medical practice, sworn 23 February 2018; the Affidavit of Jennifer Maree Simpson, sworn 23 February 2018 who is the Operation Manager and Patient Liaison employee of the plaintiff and who spoke, over the phone, with the second defendant; the Affidavit of Constantine Gionis, Lawyer, affirmed 19 February 2018; the Affidavit of Cassandra Eugenia McNeill, Social Media Manager of Cosmetic Journey, affirmed 26 February 2018; the Affidavit of John Vincent Flood, Plastic Surgeon, affirmed 26 February 2018; and the Affidavit of Andrew James Murphy, Software Developer, affirmed 8 September 2017.

12 Prior to the resolution of the proceedings in relation to the second defendant, Ms Simpson was the subject of cross-examination, but no other deponent was. Further, in those proceedings, before their resolution, the second defendant swore an Affidavit, of 30 April 2018, and was the subject of cross-examination which was incomplete in that, with the leave of the Court, the second defendant was permitted to talk with the solicitors for the plaintiff and the matter was resolved.

13 There are further Affidavits upon which the plaintiff relies. Those Affidavits go to the service effected on the first defendant and the service and/or attempts to serve documents on the first defendant in August and September 2017.

14 The plaintiff was born in Tehran, Iran, in 1969. As a teenager, he moved with his family to London and in 1986 moved to Sydney. He completed his education, obtaining a Bachelor of Science (Medicine) and a Bachelor of Medicine in 1993 and a Bachelor of Surgery in 1994 at the University of New South Wales. He is a Full Fellow of the Royal Australasian College of Surgeons (FRACS) in the division of plastic and reconstructive surgery. The plaintiff is also a member of the Australian Society of Plastic Surgeons; the Australian Society of Aesthetic Plastic Surgeons; and the International Society of Aesthetic Plastic Surgery.

15 The plaintiff holds visiting medical officer rights at St Vincent's Private Hospital and East Sydney Private Hospital and consults from rooms in Double Bay, Sydney. He performs cosmetic and reconstructive surgeries, including breast augmentation, abdominoplasty, rhinoplasty, breast reduction and breast lifts, as well as a range of facial procedures. He has also worked with victims of serious burns, of maxillofacial and hand trauma and has performed microsurgery for cancer patients.

16 He is married, as earlier stated, to Sheeva Roushanak, who also, from time to time, goes by the name Tavakoli and they have two children.

17 The professional dealings of the plaintiff with the first defendant first arose after a number of enquiries were made by the first defendant between December 2016 and January 2017 regarding rhinoplasty, breast augmentation and a facelift. When Dr Tavakoli first saw the defendant, which was 24 January 2017, the first defendant was recovering from plastic surgery performed by another surgeon.

18 Apart from the first appointment on 24 January 2017, the plaintiff saw the first defendant on 27 January and 7 February 2017. At the second visit, on 27 January 2017, a final quotation for the three proposed procedures was provided to the first defendant.

19 On 9 February 2017, the plaintiff performed the following procedures on the first defendant at East Sydney Private Hospital:

(1) Rhinoplasty, involving the revision of a former rhinoplasty on the reconstruction of the nasal septum. The previous rhinoplasty had been performed by a West Australian surgeon;

(2) Buccal fat procedure, involving removing the fat pads that augment the lower part of the cheeks, to which the plaintiff gained access through the inside of the first defendant's mouth and used dissolvable stitches on the inside of her cheeks;

(3) Fascia graft, being a procedure involving the removal of fat from one part of the body to fill another part of the body, and, in this case, the fat was removed from the first defendant's abdomen and injected into her bilateral tear trough. During recovery, the first defendant was observed by her anaesthetist as she had developed lockjaw from clenching her teeth as a result of the pain from the buccal fat procedure. Interestingly, it is this procedure that the first defendant told the second defendant had not occurred.

20 An Operation Report for the buccal fat procedure was dictated by the plaintiff on the day following the operation. In May 2017, the first defendant agreed to come in for a post-consultation visit to have steroid injections in order to reduce swelling in her nose. That procedure was performed on 22 May 2017.

21 The evidence before the Court establishes that at the time that the steroids were injected, the plaintiff and the first defendant had a conversation in or to the following effect:

> "Plaintiff: "Your nose swelling will take at least 18 months to settle. During that time you just need a number of steroid injections to reduce the swelling. You can see as many surgeons as you want but it is widely accepted you cannot perform surgery on a revision surgeon within 18 months. If you shop around, you will eventually find someone who will tell you differently."

22 The first defendant responded with words to the following effect:

> "I know, I just get so emotional and make appointments. I now understand and I will come and get the injections whenever I travel to Sydney with my daughter for her treatments."

23 There was a series of exchanges in relation to appointments for the first defendant and in which the first defendant was advised that, "as per the discussion with Dr Tavakoli, it is extremely important for your healing and results that you stick to your appointment schedule".

24 An appointment that the first defendant could not attend was re-scheduled, but the first defendant did not attend that re-scheduled appointment.

25 On the date that the appointment was initially set, namely, 21 July 2017, the first defendant sent the plaintiff (or his office) authorisation, in writing, that the second defendant was authorised to speak with the Clinic on her behalf. The subsequent telephone conversation with the second defendant is the publication that gave rise to the proceedings against the second defendant.

26 It should be noted that, by this time, the first and second defendant were no longer husband and wife and had separated. There is some minor issue as to whether the divorce had been formalised and finalised by 21 July 2017.

27 On 8 August 2017, the plaintiff, through his solicitors, sent correspondence to each of the first and second defendants seeking undertakings relating to threatened publication. The undertakings were sought within 48 hours of the receipt of the letter.

28 On 9 August 2017, the second defendant addressed three emails to the plaintiff's solicitors and copied in the first defendant. Those emails are before the Court. A second email of 9 August 2017 threatened the plaintiff that the information, previously threatened, would be passed to A Current Affair or Today Tonight.

29 The first of the interlocutory injunctions issued from the Court on 11 August 2017 and were served, personally, on the first defendant on that day and by email on both of the defendants. On 1 September 2017, McCallum J dispensed with personal service.

30 On 1 or 2 September 2017, the first defendant published the first Google review of which the plaintiff became aware on 2 September. He attests to the fact that he was extremely distressed and embarrassed when he read it and by its publication.

31 On 7 September 2017, Andrew Murphy conducted a review of data, concerning the plaintiff's local business listing on Google and since the posting of the first Google review, the rate of visitors to the plaintiff's website had dropped by 23.61% in less than one week.

32 The evidence before the Court establishes that the plaintiff's solicitors sent emails to the defendants throughout September, informing them of Court

orders, Court dates and serving copies of Notices of Motions and Affidavits on which the plaintiff intended to rely and to move the Court.

33 On 24 September 2017, the second defendant was served personally with the Statement of Claim and other documents and, on the same date, the first Google review was finally removed.

34 On 26 November 2018, the first defendant published the second Google review, on its face, contravening the orders of the Court, issued by McCallum J on 15 September 2018. On the same day, the plaintiff's lawyers wrote to the first defendant putting her on notice of her contempt and requesting that the second Google review be removed. To that notice, the first defendant responded in the following terms:

> "Piss off. I don't have any money to give you greedy people."

35 The publication of the second Google review and the response of the first defendant to the letters from the plaintiff or his solicitors inform the exercise of the discretion of the Court in determining whether to make permanent the temporary injunctions already in force.

Principles of Defamation

36 The task of a court in determining whether a publication is defamatory has been well rehearsed. It is the function of the judicial officer to determine whether imputations that have been alleged are carried by the publication from the position of a hypothetical character referred to in the authorities as the "ordinary reasonable reader".

37 The characteristics of an ordinary reasonable reader have been the subject of discussion by the Court, as presently constituted by the Court of Appeal and by the High Court of Australia, as well as other single judges of this and other courts. It is a well-settled term.

38 The ordinary reasonable reader: reads between the lines; is of fair average intelligence; is a fair-minded person; is not overly suspicious; is not avid for scandal; is not naive; does not search for strained or forced meaning; and reads the entire matter about which there is complaint: *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646; [1979] HCA 3; *John Fairfax*

Publications Pty Ltd v Rivkin (2003) 77 ALJR 1657; [2003] HCA 50; *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Nevill v Fine Arts and General Insurance Co* [1897] AC 68.

39 The Court, as presently constituted, places itself in the position of an ordinary reasonable reader of the Google reviews. As earlier stated, the ordinary reasonable reader reads the whole of the publication; reads between the lines and, therefore, considers the imputations that are alleged in the context of the entire matter about which complaint has been made: *Rivkin*, supra; *Favell v Queensland Newspapers Pty Limited* (2005) 79 ALJR 1716; [2005] HCA 52; *Greek Herald Pty Ltd v Nikolopoulos & Ors* (2002) 54 NSWLR 165; [2002] NSWCA 41; *Saunders v Nationwide News Pty Ltd* [2005] NSWCA 404.

40 It is unnecessary to recite the entire publication from which the plaintiff alleges that the imputations arise. As already indicated, the Court accepts that the pleaded imputations said to arise from the first Google review do, in fact, arise. Those imputations have been outlined earlier. The imputations arise, plainly, from the text of the publication.

41 A publication is defamatory if the publication tends to lower a plaintiff's reputation in the minds of "right-thinking" ordinary members of the community: *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632; [1979] HCA 3. The imputations that arise from the publication are, as submitted by the plaintiff, extremely serious.

42 Plainly, the publication is defamatory of the plaintiff and goes to his reputation as a surgeon. Further, as earlier indicated, it has affected the number of enquiries made of his professional website.

The Principles on Injurious Falsehood

43 It seems, perhaps unnecessarily, that the injurious falsehood has been utilised as a cause of action to enable the plaintiff to obtain, more easily, interlocutory injunctions preventing publication of the imputations of which the plaintiff was on notice. Nevertheless, the cause of action is before the Court and needs to be considered.

44 The tort of injurious falsehood is the malicious publication of a false statement that causes damage to the plaintiff: *Ratcliffe v Evans* [1892] 2 QB 524; *Swimsure (Laboratories) Pty Limited v McDonald* (1979) 2 NSWLR 796; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; [2001] HCA 69.

45 Generally, it requires the Court to find that there has been:

(a) a false statement of or concerning the plaintiff's goods or business;

(b) publication of that statement by the defendant to a third person;

(c) malice on the part of the defendant; and

(d) proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement.

46 The only contentious aspect of the foregoing is the existence of malice on the part of the first defendant. It is unnecessary to set out the limits of malice. It is sufficient to note that it is established in circumstances where the plaintiff proves that the publisher of the statement acted for a dishonest or improper purpose, including a desire to injure the plaintiff without just cause or excuse: *Roberts v Bass* (2002) 212 CLR 1; [2002] HCA 57.

47 Knowledge that the publication is untrue or an absence of belief of truth in a publication does not, of itself, constitute express malice. Nevertheless, express malice, although not to be confused with ill-will, knowledge of falsity, recklessness, lack of belief, bias, prejudice or any other motive than duty or interest for making the publication, will arise where the publication was actuated by a purpose or motive that was foreign to the occasion: *Roberts v Bass*, supra. In the plurality judgment (Gaudron, McHugh and Gummow JJ), the High Court said:

> "[75] An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of the statement is called express malice. The term 'express malice' is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice ('malice') is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff."

48 At [76], the plurality continued, in the following terms:

> "[76] Improper motive in making the defamatory publication must not be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication. If one of these matters is proved, it usually provides a premise for inferring that the defendant was *actuated by an improper* motive in making *the* publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive. But, leaving aside the special case of knowledge of falsity, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion *and* actuated the publication. Even knowledge or a belief that the defamatory statement was false will not destroy the privilege, if the defendant was under a legal duty to make the communication. In such cases, the truth of the defamation is not a matter that concerns the defendant, and provides no ground for inferring that the publication was actuated by an improper motive. Thus, a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though he or she knows or believes that the statement is false and defamatory unless the officer falsified the information. Conversely, even if the defendant believes that the defamatory statement is true, malice will be established by proof that the publication was actuated by a motive foreign to the privileged occasion. That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication.
>
> [77] If the defendant knew the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice. That is because a defendant who knowingly publishes false and defamatory material almost certainly has some improper motive for doing so, despite the inability of the plaintiff to identify the motive." (Citations omitted, emphasis in original.)

49 In the current circumstances, the evidence before the Court establishes that the first defendant knew the statement in the first Google review was untrue. She knew that the statement made to the second defendant as to the non-performance of the operation was untrue and she knew that the second Google review statements were untrue. The existence of the second and third mentioned matters is relevant to both the need for an injunction on a permanent basis and also to the motive of the first defendant in making the allegations.

50 The Court draws the inference that, at the time that the statements made in the first Google review were published, the first defendant knew them to be untrue. Further, those statements were made for a purpose to harm the plaintiff and the publication was actuated by that purpose. Malice has been disclosed.

51 The only other slightly controversial aspect of the elements of injurious falsehood is the requirement to prove actual damage. As earlier indicated, there has been a significant decline, on the evidence of the plaintiff's Webmaster, Andrew Murphy, in the rate of visitors to the plaintiff's website. This had dropped by 23.61% by 7 September 2017.

52 On the basis of the statistical and/or common-sense proposition that patients are obtained, at least in part, from persons who gain access to the website of the plaintiff, it can be inferred that there is actual damage to the plaintiff's business, if not immediately, then, if the reviews are not withdrawn and/or prevented from further publication, into the future.

53 As a consequence of the foregoing, as well as the cause of action in defamation, the cause of action in injurious falsehood has been established.

Permanent Injunctive Relief

54 While there is a reluctance on the part of the courts to enjoin defendants by way of interlocutory injunctions restraining the publication of defamatory material (see *ABC v O'Neill* (2006) 227 CLR 57; [2006] HCA 46), the restraint, on a permanent basis, of publications, in or to the same effect, where there is good reason, has not been subject to precisely the same limitations. Once publication has occurred, an injunction to prevent further publication has far less impact upon free speech and the value that society places upon it. Further, at a final hearing, the Court is determining, finally, that publication has been unlawful and not merely determining whether there is a triable issue.

55 Where, as here, the first defendant (and to a lesser extent the second defendant) has disclosed a willingness to defy orders of the Court and, without seeking to defend the publication, re-publish in or to the same effect as the earlier publication, the need for injunctive relief is obvious. The Court must, of course, be satisfied that damages will not be an adequate remedy. Ordinarily, where publication of defamatory material is a "one-off" occurrence, damages would be a more than adequate remedy.

56 In cases where the defamation has occurred through the Internet and or social media and threats have been made for further publications, different considerations arise.

57 The circumstances of this case, particularly the repeated publication of imputations and the threats to continue to repeat defamatory imputations, make this a clear case for permanent injunctions. Moreover, the first defendant has snubbed her nose at the plaintiff's cause of action by making it clear to the plaintiff and/or his solicitors that she has no money or assets which the plaintiff can obtain in any remedy in damages. The Court is satisfied that the injunctions that have been in force now for some time ought to be made permanent, or injunctions to that effect. The Court will so order.

Damages

58 Once a publication is found to be defamatory, then it is for the Court to determine the level of damages to be awarded. In assessing the level of damages the Court must have regard to: the consolation of the plaintiff for hurt to his feelings; and the compensation to the plaintiff for damage to his reputation, including business reputation, if that is relevant.

59 The third aspect of damages in defamation is the vindication of the plaintiff's reputation. However, that third aspect is not independently a head of damage. Rather, it is necessary for the Court to award damages for consolation for hurt to his feelings and compensation for damage to reputation at a measure that will, as a result, vindicate the plaintiff's reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; [1993] HCA 31; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; [2003] HCA 52.

60 The provisions of s 34 of the *Defamation Act 2005* (NSW) require a court, when determining the amount of damages in defamation, to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. This relationship continues to apply to an award that is assessed on the basis of aggravated damages.

61 The harm suffered by the plaintiff is, in this case, the hurt to his feelings and the damage to his reputation, including business reputation. The vindication of the plaintiff's reputation is ameliorative in that it looks to the attitude of others and expresses the Court's objective view that those others should think no less of the plaintiff on account of the defamatory publication or the imputations

therein: s 34 of the *Defamation Act*; *Rogers v Nationwide News Pty Ltd*, supra, at [60].

62 Where, as here, the damage to the plaintiff is, in part, to his business reputation on which he depends for his whole life, the damage is significant: see *Crampton v Nugawela* (1996) 41 NSWLR 176 at 193; [1996] NSWSC 651. Dr Tavakoli's whole life depends upon his honesty and his competence as a surgeon. The Court should place a high value upon damage to his reputation in each of those respects: *Crampton*, supra, at 195.

63 The terms of the *Defamation Act* do not permit the Court to award damages for non-economic loss greater than the cap set by s 35 of the *Defamation Act* as varied each year. Currently, the cap is $398,500: see s 35 of the *Defamation Act* and New South Wales *Government Gazette*, No 66, 29 June 2018, at 3970.

64 It is generally accepted that the cap that is imposed by s 35 of the *Defamation Act* does not require the Court to scale the damages between the least amount and most amount, with the upper limit at the amount of the cap. Rather, the cap set by the legislation acts as a maximum amount to be awarded and the Court is required to assess the damage in the ordinary way, but, if, when assessed in the ordinary way, the damages would be greater than the maximum amount that may be awarded, only the maximum can be the subject of an award of the Court.

65 The *Defamation Act* also provides that the state of mind of the defendant in publishing the defamatory material is to be disregarded, save and except to the extent that the state of mind includes malice or any other state that has affected the harm sustained by the plaintiff. While exemplary or punitive damages may not be awarded (s 37 of the *Defamation Act*) aggravated damages, which are necessarily compensatory of the damage sustained, may be awarded.

66 When the Court is satisfied that the circumstances of the publication of the defamatory material or, generally, the conduct of the plaintiff from the date of the publication, warrant the awarding of aggravated damages, then, pursuant to the terms of s 35(2) of the *Defamation Act*, the Court may award damages

for non-economic loss that exceed the maximum prescribed by a combination of s 35(1) of the *Defamation Act* and the gazetted increases thereto: see s 35(2) of the *Defamation Act*. The effect of the Gazette is prescribed by s 35(3), together with s 35(4) and s 35(5) of the *Defamation Act*.

67 While two slightly different approaches have been taken to the manner in which non-economic damages is then assessed, the two different approaches seem to make little or no difference to the amount to be awarded. On one approach, the approach that I adopted in *Al Muderis v Duncan (No 3)* [2017] NSWSC 726, following other judgments in this and other States to the same effect, aggravated damages was awarded as a separate amount over and above that which was assessed as the damages other than on account of aggravation.

68 Since that judgment a different approach has been taken, including by McCallum J (as her Honour then was) who, in light of the judgment in *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 at [65]-[82], considered that, once a finding of aggravation was warranted, the cap prescribed by the combination of ss 35(1), 35(3), 35(4) and 35(5) of the *Defamation Act* had no work to do and was irrelevant.

69 The judgment of Dixon J in *Wilson*, supra, was the subject of appeal and the reasoning and approach of Dixon J was approved: see *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 361 ALR 642; [2018] VSCA 154. While the judgment of the Victorian Court of Appeal is not, strictly, binding on the Court, the Court ought not to depart from it, unless it is of the view that the judgment or reasons therefor were plainly wrong: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22.

70 Not only does the Court, as presently constituted, consider that the reasoning in *Bauer Media*, both at first instance and on appeal, not to be plainly wrong, I consider that the reasoning is plainly correct. It is plainly correct because, as earlier stated, aggravated damages are compensatory and are still damages for non-economic loss.

71 As a consequence of the aggravation, the amount of loss is greater, and the amount of damages to be awarded may be greater on that account. To

distinguish between the two “types of damage”, ordinary and aggravated, is to impose an artificial distinction that is unwarranted.

72 As earlier stated, the Court is satisfied, at least in relation to the injurious falsehood, that the first defendant has published the material for an improper motive and, for that reason, has displayed malice. The assessment of factors going to aggravation is wider than the assessment of improper motive associated with the publication. This is because the assessment of aggravation takes account of the defendants’ conduct from the date of publication to the date of judgment: *Cerutti & Anor v Crestside Pty Ltd & Anor* [2016] 1 Qd R 89; [2014] QCA 33.

73 The first defendant published the material in order to punish the plaintiff. She did so in circumstances where she knew, at the time of the publication, that the imputations in the publication were untrue.

74 Further, during the ensuing period, notwithstanding an appropriate and proper approach by the plaintiff through his solicitors, the first defendant has refused to apologise; refused to withdraw the imputations or, at least initially, withdraw the publication from the Internet; then, once the initial publication was withdrawn, sought to publish another set of imputations in or to the same effect and withdrew that subsequent publication only at the behest of the second defendant, her ex-husband.

75 The evidence before the Court is that the plaintiff had an exemplary reputation, amongst his patients, within his social circle and in the profession. The evidence of John Flood, a Plastic Surgeon, who has known the plaintiff for many years, attests to the plaintiff’s reputation of being caring, kind and compassionate; and a skilled surgeon.

76 The extent of the publication in the first Google review is not able to be assessed precisely. However, as earlier stated, there is evidence of a significant fall in the number of enquiries online after the first Google review. The inference is irrefragable that the review caused the downward trend, even in the short period of three weeks before the first Google review was taken down.

77 The allegations contained in the publication are extremely serious and go to the heart of the reputation of the plaintiff in his profession. Damage in defamation is presumed in Australia, but, in this case, the overwhelming inference is that actual damage has been effected. No special damage (for loss in income or earning capacity) has been sought.

78 Further, the hurt to the plaintiff's feelings has been more than significant and he attests to the fact that he was extremely distressed by the accusations regarding his competence.

79 At the commencement of the proceedings before the Court, before the proceedings against the second defendant had been resolved, the second defendant sought to cross-examine witnesses. No attempt was made to cross-examine the plaintiff either to the effect that the accusations were true or to suggest that the distress to which the plaintiff attested was other than genuine and serious.

80 As is obvious from the foregoing, the first defendant at no stage sought to deny the allegations that the imputations were untrue and defamatory. Nor did the first defendant seek to suggest that the plaintiff's distress and damage was in any way disingenuous. The plaintiff was extremely embarrassed and distressed when he saw the first Google review, published by the first defendant, and, notwithstanding that it was unnecessary for the purposes of these defamation proceedings, the plaintiff attested to the fact that each of the imputations is false.

81 As earlier stated, evidence was adduced from the plaintiff's wife, who is his Assistant at work, and from personal and professional acquaintances. Each of them attests to the effect of the publication on the plaintiff: significant effect on his marriage and family; the shock at work; the concern that the publication would impact on his reputation; the impact of the allegations and their effect on the Clinic's reputation; and, as already stated, the upset of the plaintiff and his concern and worry about the first Google review and how it would impact upon his surgical practice.

82 The evidence before the Court is that the first defendant published the first Google review; did not respond when asked to take it down; continued to

publish it for over three weeks; and threw out the documents served upon her: see the Affidavit of Mark Imisides. Thereafter, the first defendant published another review, just prior to the trial and in breach, it seems, of the injunctions. Of itself, the breach of the injunctions aggravates damage: *Al Muderis v Duncan (No 3)*, supra.

83 As already stated, the imputations are directed to the plaintiff's professional reputation and conduct. It is, as already stated, that upon which his whole life depends. The Court is satisfied that the defamatory material, and the conduct of the first defendant, are such as to warrant an award of aggravated damages.

84 The Court has had regard to the schedule of comparative awards provided by the plaintiff and the Court's own experience in the awarding of damages, including aggravated damage. The process is one whereby the Court assesses the level of damage, including aggravated damage, but is not required to cap the damage at the level prescribed by s 35(1) of the *Defamation Act*.

85 In all the circumstances, the Court assesses the damage at $530,000.

Conclusion

86 Two issues remain; costs and interest. The awarding of costs in defamation proceedings is governed by the provisions of s 40 of the *Defamation Act*.

87 The discretion to award costs is part of the inherent jurisdiction of a superior court of record of general jurisdiction. Further, it is a jurisdiction conferred by s 98 of the *Civil Procedure Act* 2005 and governed by the Uniform Civil Procedure Rules 2005 (NSW) Part 42.

88 Ordinarily, costs follow the event. There is no good reason to depart, in these proceedings, from that ordinary rule. Costs are compensatory, not punitive. Costs are awarded to compensate a plaintiff for the cost of enforcing his or her rights under the law, or, alternatively, to a defendant for defending his or her rights in law.

89 Indemnity costs may be awarded, where an offer has been rejected and the litigation results in an award more favourable to the offeror than was proposed. A commercial approach should be taken.

90 In defamation proceedings, pursuant to s 40 of the *Defamation Act*, indemnity costs may be awarded on other bases. In the case of a plaintiff, where the defendant unreasonably rejects an offer or if the defendant unreasonably failed to make an offer, the Court must make such an order, where a costs order is to be made: s 40(2)(a) of the *Defamation Act.*

91 Under the general law, indemnity may also be awarded, where there is some delinquency on the part of the defendant, in the conduct of the proceedings and bearing a relationship to, and having an effect on, the proceedings.

92 In the present circumstances, the first defendant has completely ignored the proceedings and, by doing so, added significantly to the costs of proving the plaintiff's case and effecting and proving service. Further, the plaintiff requested the first defendant not to publish the defamatory material, which, if the requested were accepted, would have obviated the proceedings against her in that regard.

93 Further again, the first defendant ignored orders of the Court, of which she was aware, thereby necessitating further costs. In my view, under both the general law and pursuant to s 40 of the *Defamation Act*, I am able to award indemnity costs. The foregoing assumes, despite the use of the word "must" in s 40 of the *Defamation Act*, that the Court is exercising a discretion which must be exercised judicially.

94 Damages for defamation occur over a period of time and that aspect often informs the discretion to award interest, or the rate at which interest is paid. This practice was discussed by me in *McGaw v Channel Seven Sydney Pty Ltd* [2005] NSWSC 1270. I apply those principles.

95 The rate for pre-judgment interest, at the time of the drafting of these reasons, is 5.5% per annum. The publication was on the Internet for three weeks and the damage occurred predominantly during that period, although some of it would have continued. In the circumstances, the pre-judgment interest should be awarded at 4% per annum. If, as is expected, the interest rate falls to 5.25% in the foreseeable future, I would still award interest at 4% per annum.

96 Post-judgment interest should be paid in accordance with the rules and interest should be paid at the post-judgment rate on legal fees.

97 As a consequence of the foregoing, the Court makes the following orders:

(1) The first defendant shall pay the plaintiff $530,000 as damages for the defamation published and referred to in these reasons for judgment as the first Google review;

(2) The first defendant shall pay the plaintiff's costs of and incidental to the proceedings on an indemnity basis;

(3) Neither defendant shall create a website of or concerning the plaintiff;

(4) The first defendant shall not publish or allow to remain published her Google review, first published on or about 1 September 2017;

(5) Neither defendant shall publish, re-publish or allow to remain published any matter containing imputations in or to the effect of those contained in the Google review and prescribed in [40] of the Statement of Claim, filed in these proceedings on 15 September 2017, being:

(a) any allegation that the plaintiff charged the first defendant for a buccal fat procedure that he did not perform;

(b) any allegation that the plaintiff acted improperly in relation to a buccal fat procedure for the first defendant;

(c) any allegation that the plaintiff acted incompetently in relation to a buccal fat procedure for the first defendant;

(6) The first defendant shall pay to the plaintiff interest at 4% per annum on $530,000 from 1 September 2017 until the date of judgment and thereafter at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW), r 36.7 for post-judgment interest;

(7) The first defendant shall pay to the plaintiff interest on the costs at the rate prescribed in the costs agreement between the plaintiff and his legal representatives or at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW), r 36.7, for post-judgment interest, whichever is the lesser rate.

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