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Supreme Court of New South Wales

Rastogi v Nolan [2010] NSWSC 735 (9 July 2010)

Last Updated: 9 July 2010

NEW SOUTH WALES SUPREME COURT

CITATION:

Rastogi v Nolan [2010] NSWSC 735

JURISDICTION:

Common Law

FILE NUMBER(S):

2008/289400

HEARING DATE(S):

29 June 2010

JUDGMENT DATE:

9 July 2010

PARTIES:

Dr Anoop **Rastogi** (Plaintiff)

Deidre Nolan (Defendant)

JUDGMENT OF:

Simpson J

LOWER COURT JURISDICTION:

Not Applicable

LOWER COURT FILE NUMBER(S):

Not Applicable

LOWER COURT JUDICIAL OFFICER:

Not Applicable

COUNSEL:

B Goldsmith (Plaintiff)

N/A (Defendant)

SOLICITORS:

Goldsmith Lawyers (Plaintiff)

in person (Defendant)

CATCHWORDS:

PROCEDURE – application for adjournment – defendant unrepresented – no reasonable prospect that defendant might secure legal assistance – matter to proceed in the interests of justice – application for adjournment refused, Notice of Motion dismissed

DEFAMATION – defence – s 23 Defamation Act 2005 – s 23 does not preclude the filing or the reliance upon the second Statement of Claim where publications, imputations complained of and second Statement of Claim different.

DEFAMATION – statements amounting to defamation – particular statements – whether imputations conveyed – whether imputations defamatory of plaintiff

DEFAMATION – damages – compensatory damages – aggravated damages – factors to be considered include "motive and conduct" of the defendant and period and extent of publication – interest and costs

DEFAMATION – injunction – interim injunction made permanent

LEGISLATION CITED:

Defamation Act 2005

CATEGORY:

Principal judgment

CASES CITED:

Campbell v MGM Ltd [2002] EWHC 499

Carson v John Fairfax & Sons Ltd [1993] HCA 31; 178 CLR 44

Grieg v WIN Television NSW Pty Ltd [2009] NSWSC 877

State of NSW v Riley [2003] NSWCA 208; 57 NSWLR 496

Sutcliffe v Pressdram Ltd [1991] 1 QB 153

TEXTS CITED:

DECISION:

(i) The defendant, Deidre Nolan, be permanently restrained by herself, her servants or agents, from directly or indirectly publishing in any form any statements of or concerning the plaintiff to the effect that he is reckless, negligent or dishonest in his profession as a cosmetic surgeon, that he did not perform the defendant's surgery correctly, or allegations of a similar nature other than:

(1) to any organisation with proper responsibility for considering and determining complaints concerning the conduct of the plaintiff;

(2) as may be required by law;

(3) to professional advisors for the purpose of obtaining professional advice; or

(4) with the leave of the Court.

(ii) Verdict for the plaintiff in the sum of $65,000, together with interest in the sum of $2,500;

(iii) The defendant is to pay the plaintiff's costs of the proceedings.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

Simpson J

9 July 2010

2008/289400 Dr Anoop Rastogi v Deidre Nolan

JUDGMENT

1 **HER HONOUR**: By Statement of Claim filed on 19 August 2008 the plaintiff, Dr Anoop **Rastogi**, claimed:

> (i) an order that the defendant (Ms Deidre Nolan) remove certain material from an identified website on the Internet;

(ii) an order restraining the defendant from publishing in any form statements of or concerning the plaintiff that convey certain imputations defamatory of him (with specified exceptions);

(iii) compensatory damages, aggravated damages, and damages for economic loss, arising out of publications alleged to have been made by the defendant which were defamatory of the plaintiff;

(iv) interest and costs.

2 On 20 August 2008 an interim order was made restraining the defendant from publishing material of the kind mentioned in relation to the injunctive relief now sought. The defendant complied with this order. Compliance, in effect, secured the removal from the website, of the material mentioned in order (i).

3 At the final hearing, the claim for damages for economic loss was abandoned.

4 On 8 March 2010 the proceedings were fixed for final hearing on 29 June 2010. The defendant, who was then (and is now) not legally represented, was referred to the Pro Bono Panel maintained by the NSW Bar Association with a view to obtaining legal advice, assistance, and representation.

5 At the commencement of the proceedings on 29 June 2010, the defendant, again unrepresented, applied, by Notice of Motion supported by affidavit evidence, for adjournment of the proceedings. After hearing both parties, I refused the adjournment, giving reasons. Those reasons will be annexed to this judgment.

6 The defendant has filed a Defence, and an Amended Defence to the Statement of Claim. The Amended Defence raised only one issue: the defendant contended that, because the plaintiff had, on the same date as the date on which she commenced these proceedings, also commenced other proceedings against her in defamation, s 23 of the *Defamation Act* 2005 operated to preclude his pursuing the current Statement of Claim. The defendant asked that that matter be dealt with as a preliminary issue, and I, with the concurrence of the solicitor for the plaintiff, agreed to that course. I found, giving reasons, that the defence failed. Those reasons also will be annexed to this judgment.

7 The result of that determination is that the Statement of Claim was, effectively, undefended. The defendant sought an opportunity to plead additional matters of defence, but I concluded that further delay in the proceeding would be unfair to the plaintiff and not in the interests of justice. In this respect, the conclusions I expressed in relation to the initial adjournment application are relevant.

8 This means that the matter proceeded essentially as an assessment of damages.

Background

9 Particularly having regard to the defendant's unrepresented status, it is necessary to outline some background to the proceedings. That has some complexity.

10 The plaintiff is a medical practitioner, practising as a cosmetic surgeon. Cosmetic surgery is to be distinguished from plastic and reconstructive surgery, which was said, by the plaintiff, to be a broad group of procedures, mostly to do with reconstruction following surgery and trauma. Cosmetic surgery, by contrast, is, as the name implies, for purely cosmetic reasons – enhancement of personal appearance.

11 In June 2005 at the Bondi Junction Private Hospital, the plaintiff performed surgery of two kinds on the defendant. One was breast augmentation; the other was liposuction to her abdomen and thighs.

12 The defendant complained about the outcome of the breast augmentation surgery, initially by telephone, and, from 7 September, by letters written to the plaintiff through his staff, and then directly to the plaintiff. She demanded removal of the breast implants, and a further consultation with the plaintiff.

13 From 7 September to 13 September the defendant sent seven letters to the plaintiff, all complaining of the surgery and post-surgery treatment.

14 Thereafter, she sent a further eight letters addressed to the plaintiff, but noted on these that they were copied to various statutory bodies such as the Office of the Privacy Commission, the Registrar of the NSW Medical Board, the Office of the NSW Minister for Health, and the Office of the Health Care Complaints Commission ("the HCCC").

15 From 2 October 2005 the defendant made complaints in writing to the Director of Nursing at the Bondi Junction Private Hospital and the Ethics Committee of the Australasian College of Cosmetic Surgery, the Registrar of the NSW Medical Board and the HCCC. This bombardment of correspondence continued until September 2006. On 5 March 2006 the defendant sent no less than 13 letters to the plaintiff, each copied to the HCCC and the Minister for Health. On 23 and 24 April 2006 the defendant sent 4 letters of complaint to the HCCC.

16 By July 2006 the plaintiff had retained a solicitor, Mr Andrew Saxon, to advise him in relation to the defendant's activities. On 17 July the defendant wrote to Mr Saxon, making serious accusations about the plaintiff. She did so again on 3 August. On 25 August she telephoned Mr Saxon. There she outlined her claim against the plaintiff. In essence, she claimed monetary compensation for revision of the breast surgery, plus consequential and associated expenses, and an amount of $150,000, which could be translated (in personal injury claim terms) to a claim for non-economic loss, or general damages.

17 On 4 September 2006 the complainant wrote to the Premier of NSW complaining of a variety of issues, including the performance of cosmetic surgery. The plaintiff was not mentioned in this letter.

18 On 17 October 2006, the plaintiff launched a book written by him entitled "Breast Art". The defendant disrupted the launch, flourishing two breast implants, and screaming. Police were called.

19 In May 2007 the plaintiff sought an Apprehended Violence Order against the defendant. Ultimately, the defendant undertook to the court that she would not approach the plaintiff by any means or defame him by any means. As a result, no hearing of the plaintiff's allegations took place.

The defamatory publications

20 The material published on the Internet the subject of the defamation proceedings was published, on a website labelled "thenolanreport.blogspot", on 1 May 2008, 17 July 2008 and 18 July 2008.

1 May 2008

21 This publication appeared under the heading:

> "**Cosmetic Surgery Consumer Alert**
> The Nolan Report",

which was followed by a sub-heading:

> "**Dr Anoop Rastogi Surgery Disappointment Statistics!**"

22 The printout of this item extends over about two-thirds of a page. The defendant wrote:

> "In my opinion a patient satisfaction survey conducted nearly 10 years ago probably has very little current relevance, but Dr **Rastogi** seems to think otherwise, and is still referring to one at his website in order to promote confidence in his surgery, so I will continue in my attempts (unsuccessful so far!) to obtain a copy of the original work in question in order to assess it for myself, and will post

> my views to this blog. In my opinion a study has no standing at all if it is not being made available for independent evaluation, and public scrutiny.
>
> **Regardless of the standing of the research, it appears as it is, that nearly 10% of the patients that took part in the survey I refer to, have indicated that the results of Dr Rastogi's surgery did *not* meet their expectations.**
>
> Not that you'd necessarily grasp *that* interesting little result all too readily, if you were to go online, and check out the squeamish, obfuscating, self-serving way in which Dr **Rastogi** deals with presenting this material, and other information related to the survey. In fact this particular finding is not positively asserted at all in Dr **Rastogi**'s treatment of the research, and is not necessarily easily inferred either.
>
> ...
>
> As a sensible woman who had a normal, healthy, not unattractive, if not perfect body, for which I only sought uncompromising improvements, naturally! I would never have knowingly entered into the high level of risk, indicated by this survey result, and I guess I would not now be, yet another patient, not satisfied with the results of Dr **Rastogi**'s surgery.
>
> ...
>
> In my opinion, Dr **Rastogi** should be duty bound, to ensure that all his potential patients are required to reflect soberly on the likelihood that they too could end up being like one of the one in ten surveyed patients, who were not satisfied with the results of his surgery." (bold and italics in original)

23 The plaintiff pleads that this publication contained three imputations that defamed him. They are:

> "2
> A. The plaintiff, a cosmetic surgeon, refused to provide a copy of patient satisfaction survey requested by the defendant and in breach of some obligation or expectation that he should do so.
>
> B. The plaintiff, a cosmetic surgeon, was deceitful in the disclosure by him of the results of the surgery performed by him.
>
> C. The plaintiff, a cosmetic surgeon, was reckless in that he performed services that involved a high level risk and did not disclose that risk to his patients prior to them undertaking surgery."

17 July 2008

24 This publication began with the heading:

> "**Cosmetic Surgery Consumer Alert – Articles**",

25 It consisted of a series of items under various headings. The first sub-heading is:

> "**Survey Mystery – Letter to Dr Anoop Rastogi's Lawyers**"

The item begins with what purports to be a letter from the defendant to the firm of solicitors of which Mr Saxon is a member.

26 Below that a sub-heading reads:

> "**Dr Rastogi 's Hidden Data! Letter from Lawyers**"

27 What purports to be a facsimile of a letter from the same firm of solicitors is reproduced, with a direction to "click here" to enlarge the document, which is described as a letter from the plaintiff's lawyers informing the defendant that the plaintiff refuses to provide access to "a full scientific copy" of a patient satisfaction survey that was conducted on his practice. On the printout annexed to the Statement of Claim, the content of the letter is indecipherable. The letterhead is that of the firm of solicitors retained by the plaintiff. This is followed by a reference to a Member of Parliament, with the assertion that the Member of Parliament had written to the defendant in the following terms:

> "Thank you for your emails. I have read through them and have now forwarded them to the ICAC, the Health Care Complaints Commission and the Minister for Health. I have requested that their respective responses be forwarded directly to you."

28 The next item was headed:

> "**My Letter to Kerri-Anne Re: Dr Anoop Rastogi**"

The letter contained the following:

> "...
>
> I have been trying to convince you for around 2 years now, to take my warnings about your sometime talk show guest, Dr Anoop **Rastogi** seriously, only to find myself contemptuously dismissed repeatedly. I have continually pointed to the integrity issues that surround this doctor and you have repeatedly ignored my warnings.
>
> In view of the recent developments concerning the serious concerns that have been raised in the NSW Parliament about the dangers of irregulation in cosmetic surgery generally speaking, and the false and misleading promotional activities of your 'Dr Anoop' in particular, I wonder where this now leaves you, and whether Dr Anoop **Rastogi**, who has no AMC accredited qualifications above GP status, will continue to be presented by you, to millions of trusting Australian women as a suitable expert in the field of cosmetic surgery and cosmetic medicine.
>
> He is charming and photogenic, but is he safe and trustworthy?
>
> ..."

29 The next item was a letter from the defendant to the Premier, the Health Minister and Minister for Women. That letter included the following:

> "...
>
> However Australia certainly isn't saying no to the violence and abuses of women and girls that are rife in cosmetic surgery!
>
> ...

> As such, unscrupulous doctors in the field are encouraged, and will continue as a law unto themselves to wreak havoc on the lives of unsuspecting women and girls, in the face of the government's apparent, ongoing unwillingness to regulate this highly litigious area of medicine.
>
> ..."

30 The plaintiff pleads that this publication conveyed five imputations defamatory of him. They are:

> "4
> A. The plaintiff, a cosmetic surgeon, lacked integrity in his profession as a cosmetic surgeon.
>
> B. The plaintiff, a cosmetic surgeon, engaged in false and misleading promotional activities in relation to his cosmetic surgery services.
>
> C. The plaintiff, a cosmetic surgeon, is unsafe and untrustworthy as a cosmetic surgeon.
>
> D. The plaintiff, a cosmetic surgeon, abused females under the age of 18.
>
> E. The plaintiff, a cosmetic surgeon, wreaked havoc on the lives of unsuspecting women and girls."

18 July 2008

31 This publication appeared under the heading:

> "**Cosmetic Surgery Consumer Alert**
> The Nolan Report"

with a sub-heading, in bold typeface:

> "**Dr Rastogi's Hidden Data!**"

32 Underneath the heading was what appears to be a reproduction of the front page of a magazine called "Weekender", which features a photograph that may be taken to be that of the plaintiff.

33 The printout of the publication itself extends over five-and-a-half pages, and contains the following:

> "*Yes he 'wants your body' and he charges like a plastic surgeon – but he won't permit scrutiny of a customer satisfaction survey, (some 10 years old actually!), on which he attempts to stake his reputation as an expert practitioner of cosmetic plastic surgery, in the absence of any Australian Medical Council (AMC) accredited qualifications above GP status! He's not bad is he!*
>
> Dr Anoop **Rastogi** has refused to supply me with a full scientific copy of a patient satisfaction survey conducted on his practice nearly 10 years ago by Roy Morgan Research, for full independent scrutiny.
>
> ...
>
> It is clear to me that Dr **Rastogi** tries to build consumer confidence in his surgical prowess by referring to this survey in very self serving terms at his website.

...

If you have been reading my blog, you will know by now, if you didn't know before, that Dr **Rastogi** appears to have no Australian Medical Council (AMC) accredited qualifications above GP status, (despite his very high profile, due to vigourous (sic) advertising), whereas actual bone (sic) fide plastic surgeons undergo some 8-10 years of rigourous (sic) accreditated (sic) training on top of their basic GP degree.

...

Would you be prepared to undertake cosmetic surgery, be it a face lift, or a liposuction, or a boob job, with a minimally qualified, largely self styled, GP surgeon like Dr **Rastogi**, who relies upon heavy advertising and his own claims about a 10 year old survey, (which he will not even release for scrutiny!), in order to promote his surgical abilities, or, would you rather consider the services of other extensively trained, verifiably accredited, suitably experienced practitioner's (sic), when thinking about the prospect of having very sharp instruments taken to your most precious asset, your healthy, if not perfect body, in the pursuit of surgical enhancements?

...

I am very disappointed that both the NSW Minister for Health, Ms Reba Meagher, and the NSW Minister for Women, Ms Verity Firth, who is also my local member, have not responded to my correspondences regarding the false and misleading promotional activities of Dr Anoop **Rastogi**, and concerns about the lack of stricter regulation in cosmetic surgery generally speaking.

...

Meanwhile Dr **Rastogi**'s advertising on yahoo7 and ninemsn continues to state falsely that he is a plastic surgeon, and the industry at large continues to require extensive regulation in order to prevent such flagrant consumer abuse.

...

Dr Anoop **Rastogi** is well known for his strong internet presence and TV appearances on 'Mornings with Kerri-Anne'.

Statements on his website seem to imply that he was trained in cosmetic surgery at Cambridge University and a current internet advertising campaign states that he is a plastic surgeon.

Cambridge University have indicated that Dr Anoop **Rastogi** has never been an enrolled student at their prestigious institution, and Dr **Rastogi** would appear to have no Australian Medical Council (AMC) accredited qualifications above GP status, whereas actual bone (sic) fide plastic surgeons have 8-10 years of accredited specialist training on top of the basic GP qualification.

...

I have recently written to all members of the NSW Parliament including the Premier about the dangers of irregulation in cosmetic surgery generally speaking

and the false and misleading promotional activities of Dr Anoop **Rastogi**, as seen on 'Mornings with Kerri-Anne' in particular.

...

Not a Plastic Surgeon!! Not a Plastic Surgeon!!

Not a Plastic Surgeon!! Not a Plastic Surgeon!!

Further to my previous post on Thursday 29th May, concerning false and misleading Internet advertising at Yahoo7 and Nine MSN, in which it is being claimed erroneously that Dr **Rastogi** is a plastic surgeon, (no he isn't) I have also contacted Dr **Rastogi**'s surgery on the same day to discuss the blatant misinformation."

34 The plaintiff pleads that this publication conveyed 10 imputations defamatory of him. They are:

> "6
> A. The plaintiff, a cosmetic surgeon, refused to provide a copy of a patient satisfaction survey requested by the defendant and in breach of some obligation or expectation that he do so.
>
> B. The plaintiff, a cosmetic surgeon, stakes his reputation as an expert practitioner of cosmetic plastic surgery when he is not qualified to do so.
>
> C. The plaintiff, a cosmetic surgeon, is deceitful.
>
> D. The plaintiff, a cosmetic surgeon, is not qualified to perform the services that he performs.
>
> E. The plaintiff, a cosmetic surgeon, is not a bona fide surgeon.
>
> F. The plaintiff, a cosmetic surgeon, is not a verifiably accredited practitioner.
>
> G. The plaintiff, a cosmetic surgeon, is not suitably experienced to perform cosmetic surgery.
>
> H. The plaintiff, a cosmetic surgeon, engaged in false and misleading promotional activities in relation to his cosmetic surgery services.
>
> I. The plaintiff, a cosmetic surgeon, makes false statements that he is a plastic surgeon.
>
> J. The plaintiff, a cosmetic surgeon, abuses consumers."

35 The defendant has not pleaded either that any of these imputations is not conveyed by the publications, or that any of them is not defamatory. Accordingly, as was submitted on behalf of the plaintiff, it would be open to treat that issue as uncontested. However, because the defendant is unrepresented, it is appropriate to consider whether the imputations are, or any of them is, conveyed, and if they are, or any of them is, whether it is or they are defamatory of the plaintiff. It will be necessary to deal with each publication in turn.

The imputations: Were they conveyed? Were they defamatory?

1 May 2008

36 The first imputation, that the plaintiff refused to provide a copy of a patient satisfaction survey, access to which the defendant was entitled (I paraphrase), is said to have been conveyed by the first paragraph extracted above. I have concluded otherwise. Certainly, that paragraph states clearly that the plaintiff refused to provide a copy of the survey to the defendant. I am, however, unable to draw from that paragraph the further assertion that the plaintiff had some "obligation" or the defendant had some "expectation" that he should do so. The assertion is simply that the defendant would continue in her attempts, which had so far been unsuccessful, to obtain a copy of the work. Nowhere is it suggested that the plaintiff was obliged, whether legally or morally, to comply with her request, nor that the defendant had any expectation that he would do so.

37 I find that this imputation was not conveyed.

38 The second imputation is that the plaintiff was deceitful in the disclosure by him of the results of his surgery. The defendant referred to what she extrapolated from publication by the plaintiff of the results of research, that almost 10 percent of the plaintiff's patients who responded to the survey indicated that surgery did not meet their expectations. She went on to say that a reader would not "necessarily grasp" that "interesting little result". She then described the plaintiff's presentation of the material as "squeamish, obfuscating, self-serving".

39 I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

40 The third imputation asserts recklessness in the plaintiff in the performance of surgery involving a high level of risk without pre-surgery disclosure to his patients.

41 I am satisfied that this imputation was conveyed by those passages in which the defendant said that she would not have knowingly entered into the high level of risk indicated by the survey result (had she known about the survey result). She went on to express her opinion that the plaintiff should be "duty bound" to ensure that all potential patients are required to "reflect soberly" on the fact that they may end up as unsatisfied patients.

42 I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

17 July 2008

43 The letter purportedly from the plaintiff's lawyers, which appears to have been reproduced with a direction as to how it may be accessed, is not enlarged for the purposes of the proceedings. The document annexed to the Statement of Claim is illegible. However, what follows purports to be, at least, a paraphrase of that letter.

44 The first imputation is that the plaintiff lacked integrity in his profession. The plaintiff asserts that that imputation was conveyed in the letter to "Kerri-Anne", where the defendant explicitly referred to "integrity issues that surround this doctor". This, in my opinion, is sufficient to convey the imputation that the plaintiff lacked integrity in his profession. Plainly, it is defamatory.

45 The second imputation is that the plaintiff engaged in false and misleading promotional activities in relation to his medical practice. This is drawn directly from that passage in which the defendant referred to "the false and misleading promotional activities of your 'Dr Anoop'". I find that this imputation was conveyed, and was defamatory of the plaintiff.

46 The third imputation is that the plaintiff is unsafe and untrustworthy as a cosmetic surgeon. Again, this is drawn directly from the publication, in which the question was asked:

> "He's charming and photogenic, but is he safe and trustworthy?"

The clear implication is that the answer to that question is in the negative.

47 This imputation was conveyed and was defamatory.

48 The fourth imputation is that the plaintiff abused females under the age of 18. This is said to have been drawn from the letter to the Premier, the Health Minister and the Minister for Women. In this letter the plaintiff was not named until towards the end of the letter. However the letter is part of a single Internet publication which clearly does refer to the plaintiff, and which must be read as a whole. At an early point in the letter, the defendant referred to:

> "the violence and abuses of women and girls that are rife in cosmetic surgery!".

49 I find that this imputation was conveyed and was defamatory of the plaintiff.

50 The final imputation pleaded in relation to this publication is that the plaintiff wreaked havoc on the lives of unsuspecting women and girls. This imputation is said to have been conveyed by the passage in which it was asserted that unscrupulous doctors in the field (of cosmetic surgery) are encouraged and will continue to wreak havoc on the lives of unsuspecting women and girls. Although the plaintiff was not named directly in relation to this assertion, in the context of the entire publication it is apparent that he was included in the allegations.

51 I find that this imputation was conveyed, and was defamatory of the plaintiff.

18 July 2008

52 The first imputation pleaded in respect of the final publication is the same as the first pleaded in respect of the first publication.

53 However, the material from which it is said to have been conveyed is different.

54 On behalf of the plaintiff it was contended that this imputation was conveyed by the opening paragraph, asserting that the plaintiff "charges like a plastic surgeon" – but refuses to permit scrutiny of a customer satisfaction survey "on which he attempts to stake his reputation as an expert practitioner of cosmetic plastic surgery". Certainly, the passage conveys clearly that the plaintiff refuses to disclose the material sought by the defendant. The question is whether it also suggests that he had "some obligation" to do so, or the defendant had "some expectation" that he do so.

55 After some hesitation, I have concluded that it does, and that accordingly, the imputation was conveyed. There is the assertion that the plaintiff "wants your body" and "charges like a plastic surgeon" – but refuses to permit scrutiny of the survey. Implicit in this is, at the least, an assertion that the defendant had a (legitimate) expectation that he do so. The passage goes on to assert that the plaintiff "attempts to stake his reputation" on the survey. Again, implicit in this, is the suggestion that the defendant had a (legitimate) expectation of access to that material because of the way in which the plaintiff used it, and that, by reason of the use that she made of the survey, the plaintiff was under some form of obligation to disclose it.

56 The second imputation is that the plaintiff stakes his reputation as an expert practitioner of cosmetic plastic surgery when not qualified to do so. This was conveyed by the same opening paragraph which clearly makes that claim. I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

57 The third imputation is that the plaintiff is deceitful. This imputation was conveyed by the passage that the plaintiff tried to build consumer confidence in his surgical prowess by referring to the survey "in very self-serving terms" on his website.

58 I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

59 The fourth imputation is that the plaintiff is not qualified to perform the services that he performs. This imputation was conveyed by the assertion that the plaintiff has no "accredited qualifications above GP status", contrasted with the qualifications of *bona fide* plastic surgeons. There is the subsequent assertion that Cambridge University claimed that the plaintiff had never been an enrolled student, and a repeat of the

allegation that he had no "accredited qualifications above GP status", again contrasted with the qualifications of *bona fide* plastic surgeons.

60 I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

61 The fifth imputation is that the plaintiff is not a *bona fide* surgeon. This imputation, also, was conveyed by the same passages. It was defamatory of the plaintiff.

62 The sixth imputation was that the plaintiff was not a "verifiably accredited practitioner". This imputation is conveyed by the contrast made between the plaintiff and:

> "... other extensively trained, verifiably accredited, suitably experienced practitioners."

63 I am satisfied that this imputation was conveyed, and was defamatory of the plaintiff.

64 The seventh imputation is that the plaintiff was not suitably experienced to perform cosmetic surgery. This imputation was clearly conveyed by the passage which asks the question whether the reader would be prepared to undertake cosmetic surgery of any kind:

> "... with a minimally qualified, largely self-styled, GP surgeon like Dr **Rastogi** ..."

65 The imputation was clearly conveyed and was defamatory of the plaintiff.

66 The eighth imputation is that the plaintiff engaged in false and misleading promotional activities in relation to his medical practice. A clear reference was made to "false and misleading promotional activities" of the plaintiff (on at least three occasions), and there was a reference to "blatant misinformation".

67 I am satisfied that this imputation was conveyed and was defamatory of the plaintiff.

68 The ninth imputation is that the plaintiff makes false statements that he is a plastic surgeon. This allegation was expressly made. The imputation was conveyed and was defamatory.

69 The final imputation is that the plaintiff abuses consumers. In the same context as the allegation that the plaintiff falsely states that he is a plastic surgeon, the defendant made a reference to "such flagrant consumer abuse".

70 The imputation was conveyed and was defamatory of the plaintiff.

* * *

71 There being no other defences invoked by the defendant, it is necessary to proceed to an award of damages.

72 The plaintiff claims both compensatory and aggravated damages.

73 The manner in which compensatory damages are to be awarded was discussed in *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; 178 CLR 44. The damages are intended to vindicate reputation, and compensate for hurt and distress to feelings.

74 In *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 at 184, Nourse LJ identified those aspects of a defendant's conduct which may justify an award of aggravated damages. These include:

- failure to make any or any sufficient apology or withdrawal;
- repetition of the libel;
- conduct calculated to deter the plaintiff from proceeding;

- the manner in which the litigation is conducted, for example by hostile cross-examination;
- persisting in a plea of justification which is bound to fail;
- conduct such as to attract wide publicity;

- persecution of the plaintiff by other means.

75 Some of these apply in the present case. There were repetitions of defamatory material, not always in the same terms. However, I do not propose to take into account the manner in which an unrepresented defendant conducted her defence. What is most relevant to the question of aggravated damages is the "motive and conduct" of the defendant where they aggravate the injury done to the plaintiff: *Campbell v MGM Ltd* [2002] EWHC 499.

76 The plaintiff relies upon the campaign upon which the defendant embarked prior to the publications on the Internet as evidence of malice relevant to aggravated damages, and in particular to her demand, made of Mr Saxon, for monetary compensation.

77 In *Sutcliffe*, "persecution of the plaintiff by other means" was expressly included as one of the matters relevant to the question of aggravated damages, as indicative of the defendant's motive in publishing the defamatory material.

78 I have no doubt that the defendant did "persecute" the plaintiff up to the time of the establishment of the Internet site.

79 However, it is not always appropriate that aggravated damages be calculated as a separate sum from compensatory damages: *State of NSW v Riley* [2003] NSWCA 208; 57 NSWLR 496.

80 In this case, although I will take into account the defendant's conduct, I propose to award one sum of damages in respect of each separate publication.

81 In saying this, I record that the defendant passionately believes in the cause she has undertaken. I do not doubt her sincerity. But whether she is right or wrong in her opposition to the practice of cosmetic surgery generally is immaterial. What is material is what she published about the plaintiff.

Evidence

82 The plaintiff's evidence in chief was given by way of a statement. The bulk of this statement gives a history of his dealings with the defendant. However, he also said that when he read the Internet publications he was "shocked and horrified" and considered their publication to be an attempt to humiliate and demean him. He also considered it to be an attempt on the part of the defendant to blackmail him into paying money in return for her agreeing to remove the material from the website.

83 In paragraph 39 of the statement, he recounted queries made of him by patients or potential patients. But, to the extent that he identified the nature of the comments, they do not appear to have been patients whose opinion of him was affected by the publications; rather, they were patients who wished to draw his attention to the publications.

84 The plaintiff also called evidence as to his reputation from two former patients. One was Ms Elizabeth Boots. Besides having been the subject of surgery by the plaintiff, Ms Boots had worked for him as Practice Manager/Business Development Manager; from January 2007, she operated a consultancy company for practice management of human resources. The plaintiff was and is a client of this consultancy. Ms Boots is also a personal friend of the plaintiff and his family.

85 Ms Boots said that the plaintiff has an excellent reputation, and is held in high regard by his patients and also by his peers. She inferred that he was held in high esteem by his peers because, she said, they often telephone him for review of particular cases or for his medical opinion. She said he was:

> "considered to be a leader in the field in the cosmetic surgery industry".

86 She also said that the plaintiff is often asked to speak and present at various events and functions. Ms Boots was cross-examined to some effect by the defendant, who pointed out that, as Ms Boots is not medically qualified herself, it is unlikely that she could, in any convincing way, speak of the plaintiff's reputation amongst his medical colleagues. I think this is a valid point. Ms Boots was on stronger ground when she spoke of the plaintiff's reputation amongst "medical device companies". However, under cross-examination, she was rather unforthcoming about the details of this assertion.

87 There was no evidence, either from the plaintiff or Ms Boots, that suggested any diminution in the plaintiff's public profile, the regard in which he is held by medical peers, or others associated with the industry.

88 The second reputation witness was Ms Martyna Kahlo. Ms Kahlo could say relatively little about the plaintiff's reputation. She said that both she and her sister had undergone breast surgery performed by the plaintiff and were happy with the results. This has little to do with the issues I have to decide.

89 It is of some interest that, while the plaintiff asserted good reputation and high standing in the medical community, particularly among professional colleagues, he did not call reputation evidence (or evidence of loss of reputation), from any medical practitioner. His reputation witnesses were both former patients, on whom he had performed surgery. One was also a former employee, with whom he continues to maintain a professional (through her "consultancy" company) as well as personal relationship.

90 It is correct, however, that damage to reputation is presumed.

91 The defendant sought to show that the plaintiff has an unsavoury reputation. She cross-examined him about "adverse" mentions in television current affairs programmes, and in NSW Parliament. These attempts led nowhere, and there was no evidence, other than that of the witnesses to whom I have referred, of the plaintiff's reputation.

92 Relevant to the assessment of damages is the period over which the defamatory imputations were published. Mr Goldsmith, who appeared for the plaintiff, very fairly acknowledged that the period was relatively short, from, respectively, 1 May 2008, 17 July 2008 and 18 July 2008 until, in each case, 19 August 2008. The longest was, therefore, three-and-a-half months; the second and third were of just over one month.

93 What is not known is the extent to which members of the public took the opportunity of gaining access to the website; this is a case in which the extent of publication cannot be known.

94 Two of the imputations pleaded in respect of the 1 May publication have survived. This was the publication which extended over the longest period of time. The surviving imputations were of deceitfulness and recklessness. These are serious imputations, especially the latter. In respect of this publication I propose to award a composite sum by way of compensatory and aggravated damages of $20,000.

95 The second publication conveyed five imputations, which were, in my opinion, rather more serious than those in the May publication. Publication of these imputations continued for just over one month.

96 In respect of this publication, balancing the more serious imputations against the shorter span of time, I will also award the sum of $20,000.

97 The third publication was on the following day and also extended just over one month. However, it conveyed 10 defamatory imputations, some of them quite serious. In respect of this publication I will award the sum of $25,000.

Interest

98 The plaintiff is entitled to an award of interest. An amount of 4 percent per annum is claimed. In my opinion that should be reduced. The publications ceased following the orders made by this Court. The impact thereafter reduced: see *Grieg v WIN Television NSW Pty Ltd* [2009] NSWSC 877 per McClellan CJ at CL.

99 As against that, of course, the plaintiff was entitled to the award of damages as at the dates of publication. Interest is intended to compensate him for the lost earning capacity of money to which he was then entitled.

100 Nevertheless, I consider a fair award of interest is 2 percent per annum. Bearing in mind that it is just under 2 years since publication, I will award the sum of $2500.

Injunction

101 The plaintiff seeks an order that the interim injunction made in August 2008 be made permanent. Having regard to the history of the matter, I consider that this is necessary and appropriate.

102 The orders I make are:

> (i) The defendant, Deidre Nolan, be permanently restrained by herself, her servants or agents, from directly or indirectly publishing in any form any statements of or concerning the plaintiff to the effect that he is reckless, negligent or dishonest in his profession as a cosmetic surgeon, that he did not perform the defendant's surgery correctly, or allegations of a similar nature other than:
>
> > (1) to any organisation with proper responsibility for considering and determining complaints concerning the conduct of the plaintiff;
> >
> > (2) as may be required by law;
> >
> > (3) to professional advisors for the purpose of obtaining professional advice; or
> >
> > (4) with the leave of the Court.
>
> (ii) Verdict for the plaintiff in the sum of $65,000, together with interest in the sum of $2,500;
>
> (iii) The defendant is to pay the plaintiff's costs of the proceedings.

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IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

Simpson J

29 June 2010

2008/289400 Dr Anoop Rastogi v Deidre Nolan

JUDGMENT – on application for an adjournment

1 **HER HONOUR**: These proceedings constituting a claim in defamation were commenced by a Statement of Claim filed on 19 August 2008. Thereafter the matter has been before the Court on a number of occasions.

2 The Statement of Claim alleges that the defendant published various items on the Internet concerning the plaintiff and that these publications conveyed imputations defamatory of him. He accordingly claims damages and aggravated damages.

3 The defendant has at all times represented herself, including, it would appear, in preparing and filing a defence to the proceedings. The operative defence is an Amended Defence filed on 2 March 2009 which only pleads that by reason of s 23 of the *Defamation Act* 2005 the proceedings are duplicitous, misconstituted and an abuse of process and ought to be struck out.

4 I have been provided with a chronology of the occasions on which this matter has been before the Court.

5 The defendant has filed in Court today a Notice of Motion seeking that the matter be adjourned and referred for pro bono assistance. She also seeks an order that the Court convene to determine a charge of perjury against the plaintiff but this claim is misconceived and for the purpose of the present determination I disregard it.

6 The defendant has filed an affidavit in support of the application for an adjournment. It does contain some material which would suggest that an adjournment is appropriate but only if there is a reasonable prospect that she might be able to obtain legal assistance.

7 The affidavit discloses that on 8 March the defendant was referred to the pro bono panel for legal assistance. It also discloses that requests have been made on five occasions to barristers on the panel but that legal representation has not been forthcoming. There is no current pro bono reference in operation.

8 The history of the matter as contained in the affidavit and in the chronology is such that I do not have confidence that the defendant will ever obtain or retain legal representation and accordingly it would be unfair to the plaintiff, and indeed to the defendant, to delay this matter further. In the end, the interests of justice require that the matter proceed.

9 I refuse the application for adjournment. The Notice of Motion is dismissed.

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IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

Simpson J

29 June 2010

2008/289400 Dr Anoop Rastogi v Deidre Nolan

JUDGMENT – on Amended Defence

1 **HER HONOUR**: The only defence raised by the Amended Defence invokes s 23 of the *Defamation Act* 2005. That section is in the following terms:

> "**Leave required for further proceedings in relation to publication of same defamatory matter**
> If a person has brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against any person in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the

> same or like matter, except with the leave of the court in which the further proceedings are to be brought."

2 The circumstances giving rise to this defence are these: On 19 August 2008 two Statements of Claim were filed on behalf of the plaintiff. One was numbered 20348 of 2008, the other 20349 of 2008. In proceedings 20348 of 2008 the plaintiff sought an order restraining the defendant from publishing in any form certain statements of fact with identified exceptions, and also claimed damages, including aggravated damages, in respect of the publication of allegedly defamatory imputations.

3 The publication pleaded was said to have been made on or about 18 July 2008 by way of correspondence by email to a number of persons identified as medical practitioners. It raised questions about the medical practice of the plaintiff, including what is said to be Internet advertising by him. It is alleged that the email conveyed four imputations defamatory of the plaintiff.

4 The second Statement of Claim also seeks an order in the nature of a mandatory injunction and a further injunction with respect to publication of material defamatory of the plaintiff and again claims damages for communications or applications alleged to be defamatory of the plaintiff. These are pleaded to have been made on 1 May 2008, 17 July 2008 and 18 July 2008 by way of Internet publication. Again, the imputations said to have been conveyed are set out in the Statement of Claim.

5 There is a certain amount of commonality to this extent, and this extent only, that the publication alleged in the earlier numbered Statement of Claim concerns the plaintiff in his practice as a medical practitioner, as do the publications the subject of the second Statement of Claim: however, the content of the publications is different. The imputations said to have been conveyed are not identical.

6 Section 23 precludes the bringing of subsequent defamation proceedings where defamation proceedings have already been commenced in respect to "the same or any other publication of the same or like matter" except with the leave of the Court. What Ms Nolan asserts is that leave of the Court has not been sought and the second Statement of Claim ought to be struck out as contravening s 23. In oral submissions Ms Nolan relied heavily on the words "or like matter", the effect of her submission being that what is alleged to have been published in the publications complained of in the second Statement of Claim are of "like" matter to that complained of in the first.

7 Obviously what is "like" matter is a question of degree and evaluation. Here, the medium in which the publications are said to have been made is different, the dates of two of the publications the subject of the second Statement of Claim are different, the content of the publications is different and the imputations complained of are different. Accordingly, I have come to the view that s 23 does not preclude the filing of or the reliance upon the second Statement of Claim and I will now proceed with the hearing of that Statement of Claim.

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LAST UPDATED:

9 July 2010