Navigating Online Reviews and Defamation

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Donna Dalby
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Douglas Raftesath – Meridian Lawyers

Meridian is increasingly receiving enquiries from both health practitioners and service providers seeking advice regarding negative reviews placed online by members of the public.

Sometimes the reviews are thought to be unfair and unreasonable, and sometimes they cross over the line and are abusive and defamatory.

With the ever increasing reliance on digital marketing and the ease with which it is now possible to leave a review, combined with the ability of the reviewer to leave an anonymous review, reviews of service providers are now common place.

There have been a number of disputes that have proceeded through the Courts in recent years at the instigation of unhappy reviewees. A number of these disputes have resulted in significant damages awards being made in favour of the reviewee.

However, amendments to the Defamation Acts of most Australian States were introduced on 1 July 2021 in order to curb the flow of unmeritorious defamation claims following concerns that had been raised that "defamation law is increasing being used for trivial, spurious and vexatious backyard claims".

The amendments have included the introduction of a "serious harm" provision at s10A of the Defamation Acts in most Australian States.

The effect of the amendments is that serious harm is now an element of a cause of action for defamation. This means that in order to successfully pursue a claim for defamation, a person must be able to establish that he/she has suffered or is likely to suffer serious harm.

Examples of successful defamation claims for online reviews

In Mickle v Farley [2013] NSWDC, a former student of Orange High School who had not been taught by Mickle, made a number of abusive posts on Facebook and Twitter about her. He refused to provide an apology and was subsequently ordered to pay $85,000 in compensatory damages and $20,000 in aggravated damages.

In Asbog Veterinary Services Pty Ltd v Barlow [2020] QDC, a veterinarian based in Queensland sued a former customer who had

left a number of online comments on Facebook, Twitter and True Local after receiving a bill for $427 for services provided to her dog, which had been attacked by another dog. She claimed that she had been overcharged "400% mark-up" on medicines, and alleged that the vet was grumpy and should not be dealing with people or animals. The matter could not be resolved between the parties and ultimately the District Court awarded the vet $25,000 plus interest and costs.

In Moy v Issac (unreported Queensland Magistrates court 2020), four Facebook posts were made about an Australian wedding planner, falsely accusing the wedding planner of sabotaging previous weddings. These posts were shared by another Facebook user who also asserted that the wedding planner had ruined her own wedding by trying to have the wedding venue cancelled. There was no truth to these assertions. The wedding planner was awarded $100,000 for general and aggravated damages against the person who made the original post on Facebook, and $50,000 in general damages against another person who shared the posts and made the additional assertions about trying to have her own wedding venue cancelled.

In Cheng v Lock [2020] SASC14, a review was posted on Google My Business which stated among other things, 'stay clear of this place! Gordon [Cheng] brings shame to all lawyers and is infamous for his lack of professionalism amongst the Law Society in Adelaide. He is only concerned about how to get most of your money." This review was also published in Chinese. Mr Cheng had never actually acted for the reviewer, Lock, and the two had never met. Mr Cheng gave evidence that he had lost around 80% of his clients and had suffered irreparable damage to his reputation. The Supreme Court awarded Mr Cheng $750,000.

In Tavakoli v Imisides (No4) [2019] NSWSC717 a claim for defamation was made by a plastic surgeon, against a person who left a Google review that alleged the plastic surgeon had charged for work that he did not perform, acted improperly and acted incompetently. The Court found that the allegations in the review were plainly untrue. The plastic surgeon was awarded a total amount of $530,000 which included aggravated damages.

In Colagrande v Kim [2022] FCA409 a cosmetic surgeon left a review on the site "Rate MD" regarding another cosmetic surgeon. The review was left anonymously and alleged that the cosmetic surgeon should not be practising as he had been convicted of sexual assault. The review also stated: "After what he did to me, I can't believe he is still practicing".

The review was posted several months after the cosmetic surgeon's conviction for sexual assault was quashed on appeal. The defendant in this matter did not seek to dispute that the review was defamatory. Rather, the defence sought to argue that it was unlikely that one negative review would be likely to have caused the plaintiff damage, especially given the significant media coverage of the plaintiff's original conviction that was subsequently quashed.

Having heard the evidence of the plaintiff, the judge accepted that the single review had caused the plaintiff significant harm. The judge found that the defamatory imputations: "are among the gravest that can be alleged against a medical practitioner". The rival cosmetic surgeon who made the defamatory review was ordered to pay approximately $450,000 in damages plus interest and legal costs.

The legal costs in that matter will likely have been significant, given the efforts made by the plaintiff to identify and locate the author of the anonymous review.

In Dean v Puleio [2021] VCC848 a number of Google reviews were posted by a former patient of a periodontist after the periodontist had terminated the doctor patient relationship. There were four reviews, made over the course of one week. The former patient accused the doctor of being unprofessional and undermining and failing to diagnose various illnesses from which she was suffering, over charging, making ludicrous suggestions as to treatment, and being someone who bullied and berated her patients. A secondary review referred to the doctor providing "unprofessional and undermining service". A third review falsely stated that the doctor had "apologized for the negligence of my care however the outcome is unsatisfactory". The doctor suffered a downturn in new patient referrals following the reviews. The doctor was awarded $170,000 for damages.

In Nettle v Cruse [2021] FCA935, a former patient of a plastic surgeon conducted what the Court described as an 'appalling and entirely unjustified and unjustifiable negative internet campaign" regarding the cosmetic surgeon's work and conduct. There were a large number of defamatory posts made by the former patient using fake names. The cosmetic surgeon was referred to in the posts as being unethical, a compulsive liar, the devil himself and suggested that he provided inhumane medical care. The posts that were defamatory of the doctor caused his five star Google rating to drop to three and a half stars. The patient was ordered to pay $450,000 in damages to the cosmetic surgeon.

Kabbabe v Google LLC [2020] FCA 126 involves an action by a dentist who was the subject of anonymous defamatory reviews which suggested that the dentist was unfit to be a dentist. Dr Kabbabe commenced proceedings against Google, seeking orders that would enable him to identify the anonymous reviewer.. Dr Kabbabe obtained the orders he sought and it transpired that the author of the defamatory material was another dentist and his former employer.

The cases referred to in this article relate to defamation that took place before the 1 July 2021 amendments to the various Defamation Acts. They are cases in which it seems likely that the Courts would have accepted that the reviewee in question had suffered, or was likely to suffer, serious harm. This is arguably evident from the amount of the damages awards. However, there have been many cases that have proceeded to Court which are unmeritorious.

As mentioned above, the introduction on 1 July 2021 of the serious harm threshold essentially means that serious harm is now an element of the cause of action for defamation and that in any proceeding for defamation, the Court (and not a jury) must determine whether the defamatory material complained of caused, or is likely to cause, serious harm to the reputation of the complainant.

Prior to the amendment, the seriousness of any defamation was a relevant factor in relation to the award of damages. Not, as it

now is, to establishing whether there is a cause of action for defamation.

In Newman v Whittington [2022] NSWSC249, the case involved defamation proceedings in which it was alleged that the defendant posted 27 defamatory imputations about the complainant online, mainly on Facebook. As some of the alleged posts were made after 1 July 2021, it was necessary for the complainant to satisfy the "serious harm" threshold. While the judgment in this matter was only an interlocutory judgment, the Judge confirmed that:

1.the serious harm threshold would normally be determined before trial unless special circumstances arose

2.the onus is on the plaintiff to prove serious harm in every case as a fact, and this is a necessary element to a defamation claim

3.in order to establish serious harm, consideration must be given to the facts of each matter and the impact of the publication, rather than to harm that might be inferred from the use of the words used within the publication and the generally understood meaning of those words

4.the s10A serious harm provisions abolished the common law presumption that a plaintiff has suffered damage upon the publication of defamatory material.

In most, if not all, of the historical cases referred to in this article, it seems likely that the "serious harm" threshold issue would have been able to be satisfied by the plaintiff if he or she had needed to do so. It is clear, however, that the serious harm threshold is likely to have a significant impact on potential defamation cases in the future.

The other reforms that were introduced to the defamation regime on 1 July 2021 by virtue of the Defamation Amendment Bill 2020 (NSW) include the following:

1.A "single publication rule" has been introduced which means that a claim for defamation must be brought within one year of the first publication of the defamatory material rather than starting again each time that the electronic publication was viewed or uploaded.

2.The person, the subject of the defamation, must serve a "concerns notice" on the defendant(s) responsible for the publication and wait at least 28 days before commencing court proceedings. A concerns notice must detail with precision the defamatory publication complained about, must identify the imputations that arise from the defamatory statements, and must refer to the serious harm suffered by the complainant.

3.The uniform defamation laws provide a defence in certain circumstances in which a reasonable offer to make amends by the defendant is not accepted.

Accordingly, by requiring these steps to be taken prior to defamation proceedings being commenced, it is hoped that defamation claims can be resolved at an early stage without the necessity to go to court.

Our recommendations when an unwarranted or potentially defamatory online review is received

There are various options that can be used to deal with or lessen the impact of adverse reviews. The best approach to adopt will depend on the individual circumstances and on the seriousness of the adverse review or defamatory publication.

Starting at the bottom end of the scale of adverse reviews, for any business that receives reviews, it is almost inevitable that at some time a negative review will be received. When such a review is received, the main choices are to either do nothing or to post a reply to the review. Whether or not it is best to post a reply or to do nothing is a judgment call and is likely to depend to some extent on what the negative review actually says and how inflammatory it is.

If the negative review is just one bad review among many positive reviews, it will often be best to do nothing. Most rational people will accept that the person who left the negative review is an anomaly and in the circumstances, it is unlikely that significant damage will be caused.

If a decision is made to post a reply to the review, it is important not to be aggressive or rude. This is the case even if the review itself was aggressive or rude. A calm response to a negative review is much more likely to lead to anyone who reads the exchange to conclude that you or your business are reasonable and that the negative review is out of the ordinary. It is very important to you come across as being entirely reasonable. This can significantly help to defuse the situation.

A response to the review could for example say something like: 'We are sorry to hear of your experience. We would be grateful if you would contact us so that we can discuss your experience with you". Alternatively and depending on the circumstances, you could say something like: "We are sorry to hear about your experience. What you have described does not accord with our recollection of what occurred." Health professionals should be careful not to disclose any private personal information about the author of the review in any response.

At the other end of the scale of adverse reviews is a review, or a series of adverse reviews, which make outrageous allegations which are clearly false. The problem with such reviews is the risk that there will be people who believe that the matters raised in the review are true, even if they are not certain whether they are true or not, they will decide as a matter of caution to take their business elsewhere.

If these kinds of reviews are received, the two main choices are to either do nothing, and hope that most people who read the review(s) will not take them seriously, or you ask a lawyer to send a concerns notice to the author of the review.

If the outrageous review is essentially one bad review in the company of many very good reviews, it may well be reasonable to conclude that most readers of the review will not take it too seriously. Once again, it depends on what the review actually says.

As can be seen from most of the cases referred to in this article, a very bad review can result in very significant emotional harm and to potentially catastrophic economic loss being suffered by the person or business the subject of the review.

It is our experience that when an author of an outrageous review receives a well drafted concerns notice from a solicitor, in most cases they are prepared to take steps to remove the review and to offer an apology. If this does not occur, and assuming that you are able to establish that you have suffered or are likely to suffer serious harm from the review, the commencement of defamation proceedings may be the only option left.

This article was written by Douglas Raftesath, Principal, Meridian Lawyers.

Any queries, contact MIPS