

CANADA / JUDGMENT

Peterson v. Deck

2021 BCSC 1670

COURT

Supreme Court of British Columbia

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2021 BCSC 1670 Peterson v. Deck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peterson v. Deck,

2021 BCSC 1670

Date: 20210825

Docket: S122973

Registry: Kelowna

Between:

Brian Peterson

Plaintiff

And

Rosa Campagna Deck

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

D.L. Polley

Counsel for the Defendant:

J. Chandler

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 13 - 15, 2021

Place and Date of Judgment:

Kelowna, B.C.

August 25, 2021

I. Introduction

- [1] The plaintiff, a plastic surgeon, performed breast augmentation surgery on the defendant on November 3, 2015 ("First Surgery"). The defendant, who describes herself as a blogger, was unhappy with the results. Three years later, she posted negative "reviews" on her personal website and on Google Reviews. The plaintiff considered the defendant's comments to be defamatory and asked her to remove them; she refused. On March 19, 2019, the plaintiff commenced this action seeking damages for defamation.
- [2] The defendant filed her response on April 10, 2019, claiming that her reviews were not defamatory and simply represented her personal opinions. She claims they were not only true, but were fair comments about a matter of public interest. She also concurrently filed a counterclaim against the plaintiff for professional negligence. That counterclaim was dismissed by way of a consent order on September 24, 2019.
- [3] On March 3, 2020, the defendant filed a notice of application seeking summary dismissal of the plaintiff's claim by way of summary trial. On September 30, 2020, the plaintiff filed his own summary trial application. Both applications were heard together. The parties agree that this matter is suitable for a summary trial under R. 9-7, citing *Gichuru v. Pallai*, 2013 BCCA 60. They also agree that this Court is able to find the facts necessary to decide this case, even though there may be some facts in dispute. They assert that any conflicts in the affidavit evidence can be resolved by reference to undisputed documentary evidence and/or evidence given on examination for discovery; the Court can find the facts necessary to determine the matter by way of summary trial; and that it would not be unjust to do so in these circumstances: R. 9-7(15); *Henshaw v. Henshaw*, 2020 BCSC 1379 at paras. 24-26.
- [4] The conflicts in the evidence, especially as to what was discussed in the pre-First Surgery consultations between the plaintiff and defendant as to the type and size of implants that should be used, the final look the defendant was seeking, the nature and extent of the risks associated with the procedure, all compared to the outcome of the First Surgery are difficult to unravel and reconcile. However, given the parties' urgings that this dispute be decided by way of summary trial, I conclude that the Court can find the facts necessary to decide the issues and it would not be unjust to do so.

II. Impugned Comments

[5] On November 9, 2018, the defendant posted the following comments, including photographs of her augmented breasts, on her website, relentlessrosereviews.com ("Defendant's Website"):

Brian Peterson, Plastic Surgeon Kelowna

My experience with this particular surgeon was an anxiety filled nightmare. Not only did I leave the operating table worse than when I initially laid down for my procedure but Peterson & his receptionist made correcting the issues seem unimportant & unpredictable.

I knew something wasn't right immediately from the bottom half of my breast being almost entirely black & blue. He shrugged it off, said it was fine. I took his word for it even though it didn't feel or look fine.

Fast forward to three months post op - low & behold the itty bitty boob I traded in, for a deformed downward breast that was well over an inch higher than the other. Aka torpedo tit. Peterson told me nothing could be done until it was healed leaving me with a grotesque body part for six months.

Peterson publicly stated - gotta love the lack of privacy & breach of doctor/patient confidentiality - how my condition was 'utterly complex.' Yet never once during my appointments did he mention the 'complexity' of my chest. On the contrary, he boasted how my chest wall would give me more cleavage, not only selling me on the idea of breast augmentation but encouraging it telling me how often he's done the surgery for my 'particular case.'

To correct his mistake in the first place the muscle needed to be released more on one side which he failed to do in my initial surgery. Resulting in my breast having next to no bottom pole.

[A small but vastly important step that turned a 4-6 week recovery time into 9 months.]

When I tried to make sense of this & asked if he had done just that during surgery all Peterson said was 'I think so,' looking onto a measly couple lines of notes on the back piece of paper for questionable confirmation.

I did not feel good I let this surgeon cut me open.

I was scared to have Peterson operate on me again. I requested a different surgeon in the office who I found to be so much more detailed & informative than Brian. It was night & day difference. Notes were thorough as were consultations - opposed to my at most 5 minute consultation with Brian.

It was a lengthy, stressful battle to have a different surgeon correct his mistake without having to pay full price for another breast augmentation. At one point I wanted the implants completely taken out because I fully regretted the procedure he did on me. It was a hard, frustrating process in negotiating revision surgery & costs. Brian's mistake was more than I bargained for.

Call me picky but would YOU be happy with these results?

You couldn't pay me to go back to go back him [sic].

[6] On February 1, 2019, she posted a similar review on Google Reviews adding these comments:

NOTHING WAS SUGGESTED in regards of a 'different approach.' The only advice I rejected of Peterson's, is when I took Dr. Valniceks suggestion making one implant 30cc bigger, again I am so thankful I did not take Peterson's misguided advice or my breasts would still not be symmetrical like they are today.

. . .

Also I have spoken to a number of people with similar experiences after my review went viral. Peterson constantly tries to take down my review and publicly bully me. I'd suggest taking note of the '5-star' reviews all similar praise with Peterson being their own review. Why is it there is not one negative? If you write any other word then breast he has leverage to take down your post. Awareness. Don't learn the painful way. My website has detailed pictures of his work.

(Collectively, the "Posts").

III. Brief Background

[7] The defendant planned to undergo breast augmentation following the birth of her daughter in June 2015, and started researching plastic surgeons in Kelowna, BC. She settled on the plaintiff because he could get her in for a consultation relatively soon. Her first consultation with the plaintiff was on August 5, 2015, during which they discussed a possible breast augmentation. The plaintiff followed his typical first-visit protocol that included taking a history, physical examination, having the defendant watch a 10-minute video about the breast augmentation process, and a discussion of what the defendant was looking for. He also discussed the types of implants available and potential risks associated with the procedure.

[8] During the physical examination, the plaintiff noted that the defendant had a chest wall deformity known as Pectus Excavatum, also known as a sunken chest ("Pectus Condition"), where the front of the chest is concave rather than convex, resulting in a depressed sternum and asymmetry between the left and right sides. The plaintiff discussed the condition with the defendant and explained how it could complicate the breast augmentation surgery. The plaintiff says he suggested that by using implants of a different size and profile, the issue with her chest deformity could be compensated for. He told her he had done such procedures many times in the past. He explained that with Pectus Excavatum patients, the implants tend to migrate towards the sunken sternum creating an appearance of increased cleavage.

- [9] Following her consultation with the plaintiff, the defendant met with one of his nurses to pick the size of implants she wanted, ultimately opting for 480 cc Ultra High Profile implants of the same size for each breast because she liked their look and overall effect when she tried them out using a bra. As is his policy, the plaintiff deferred to the defendant's choice of implants. Despite his recommendation during the August 5, 2015 consultation that different sized implants be used to better address the Pectus Condition, he understood she wanted the same sized implants. He did not further discuss the issue with the defendant prior to the First Surgery.
- [10] The First Surgery was scheduled for November 3, 2015, and was carried out as planned. Within a few days, the plaintiff's office began receiving numerous calls, text messages, and a breast photograph from the defendant. Her concern was that her left breast was higher than the right breast and that the lower half of the left breast was quite black and blue, indicating bleeding.
- [11] On November 9 and 20, 2015, the defendant was examined by the plaintiff at his office. He was not concerned about the outcome and reassured the defendant that the left implant would drop into place over time and result in it being the same height as the right implant. He reminded her of the Pectus Condition that complicated matters somewhat. He suggested she return in three months or so for a follow-up.
- [12] The defendant returned again on December 14, 2015. She was very upset that her left implant had still not dropped into position, her breasts looked different, and she wanted something done about it. Again, the plaintiff felt it was too early in the process and that with time, the left implant would probably drop into position. He explained that if it did not, he could perform a left-sided "capsulotomy" to expand the pocket on the lower pole of that breast to allow the implant to drop. He suggested they review matters in March 2016, after the implants had time to settle near their final position.
- [13] On January 26, 2016, the plaintiff received a number of emails from the defendant, who made it clear that she was very unhappy and frustrated with the result of the First Surgery. The upshot was that the plaintiff arranged for her to see another plastic surgeon in his office, Dr. Valnicek, who saw her on February 9, 2016.
- [14] A further meeting between the plaintiff and defendant occurred on March 3, 2016. Present were the plaintiff, one of his nurses, the defendant and her husband. The defendant secretly audio recorded the meeting and put the full transcript of the recording in evidence ("Transcript"). The Transcript discloses that the plaintiff told the defendant that he released more muscle on the left side during the First Surgery to allow the implant to settle in, but it did not settle as expected. To correct the situation, he recommended a left lower pole capsulotomy (a relatively minor and not-uncommon procedure) that would surgically expand the lower pocket to allow the implant to drop into place. He was confident that the procedure would work. He told the defendant that he wanted to ensure she was happy with the results and that he would perform the surgery at no cost to her.

- [15] The same day, the defendant met with Dr. Valnicek again. He made a similar recommendation and also suggested using a slightly larger implant on the more recessed side of her chest to increase the projection. This recommendation was similar to what the plaintiff recommended during the initial consultation on August 5, 2015.
- [16] As captured in the Transcript, the defendant told the plaintiff that she preferred Dr. Valnicek to do the surgery because he had spent more time with her and she felt he was more thorough. The Transcript discloses that she stated:

So, it's like if I feel more comfortable going to a different surgeon now because he's taken the time to you know answer every question or to go every implant with me or tell me every, each size and spent hours and hours with me then I think that's fine and I feel like if I do have adjust, we're going to see if loosening it works first because obviously the cheapest and the safest and quickest seems to be better, if that's going to fix the problem then great. But if we have to upgrade to a different implant than I really feel like whatever I paid for, my original surgery, should be taken off and paid, to pay for my additional cost to repair it. Obviously, we're taking the cheaper solution and trying to do that, that way.

- [17] Later on in the Transcript the plaintiff commented:

You got your implants; you got your breasts with same size implants in two different positions right now is what you have. And so, if the plan is to lower the left implant then I think that's a good starting point, is it going to be definitive, I don't know the answer to that. Sometimes we operate on people two, three, four times before we get it right.

- [18] The defendant remained upset and declined the plaintiff's offer to perform the capsulotomy at no cost to her. She opted to have Dr. Valnicek perform a second surgery ("Second Surgery"), which involved replacing both implants from the First Surgery (Ultra-High Profile implants) with implants of different sizes--a High Profile 500 cc implant and a 550 cc implant. According to Dr. Valnicek, the size increase from the 480 cc implants used in the First Surgery is negligible. The slightly larger implants were used because High Profile 480 cc implants were not available at the time of the Second Surgery, and the look of the "high profile" implants was more in line with the look the defendant was seeking.
- [19] The Second Surgery took place on April 20, 2016. The defendant remained upset that the plaintiff would not pay the cost of the Second Surgery because, in her view, it was necessitated by mistakes made in performing the First Surgery. The plaintiff maintained that although he would pay for the capsulotomy, he would not pay for new, larger, asymmetrical implants because he suggested using different sized implants to her originally; she had rejected his advice and opted for the same sized implants instead.
- [20] In the end, the defendant was very happy with the results of the Second Surgery.

IV. Preliminary Issues

[21] The defendant raises two preliminary matters. First, that the claim should be dismissed on the basis that the Posts are protected by the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA]. Second, that this Court has no jurisdiction to hear this claim.

A. The Application of the Protection of Public Participation Act

[22] On October 5, 2020, the defendant filed an application seeking an order dismissing the action under s. 4 of the PPPA. She wanted it to be heard "around the same time as the defendant's application for summary trial filed March 3, 2020" ("PPPA Application"). She also sought an order for full indemnification of her costs.

[23] The PPPA came into force in March 2019. The purpose of the PPPA is to protect public participation in matters of public interest. It is designed to screen out actions that have the effect of limiting a defendant's participation in public debate, and seeks to balance the rights of individuals to protect their reputations against the benefit to society of protecting free speech and rigorous debate on issues of public interest.

[24] The defendant relies in particular on s. 4 of the PPPA as a complete defence to the plaintiff's claim. She asserts the Posts were expressions of public interest. Section 4 of the PPPA reads:

4(1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest.

(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
- (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

- [25] Section 4 of the PPPA creates a pre-trial procedure that allows a defendant to apply to the court for an order dismissing a claim arising out of an expression of public interest. The province's stated intention in enacting the PPPA was to protect public participation in debates of the issues of the day and prevent strategic lawsuits brought by the wealthy and powerful to shut down public criticism: *Neufeld v. Hansman*, 2021 BCCA 222 at para. 3; *Hobbs v. Warner*, 2021 BCCA 290 at para. 6.
- [26] The defendant's submissions supporting her PPPA Application rely heavily on the chambers decision in *Neufeld v. Hansman*, 2019 BCSC 2028, which was overturned on appeal just over one month prior to the hearing of this summary trial.
- [27] The PPPA creates a multi-step process for determining whether an action should proceed. It essentially acts as a "gatekeeper" to prevent defamation lawsuits from continuing where the impugned words arise out of an expression related to matters of public interest. The first step places the onus on the defendant to demonstrate on a balance of probabilities that: 1) the action arises from an expression made by the defendant; and 2) the expression relates to a matter of public interest (*Hobbs*, at paras. 11-12). The phrase "relates to a matter of public interest" is to be given a broad and liberal interpretation: *Hobbs*, at para. 11.
- [28] If the defendant meets the first step, the onus then shifts to the plaintiff to show that the action should not be dismissed by satisfying the court that there are grounds to believe the proceeding has substantial merit, has a real prospect of success, and that the defendant has no valid defence. In the end, the assessment requires that society's interest in allowing meritorious lawsuits to proceed must outweigh society's interest in protecting expression on matters of public interest: *Hobbs*, at paras. 13-15, citing *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. As Justice Côté put it in *Bent v. Platnick*, 2020 SCC 23 at para. 139, this weighing process is the "crux" of the analysis and one consideration must outweigh the other. It requires more than just a balancing exercise: *Hobbs*, at paras. 66-67.
- [29] It is intended that a PPPA application be heard at an early stage in a defamation proceeding to "nip cases in the bud". In my view, it is inappropriate in circumstances, such as here, where both parties have put their cases forward and have asked the Court to determine the case on the merits. Nevertheless, I will briefly dispense with the defendant's PPPA Application.
- [30] In my view, a consumer review of a plastic surgeon's skills is within the ambit of public interest. Consumer protection and reviews have long been held to be matters of public interest in defamation cases: see e.g., *Subway Franchise Systems of Canada Ltd, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26; *Level One Construction Ltd. v. Burnham*, 2018 BCSC 1354 at para. 179. As Chief Justice McLachlin, as she then was, said in *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 105-106:
- [105] The case law on fair comment 'is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews'.

- [106] The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.
- [31] The defendant relies on *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, aff'd 2019 ONCA 141, which, in my view, is well-founded. The Court in that case made the following findings:
- [25] The Google reviews posted by Ms. Sulaiman that relate to the services she received from New Dermamed are, in my view, analogous to an online review that one may read of a person's experience in respect of services provided to the public by, for example, a restaurant or a hotel, which often involve matters that are determined by one's personal tastes and subjective experiences. Online reviews of goods or services offered to members of the public, such as those posted by Ms. Sulaiman, are commonplace on Google or other web sites. While much of the general public may not be interested in reviews such as those posted by Ms. Sulaiman, it is enough that some segment of the community would have a genuine interest in receiving information on the subject.
- [26] When I consider the statements posted by Ms. Sulaiman in their entirety, I regard them as expressions of Ms. Sulaiman's experiences with the services that are offered to the public by New Dermamed. These statements, objectively viewed, reflect Ms. Sulaiman's own perceptions of the outcomes of the treatments she received. In the first post, Ms. Sulaiman referred to how her face looked to her following the treatments. In the second and third posts, she specifically referred to photographs that were taken that, she wrote, showed the effect on her own appearance that she described as "volume loss". I consider the use of this term, in context, to be a description of Ms. Sulaiman's subjective perception rather than a statement of objectively measurable scientific fact that can be proven or disproven. For this reason, I do not accept that Ms. Sulaiman's comments are properly characterized as "false" or "indefensible", as New Dermamed submits I should.
- [27] In my view, the comments by Ms. Sulaiman in her Google reviews of her experience at New Dermamed qualify as expressions that relate to a matter of public interest. . . .
- ...
- [45] I conclude that Ms. Sulaiman's statements in her published Google reviews are comments, and not statements of fact, expressing her views concerning her experience at New Dermamed that relate to a matter of public interest, namely, the quality of the consultation and treatment services that are offered to the public by New Dermamed.
- [32] I find that the Posts are expressions on a matter of public interest (i.e., the quality of the services offered by a plastic surgeon). There is, and will be, a segment of women potentially considering breast augmentation and contemplating having the plaintiff perform the procedure. That segment of society would have a genuine interest in receiving information on the procedure, the defendant's experiences with the plaintiff, and his abilities as a surgeon (see *Pointes*, at para. 27, citing *Grant*, at paras. 101-106). The defendant has thus

satisfied the first limb of the test.

- [33] However, in my view, the PPPA Application fails at the second and third stages of the analysis. My conclusion, as discussed below, is that the proceeding has substantial merit, the defendant has no valid defence, and the harm caused to the plaintiff by the Posts was serious enough that society's interest in continuing the proceeding outweighs society's interest in protecting the defendant's expressions. As Justice Goepel aptly noted in *Hobbs*, at para. 18, the weighing exercise necessitates that some "defendants will occasionally have to defend against lawsuits claiming damages for expressions that relate to matters of public interest." This is one of those cases.
- [34] This action was not brought to stifle or frustrate the defendant's freedom of expression or prevent her from making reviews or participating in matters of public debate. Consumer reviews, as a general principle, ought to be encouraged and there is a very real danger of a chilling effect if they are curtailed. However, such reviews should not be left unbridled. Online review platforms are not a *carte blanche* to say whatever one wishes without potential consequences. This case was brought to vindicate the plaintiff's reputation as a plastic surgeon in light of the Posts. As was stated by Justice Côté in *Bent*, at para. 1:
- [1] Freedom of expression and its relationship to the protection of reputation has been subject to an assiduous and judicious balancing over the course of this Court's jurisprudential history. While in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, this Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, this Court has also recognized that freedom of expression is not absolute -- '[o]ne limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault': *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 2, per McLachlin C.J. Indeed, 'the right to free expression does not confer a licence to ruin reputations': para. 58. That is because this Court has likened reputation to a 'plant of tender growth [whose] blossom, once lost, is not easily restored': *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928), at p. 492, per Cardozo J., cited by Cory J. in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 92. Values, therefore, are not without countervailing considerations.
- [35] Accordingly, the PPPA Application is dismissed.

B. Jurisdictional Challenge

- [36] The defendant also argues jurisdiction as a substantive defence. She asserts that this Court has no jurisdiction to hear this case because the plaintiff has failed to prove that the locus of publication was in British Columbia.

- [37] In my view, this argument has no merit. The defendant has not referred me to any authority for the proposition that the locus of the impugned publication must be in the jurisdiction in which the case is brought or that the jurisdiction of the publication is a substantive defence to a defamation claim. She did not bring a jurisdictional challenge under R. 21-8, nor did she seek an order that this Court decline to exercise jurisdiction.
- [38] In any event, the defendant was ordinarily resident in British Columbia at the time the Posts were made. She has continued to be ordinarily resident in British Columbia since the commencement of this litigation. Therefore, this Court has personal jurisdiction over the defendant: Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 3(d).
- [39] Given the absence of a jurisdictional challenge, the plaintiff need only prove that the Posts were published or that it can be reasonably inferred in the circumstances. This issue is discussed below.

V. Legal Framework for Defamation Claims

- [40] To ground a defamation case, the plaintiff must first prove a *prima facie* case that the impugned words:
- a) are defamatory in the sense that they are capable of lowering the plaintiff's reputation in the eyes of a reasonable person;
 - b) in fact refer to the plaintiff; and
 - c) were published to at least one other person,

Grant, at para. 28 ("Grant Factors").

- [41] As set out by Mr. Justice Hinkson, as he then was, in *Lawson v. Baines*, 2012 BCCA 117 at para. 13, there are three alternative means of proving words are defamatory:

- [13] . . . a) if the literal meaning of the words complained of are defamatory;
- b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or
 - c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).
- [42] An inferential meaning is one which the ordinary person, without special knowledge, will infer from the words complained of. This meaning must be determined objectively in light of the context and tone of the article as a whole: *Lawson*, at paras. 23 & 35.

[43] The court may take into consideration all of the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published, and the manner in which they were presented: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 62.

[44] If the plaintiff fails to prove any one of the Grant Factors, the case must fail. If a *prima facie* case of defamation has been established on a balance of probabilities, the burden of proof then shifts to the defendant to establish a defence: *Grant*, at paras. 28-29. In this case, the defendant may defeat the plaintiff's claim by successfully proving the pleaded defences of justification/truth, qualified privilege, and/or fair comment.

VI. Issues

[45] The issues for determination are:

- a) Has the plaintiff proven a *prima facie* defamation claim?
- b) If so, has the defendant proven the defences of justification/truth, qualified privilege, or fair comment?
- c) If defamation has been proven and no defences are available, what damages should be awarded?

VII. Analysis

[46] I will deal with each of the issues as outlined above in turn.

A. *Prima Facie* Defamation Claim

[47] A person's reputation in his/her profession or calling is fundamentally important to his/her professional life and once damaged is difficult to repair: *Botiuk*, at paras. 69 and 92; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 68. In *Weaver*, at para. 62, the Court stated:

[62] The function of defamation law is to protect and vindicate reputation from harm that is unjustified. A good reputation fosters one's sense of self-worth and, as an aspect of personality, is related to the innate worthiness and dignity of the individual, an underlying value of the Canadian Charter of Rights and Freedoms. Once tarnished, good reputation is hard to regain, with sometimes devastating consequences, particularly in a professional context. However, its protection must be balanced and reconciled with the Charter guarantee of freedom of expression, a recognised pillar of modern democracy: *Church of Scientology* at paras. 100-121; *WIC Radio* at paras. 2, 15; *Bou Malhab* at paras. 16-18; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 91-92.

- [48] Professionals may be defamed by comments that question or impugn their qualifications, knowledge, skill, capacity, judgment, or efficiency. Comments suggesting that a medical practitioner is incompetent, unqualified, or guilty of discreditable conduct in his or her profession are defamatory: *Casses v. Canadian Broadcasting Corporation*, 2015 BCSC 2150 at para. 318, citing *Cimolai v. Hall*, 2005 BCSC 31 at para. 72, aff'd 2009 BCCA 212.
- [49] The plaintiff asserts that an ordinary person without special knowledge would infer the following meanings from the Posts:
- a) he provided substandard care to the defendant;
 - b) he made a fundamental error during the surgery by failing to perform a basic step which caused damage to the defendant;
 - c) he either carelessly or intentionally failed to inform the defendant in relation to her Pectus Condition and how it could complicate the surgery and its results;
 - d) he encouraged the surgery and in so doing was motivated by financial gain in priority to concerns for the defendant's health;
 - e) he failed or refused to treat post-surgery complications without being paid and was thereby motivated by financial gain in priority to concerns for the defendant's health;
 - f) he is not a competent plastic surgeon; and
 - g) he is not a professionally ethical surgeon.
- [50] Respecting the first Grant Factor, I conclude the plaintiff has proven that the Posts are defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonably and right-thinking member of society, who is reasonably thoughtful and informed and not someone with an overly fragile sensibility: *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260 at paras. 64-68.
- [51] The second Grant Factor is also established. The defendant rightly concedes that the Posts expressly refer to the plaintiff, as his full name and vocation are clearly referenced.
- [52] The third Grant Factor relates to the publication of the Posts. Publication of defamatory statements may be established even in the absence of direct evidence that the statement has been read by some person. The court may infer readership from the evidence in order to establish publication: *Hee*, at paras. 82-85.
- [53] While I cannot presume that the Posts were read, it is open to the court to draw inferences from other evidence that they were: *Hee*, at para. 78, citing *Crookes v. Holloway*, 2007 BCSC 1325, aff'd 2008 BCCA 165 at para. 109.
- [54] I conclude that there is enough evidence before the Court to infer that the Posts were published. Ms. Mandelbaum, the plaintiff's executive assistant from February 2012 through mid-January 2020, confirmed that in March 2018, she read the Posts. That evidence alone

proves publication. Other evidence supports that the Posts were published, including the defendant's statement in her Google Review that her review went "viral"; the fact that the plaintiff's practise is restricted to Kelowna, BC; the responses the defendant received to the Posts; and the realities of 21st century communications and internet-based publications: *Rook v. Halcrow*, 2019 BCSC 2253 at paras. 25-26.

[55] All of these leave a reasonable inference that the Posts were read by others. I am satisfied that the plaintiff has proven publication of the Posts on a balance of probabilities.

[56] I conclude that the plaintiff has made out a prima facie case of defamation. The Posts are reasonably capable of lowering the plaintiff's reputation as a plastic surgeon, they refer directly to him by name, and they were published to at least one other person.

B. Are any Defences Available to the Defendant?

[57] In her submissions, the defendant advances the defences of justification, fair comment, and qualified privilege. Her overarching position is summarized as follows.

[58] The defendant describes herself as a "blogger" who writes about her experiences on her website and on Google Reviews. She admits placing the Posts, which she calls "online reviews", on her personal review website (where she says she has posted many reviews) and on Google Reviews, which she describes as an internet-based platform for business reviews. She notes that the Google Review platform allows for responses to be posted and that the plaintiff's office posted a response to her review.

[59] She receives no remuneration from either site. She says that placed in this context, the Posts were simply her reviews of her dissatisfactory experience with the plaintiff and were made to benefit others contemplating breast augmentation surgery, so they would be better informed before making the decision.

[60] The defendant characterizes the Posts as nothing more than expressing and voicing her opinions, feelings, and criticisms about the plaintiff and her surgical experience that she was extremely dissatisfied with. She says the Posts, while perhaps harsh and unflattering, were not posted maliciously or with ill feelings towards the plaintiff. She says she had no intention of harming the plaintiff's reputation or his breast augmentation surgical business.

[61] In any event, she asserts that the Posts are factually correct (or at least substantially so) and were based on an appraisal of her honestly held beliefs. Nothing in the Posts, she contends, is inaccurate.

[62] I will now turn to the defences raised by the defendant.

i. Justification/Truth

[63] If the defendant proves the impugned statements were true, or substantially true, it is a full defence: *Pan v. Gao*, 2020 BCCA 58 at para. 14; *Grant*, at para. 33; *Vigna v. Levant*, 2010 ONSC 6308 at para. 35.

- [64] At the outset, I would point out that many of the defendant's impugned statements are not matters of fact that fall within the ambit of a justification/truth defence. The Posts contain statements of opinion that the defence of justification/truth does not cover. Thus, prima facie defamatory comments, such as "You couldn't pay me to go back to go back him [sic]" or "I did not feel good I let this surgeon cut me open" are not protected by a justification defence and must be addressed under fair comment.
- [65] Other examples include the statement: "I knew something wasn't right immediately. . . ." This too is opinion and is not a statement of fact, and will be dealt with under fair comment. The basis for her opinion was that her left breast was ". . . almost entirely black and blue", a statement of fact. The statement that follows in this passage is that the plaintiff ". . . shrugged it off, said it was fine." Whether or not stating that the bruising was fine could be defined as the plaintiff "shrugging it off" is a matter of opinion.
- [66] The plaintiff's evidence, which I accept, is that the bruising on the defendant's left breast is a normal risk in breast augmentation surgery, particularly when muscle tissue is released. It does not indicate a problem. I accept that the plaintiff responded to the defendant's concerns about the bruising on her left breast and reassured her that there was nothing for her to worry about.
- [67] The Posts also contained the following characterization:
- Fast forward to three months post op - low & behold the itty bitty boob I traded in, for a deformed downward breast that was well over an inch higher than the other.
- At three months' post-surgery, the defendant was assessed by Dr. Valnicek, who found that her left breast was still sitting about a centimetre high and that it was not unusual for one implant to take a little bit longer to drop. I accept that at this point, there was a problem with the left implant not falling into place. It was deformed with a height difference over the right breast.
- [68] The defendant's Posts also made the following statement of fact regarding the complexity of her chest:
- Yet never once during my appointments did he mention the 'complexity' of my chest. On the contrary, he boasted how my chest wall would give me more cleavage, not only selling me on the idea of breast augmentation but encouraging it telling me how often he has done the surgery for my 'particular case'.
- [69] The plaintiff disputes this statement and says it is untrue. He also disputes the defendant's version of the circumstances that resulted in the same sized implants being used during the First Surgery. The plaintiff says that at the August 5, 2015 consultation, he recommended different sized implants to accommodate the defendant's Pectus Condition, with her right side being more prominent than her left side. He says that contrary to that recommendation, the defendant opted for the same sized 480 cc implants because she preferred the way they looked during the sizing process. The plaintiff says that, as is his practice, he used the implants the defendant requested. The plaintiff's chart notes for

August 5, 2015, albeit cryptic and meaningful to the plaintiff only, suggest that following his examination, the plaintiff noted: "therefore, vary implant size", but after sizing, the defendant "liked same size implants".

- [70] I accept the plaintiff's interpretation of his chart notes as confirming the defendant chose to have the same sized implants during the First Surgery despite the plaintiff having recommended different sized implants during the August 5, 2015 consultation. This is categorically at odds with the plaintiff's statement in her Google Review that:

The only advice I rejected of Peterson's, is when I took Dr. Valniceks suggestion making one implant 30cc bigger, again I am so thankful I did not take Peterson's misguided advice or my breasts would still not be symmetrical like they are today.

- [71] It is clear that the defendant did in fact reject the plaintiff's initial recommendation to use asymmetrical implants. This statement of fact is capable of lowering the plaintiff's reputation and is objectively false, and thus cannot be justified. I note, however, that there is no evidence that, following the sizing process, the plaintiff discussed the issue of her Pectus Condition and use of different sized implants prior to the First Surgery.
- [72] The plaintiff's post-operation chart notes dated November 3, 2015, as interpreted by the plaintiff, say that he increased the release on the left breast. His chart note for November 20, 2015, two-and-a-half weeks after the First Surgery, suggest that he reminded the defendant of her Pectus Condition, that the left implant was "a little higher", that it should drop into place with time and that he had released more muscle on the left side. The plaintiff's chart note for December 14, 2015, confirms that the defendant was upset that the left implant had not dropped and that her breast looked so different. He again noted that the left implant "has just not dropped in yet" and that he may have to lower it. He notes that he would re-assess in early March and decide what to do.
- [73] Based on the evidence before me, including the affidavits, the Transcript and the plaintiff's clinical notes, I accept that the plaintiff discussed the Pectus Condition with the defendant on August 5, 2015, and suggested she consider different sized and profile implants. I also accept that the plaintiff discussed the general surgical procedure with the defendant and generally explained potential risks and complications to the defendant.
- [74] Therefore, I conclude that the justification/truth defence does not apply to this part of the Posts. The defendant's Posts state that the plaintiff did not mention the complexity of her chest, which she has not proven as true.
- [75] Approximately three months' post-surgery, Dr. Valnicek provided similar information to the defendant, confirming that the defendant's pre-existing chest asymmetries presented some difficulties. The above statements of fact, which give rise to a defamatory inference, are thus incorrect and not covered by the justification defence.

[76] The Posts continue with a focus on the nature of the complications and the timeline of the recovery process:

To correct his mistake in the first place muscle needed to be released more on one side which he failed to do in my initial surgery, resulting in my breast having next to no bottom pole

[A small but vastly important step that turned a 4-6 week recovery time into 9 months.]

[77] The defendant argues that the capsulotomy proposed by the plaintiff would require additional recovery time and would not have been required but for the "mistake" made by the plaintiff during the First Surgery. In other words, she says that the fact that a capsulotomy was required proves that a mistake was made.

[78] I disagree. There is no compelling evidence that proves a mistake was made during the First Surgery. Indeed, the evidence indicates that the plaintiff performed a more complete muscle release on the left side to accommodate the implant and that it is not unusual for implants to take different times to settle into place. The defendant has not satisfied me that the plaintiff made a mistake during the First Surgery or that he failed to do anything or take any step that should have been taken, or that it was the plaintiff's fault that a normal four to six week recovery time turned into a nine-month recovery time.

[79] The Second Surgery was not performed to release more muscle in the left breast but rather, at the defendant's request, to replace both implants with slightly larger and different profile implants.

[80] The evidence suggests that the left implant would not have dropped independent of the size of the implant used. In other words, had the plaintiff used different sized implants during the First Surgery, the issue with the left implant failing to drop would still have existed. Dr. Valnicek's uncontroverted evidence is that the difference in size between the 480 cc and 500/550 cc implants is negligible. Therefore, no connection between the failure of the left implant to drop and the size of the implants has been proven. There is no convincing evidence that the plaintiff either made a surgical error or other mistake, or that his care or operation regarding the defendant fell below the standard of care of plastic surgeons. Indeed, there is no evidence at all of the standard of care of plastic surgeons performing breast augmentation surgery.

[81] The defendant also made the following statements of fact regarding the plaintiff's note-taking practice:

When I tried to make sense of this & asked if he had done just that during surgery all Peterson said was 'I think so', looking onto a measly couple lines of notes on the back piece of paper for questionable confirmation

[82] This suggestion was not contained in the Transcript. Again, I conclude that this statement is a misrepresentation and based on the defendant's incorrect assumptions on how the plaintiff keeps chart notes. He describes a different methodology of keeping chart notes

than other doctors, including Dr. Valnicek. The plaintiff uses his own shorthand and diagrams which he has developed over the years that, while quite meaningful to him, would mean very little to lay persons such as the defendant who would not be able to interpret them. The fact that the plaintiff performed the left-sided muscle release during the First Surgery is noted in his chart notes and drawings. The fact that the plaintiff recommended a follow-up capsulotomy suggests that a more significant muscle release was necessary to achieve the defendant's desired results.

[83] The defendant also made the following comments:

I requested a different surgeon in the office who I found to be much more detailed & informative than Brian. It was night & day difference. Notes were thorough as were consultations - opposed to my at most 5 minute consultations with Brian."

[84] The only factual statement in this passage is that the defendant did indeed get a different surgeon. The rest is her opinion. The matters of her opinion will be addressed under fair comment. I note, however that the defendant had no access to either Dr. Valnicek's notes or the plaintiff's records until they were disclosed after this lawsuit began and well after the Posts were made.

[85] For the reasons stated, the defendant is not entitled to raise the defence of justification or truth. I have concluded that material portions of the Posts, read in their entirety and in context of what occurred, are not true and therefore the defence is not available to her.

ii. Qualified Privilege

[86] Qualified privilege applies when there is a "duty, legal, social or moral, to publish the matter complained of to persons with a corresponding duty or interest to receive it": *Caron v. A.*, 2015 BCCA 47 at para. 15, quoting *Pressler v. Lethbridge* (2000), 86 B.C.L.R. (3d) 257 at 296 (C.A.).

[87] No such reciprocal duty exists in this case. Accordingly, this defence does not apply.

iii. Fair Comment

[88] Fair comment deals with statements of opinion or commentary. It does not cover defamatory statements of fact that are untrue. A fair comment defence cannot, as a matter of law, expunge the unjustified defamatory statements of fact noted above. It may, however, preclude liability for some of the defendant's prima facie defamatory opinions.

[89] The defendant has the onus of establishing the elements of the defence of fair comment: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 30. The principles set out in the Charter of Rights and Freedoms do not provide a license to damage another person's reputation simply to fulfil one's atavistic desire to express oneself: *Grant*, at para. 51.

- [90] The publication of negative and unflattering remarks about a plaintiff, if honestly held, based on fact, not actuated by malice, and in respect of matters of public interest, are considered fair comment and not actionable: WIC, at para. 28. A defendant claiming fair comment must satisfy the following test as contextualized in paras. 104-107 of Weaver:
- [104] In WIC Radio, Mr. Justice Binnie described the fair comment defence as holding the balance in defamation law between two fundamental values: respect for individuals and protection of their reputations from unjustified harm, on the one hand, and freedom of expression and debate, on the other: para. 1. He also endorsed the following test for the fair comment defence:
- [28] [referencing the formulation of the test in Cherneskey]:
- a) the comment must be on a matter of public interest;
 - b) the comment must be based on fact;
 - c) the comment, though it can include inferences of fact, must be recognisable as comment;
 - d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
 - e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice .
- [105] Comment is distinguishable from factual imputation. While a "comment" must be recognisable as such, it may include a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof: WIC Radio at para. 26, citing *Ross v. New Brunswick Teachers' Assn*, 2001 NBCA 62 at para. 56. If the statement is a comment, the facts upon which it is based must be sufficiently stated, referenced or notorious to enable viewers and readers to make their own assessment of the merits of the comment. If the factual foundation is unstated, unknown or false, the defence is not available: WIC Radio at paras. 26, 31, 34; *Mainstream Canada* at paras. 24-28.
- [106] As with the "of and concerning" issue, in light of my view that a new trial is required it is neither necessary nor desirable to consider in detail whether the judge erred in her analysis of the fair comment defence. This is particularly so due to the relationship between factual findings on defamatory meaning and the application of the defence. However, given the appellants' request for guidance on proper principles, I would make the following brief observations.
- [107] It is not entirely clear to me which of the impugned words the judge considered factual assertions and which of them she considered comment. In analysing the fair comment defence, it is important clearly to distinguish between the two. It is also important to confine an analysis of the factual foundation said to justify a comment to that set out in the pleadings and relied upon by the defendants. I agree with the appellants that, on occasion, the judge's analysis of the relevant factual foundation for consideration overstepped that

boundary.

[91] Hence, the facts must be sufficiently stated or otherwise known to the reader, so that the reader is able to make up his or her own mind on the merits of the comment. The comment must be presented as an expression of subjective opinion, not an assertion of objective fact: Hee, at para. 93; *Mainstream Canada v. Staniford*, 2013 BCCA 341 at paras. 21-38.

[92] As earlier mentioned, the thrust of the Posts is a subjective commentary of the defendant's belief. The "sting"--that the plaintiff is an incompetent plastic surgeon--is encapsulated in the following lines of her opinion:

". . . correcting the issues seem unimportant & unpredictable"

"I did not feel good I let this surgeon cut me open. . ."

"I was scared to have Peterson operate on me again. . ."

"I requested a different surgeon in the office who I found to be so much more detailed & informative than Brian."

"It was a lengthy, stressful battle to have a different surgeon correct his mistake without having to pay full price for another breast augmentation."

"Brian's mistake was more than I bargained for. . ."

"Call me picky. . . but would YOU be happy with the results? You couldn't pay me to go back to him."

[93] The defendant also refers to photographs of her breasts following the First Surgery, allowing those reading her website to view the end result. The question becomes whether a consumer viewing those photographs could reasonably hold the defendant's views based on the factual matrix she described in the Posts.

[94] In my view, the answer is probably yes.

[95] However, the defendant's description of a number of the background facts that make up the Posts, I conclude, misrepresents the facts. First, she omits--and actually says the opposite--that during the August 5, 2015 consultation, the plaintiff discussed with her the Pectus Condition and the impact it could have on the results of the surgery. He also had her watch a 10-minute video of the process. There is a reference to this issue in her Google Review but not in her original post. The defendant confirms in an email of January 26, 2016, to the plaintiff that he:

". . . explained to me about my chest wall and that I have Pectus Excavatum and explained why one breast was bigger than the other".

[96] I am persuaded by the evidence that the Pectus Condition made the breast augmentation surgery more complex than normal. I am persuaded that because of this complexity, the plaintiff recommended different sized implants but that the ultimate decision was made by the patient. However, as I noted above, the evidence before me does not suggest that the size of the implant selected was responsible for the initial asymmetry between the defendant's breasts.

[97] Secondly, the defendant's reference to the plaintiff making a "mistake" during the First Surgery is not factually correct. Other than the fact that the left implant did not settle into place as quickly as the plaintiff or defendant would have liked or hoped, or at all, does not prove as a fact that a mistake was made. The plaintiff's evidence on the point, is that he felt:

- a) ". . . this bruising was due to the more complete muscle release and bleeding from the lower edge of the muscle on the left breast";
- b) ". . . as though over time it should drop into position to match the right breast"; and
- c) ". . . the muscle was more thoroughly released on the left side",

(Plaintiff's Affidavit #1, paras. 21 and 23). This evidence suggests that there was no mistake at all.

[98] The defendant has not satisfied the burden on her to prove that failure of the left implant to drop into place was due to an error by the plaintiff during the First Surgery and not a complication of her Pectus Condition.

[99] The defence of fair comment is only available if based on true facts. Where the defendant cannot prove the truth of the facts upon which the comment is made, the defence of fair comment will fail. Put another way, in order to meet the test for the defence of fair comment, the comment must have a factual foundation. In *Mainstream Canada*, Justice Tysoe stated at para. 24:

[24] In order for the defence of fair comment to succeed, it is necessary for the comment to have a factual foundation or factual substratum. The comment must be an expression of opinion on a known set of facts, and the audience must be in a position to assess or evaluate the comment. The rationale for this requirement was explained over a century ago in the South African case decided by the Transvaal Supreme Court in *Roos v. Stent and Pretoria Printing Works, Ltd.*, 1909 T.S. 988 at 998 per Innes C.J.:

But it is obvious that to entitle any publication to the benefit of this defence it must be clear to those who read it what the facts are and what comments are made upon them. And for two reasons. Because it is impossible to know whether the comments are fair unless we know what the facts are; and because the public must have an opportunity of judging the value of the comments.

[100] The factual foundation for the Posts has not been established. The defendant says that the Posts simply reflect her subjective personal experience with the plaintiff and his office in relation to breast augmentation surgery that, for her, went horribly wrong. While there is

no doubt that the defendant was upset with what she perceived was a mistake made by the plaintiff during the First Surgery and was upset with the results, her commentary ignores, and actually misstates, the fact that the plaintiff discussed the Pectus Condition with her during the initial consultation as well as the potential complications it could cause. A reasonable reader with the knowledge of these communications could not have come to the same opinion as expressed in the Posts. Further, she downplays the plaintiff's proposal to perform a capsulotomy at no cost to her. The evidence suggests that the capsulotomy would have corrected the issue. In sum, she has failed to prove that the facts upon which she based her criticisms were true, namely, that the outcome of the First Surgery was due to errors made by the plaintiff.

[101] Given my finding that the defendant has not proven the defence of fair comment, it is not necessary to deal with the issue of malice.

VIII. Conclusion

[102] While internet postings in the nature of "reviews" of restaurants and services are the norm in today's world, defamatory comments dressed up as "reviews" that are not factual or do not qualify as fair comment are subject to the laws of defamation. Here, the broad thrust of the Posts was that the plaintiff made mistakes during the First Surgery, took a "couldn't care less" approach to the defendant's concerns when confronted with the results, and that the defendant was forced to pay another surgeon to have another surgery to correct the problem.

[103] In my view, a reasonable person knowing the proven background facts (e.g. discussion about the Pectus Condition and risks associated with the surgery), could not honestly express the opinions set out in the Posts. Moreover, the Posts contain defamatory statements of fact that cannot be justified. The plaintiff is thus liable for her libel.

IX. Damages

[104] General damages are presumed in defamation actions: Bent, at para. 144. The plaintiff bears no obligation to prove actual loss or injury: Weaver, at para. 70. Reputation is one of the most valuable assets a person can possess and is an attribute that must be protected by society's laws: Bent, at para. 146.

[105] The objective of a general damage award when defamation has been proven is:

- a) to act as a consolation to the plaintiff for the distress suffered as a result of the defamation;
- b) to repair the damage to the plaintiff's reputation; and
- c) to vindicate the plaintiff or his business reputation:

Turco v. Dunlop, [1998] B.C.J. No. 2711 at para. 75 (S.C.); Rutman v. Rabinowitz, 2016 ONSC 5864 at paras. 214-215.

- [106] A person's professional success is founded and maintained on the basis of a good reputation for professional integrity and trustworthiness. Accordingly, defaming a professional person is a serious matter and warrants substantial damages, including punitive or exemplary damages if the circumstances permit: *McElroy v. Cowper-Smith*, [1967] S.C.R. 425.
- [107] A person with a good reputation and standing in the community will suffer greater damage from a defamatory statement: *Rutman*, at para. 218; *Rook*, at para. 29.
- [108] The evidence satisfies me that the plaintiff has a good standing in the community, has an impressive CV, he is a specialist in his field, and his professional reputation is important to him and his business. I am satisfied that it took him years to acquire his reputation.
- [109] The case law reveals a wide range of general damages in defamation cases where the words are directly aimed at a plaintiff's professional reputation, from \$25,000 in *Bains v. 1420546 Ontario Inc. (c.o.b. Niagara Weekly)*, 2011 ONSC 3686, to \$300,000 in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. This is to be expected.
- [110] As Justice Cory adopted in *Hill*, at para. 182, damage assessments for defamation are a highly fact specific exercise governed by all the circumstances of the particular case. The court should consider "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 [the] verdict'": *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at para. 116, quoting *Hill*.
- [111] Here, the defendant published the Posts using the internet, a medium with tremendous power to harm a person's reputation by spreading falsehoods far and wide. Having regard to relevant factors, including my finding that there was a public interest in the Posts, the defamatory nature of the Posts, the defendant's refusal to remove them, the medium she used, pervasiveness and permanence of internet postings, the attack on the plaintiff's professional reputation, and her conduct since this litigation began in gathering up negative hearsay in an attempt to show that the plaintiff is a bad plastic surgeon, I conclude that damages of \$30,000 are appropriate.
- [112] The plaintiff also seeks a mandatory injunction requiring the defendant to remove the Posts from the internet. A permanent mandatory injunction is a discretionary order governed by the following factors:
- (1) the character of interest to be protected;
 - (2) the relative adequacy to plaintiff of injunctive relief in comparison with other remedies;
 - (3) delay, if any, in bringing an action;
 - (4) misconduct, if any, of the plaintiff;

- (5) relative hardship likely to result to defendant if injunction granted and to plaintiff if it is denied;
- (6) interest of third persons and of the public;
- (7) practicality of framing and enforcing the order or judgment,

(417489 B.C. Ltd. v. Scana Holdings Ltd., [1998] B.C.J. No. 140 at para. 8 (S.C.); Simard Westlink Inc. v. Wallace, 2013 BCSC 2218 at para. 49).

[113] Having considered these factors, I find that a permanent mandatory injunction is just and convenient. I exercise my discretion in granting the plaintiff a permanent mandatory injunction requiring the defendant to forthwith remove and take down the Posts and not re-post them on any media.

X. Summary

[114] For the foregoing reasons, I make the following orders:

- a) the defendant must forthwith take down and remove the Posts and not re-post them on any media; and
- b) The plaintiff is awarded damages against the defendant for defamation in the amount of \$30,000.

[115] The plaintiff is awarded costs.

"G.P. Weatherill J."

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