

Death by Rating - The Rise of Google Review Defamation Suits in Australia

Nicole Phillips, lawyer at Arnold Bloch Leibler, discusses the new line of cases in the Federal Court with business owners seeking relief against defamatory online reviews, including court orders to identify anonymous reviewers.

Until very recently, recipients of an anonymous negative online review were generally powerless against the cloaked complainer, with the only real option to respond to the review and hope that no one would pay it any attention. It's a David and Goliath story; in one corner, the helpless business owner with just a slingshot to defend its reputation. In the other corner, the multinational tech giant backed by an army of keyboard warriors brandishing (s)words.

Just two years ago, the High Court paved the way for defamation proceedings against search engines in the landmark case *Trkulja v Google Inc [2018] HCA 25*. Since 2018, the significance of and reliance upon online reviews has accelerated profoundly, with customers turning their nose up at anything less than a 4 out of 5-star rating (or strictly 4.3 and up if you consider yourself a foodie). In the age of Google reviews, customers wield more power than ever before, holding equipped with the weaponry to destroy a business' reputation in 100 characters or less.

The pursuit of defamation proceedings in respect of online reviews has one key barrier: the protection of virtual anonymity. Without the identity of the potential respondent, defamed personnel are unable to commence proceedings. Four successive claims made their way to the Federal Court in February and March this year that herald a strengthened position for besmirched proprietors by lifting the veil of anonymity. This article will examine the recent timeline of online review defamation cases to suggest potential judicial trends towards compelling discovery to identify anonymous online reviewers.

But first, when is a Google review defamatory?

Generally, an action in civil defamation must establish three components: publication, identification and a defamatory meaning. A Google review passes the first two stages by its very nature: a review is published to more than one person other than the party allegedly defamed (i.e. the entire world) and it identifies the allegedly defamed person by naming them or their business. A review will be considered defamatory to the 'ordinary, reasonable person' if it is likely to damage the person's professional reputation by suggesting a lack of qualifications or skills in that person's trade or business. Again, this is often easily established by the brazen nature of a vindictive online review. The potential statutory defences that may be raised in response to a defamatory online review are that of truth and honest opinion:

- 1. Truth:** If the claim/s made in the Google review are substantially true, there is a complete defence to allegations.
- 2. Honest Opinion:** If the author of the review held an honest opinion based on truth and posted such opinion in the form of the review, they will have a full defence regardless of whether that opinion was correct.
- 1. Damages for defamed Barrister: *Cheng v Lok [2020] SASC 14***

The first major development in Google review defamation litigation occurred on 6 February 2020, when the Supreme Court of South Australia awarded a lawyer a whopping \$750,000 in damages against a

woman who posted defamatory comments on the firm's *Google My Business* page.

Gordon Cheng was a barrister originally admitted to practise as a lawyer in Hong Kong. Most of his client base was from the Chinese community in South Australia and were referred by word of mouth. The defendant, Isabel Lok, was never a client of Cheng and had never had contact with Cheng. In late February 2019, Cheng discovered a one-star review about his practice posted by Lok which warned clients to stay clear and claimed that Cheng lacked professionalism, gave false and misleading advice and convinced clients to go to court even if their case lacked merit. From late 2019 to February 2019, Cheng gave evidence that he had lost about 80% of his client base while data from Google showed the post had been viewed thousands of times. On 12 March 2019, Cheng posted a concerns notice in response to the review and lodged a complaint with Google. Google deleted the post but Lok continued to post new posts under varied pseudonyms, including her own father's name.

Damages, including aggravated damages, were apportioned by the Court for past and future economic loss, loss of goodwill as well as general damages "to signal the public vindication of [his] reputation." While the motive of the defendant was not revealed in proceedings, their pseudonym-shifting method was transparent.

Unlike the three scenarios examined below, this case fits squarely into the defamation case cookie-cutter with an identifiable respondent.

The waters become murkier when Google is less compliant, and the defamed party is unable to identify the anonymous reviewer. The cases below suggest a trend of preliminary discovery in these circumstances.

2. Dentist won't be mouthed off: *Kabbabe v Google LLC [2020] FCA 126*

Most patients are aware of the unwritten dental code: never speak while someone is operating sharp instruments in your mouth. One anonymous 'patient' chose to speak later, via the protected platform of Google review.

In November 2019, an unknown reviewer under the pseudonym 'CBsm 23' posted a very unfavourable Google review of Dr Matthew Kabbabe's dental clinic. The review described a procedure performed by Dr Kabbabe as "extremely awkward and uncomfortable", a "complete waste of time", not "done properly" and claimed that it seemed like the dentist "had never done this before".

Google declined to take down the review upon Kabbabe's initial request. Kabbabe sent a follow up email to Google seeking any identifying information about user CBsm 23 for the purposes of bringing a defamation action against that user. Google responded saying it would not remove the review and did not have any means to investigate where or when the user ID was created.

On 12 February 2020, Federal Court Justice Bernard Murphy ordered Google to provide Matthew Kabbabe with preliminary discovery of all documents '*relating to the description of an unknown person who posted an allegedly defamatory review in relation to Dr Kabbabe's dental practice on Google.*' The grant of preliminary discovery pursuant to rule 7.22(1) of the Federal Court Rules provides that 'a prospective applicant may apply to the Court for an order to require a party

to provide information about a prospective applicant where a person is unable to commence a proceeding because of a lack of information about a party'. Murphy J held that if Kabbabe received access to Google's information regarding the identity of CBsm 23, he may be able to bring proceedings to argue that the review "tended to lower his reputation as a dental surgeon in the opinion of right-thinking members of the community."

In granting the order, Murphy J compelled Google to provide Kabbabe with any identifying information it had control over, including the subscriber information for CBsm 23's account, name of the account user, phone number, IP address, location metadata associated with that account and any other Google accounts which may have originated from the same IP address during a similar time period to when their account was accessed to post the offending review. The Court found that Kabbabe made reasonable inquiries and took steps reasonably required to ascertain the identity of the prospective respondent. The grant of preliminary discovery will assist Dr Kabbabe in identifying the anonymous reviewer to bring defamation proceedings against her or him.

3. Barrister gangs up on Google: *Zarah Garde-Wilson v Google*

Barrister Zarah Garde-Wilson, prominent for representing gangland clients in Melbourne, filed an application in the Federal Court on 17 February 2020 to compel Google to provide information about a pseudonymous reviewer claiming to be a former client. The review posted in early February was published under the name Mohamed Ahmed and criticised Garde-Wilson's criminal law firm. Gard-Wilson publicly responded that her firm had never acted for someone with the name 'Mohamed Ahmed' and that she had forwarded the review to the Google investigations team to be removed. She suspected the review, which stated "Hiring Zara was the

most expensive and worst decision I have ever made" was written by a legal competitor. Google did not remove the review from her page despite the request. Following filing of the application, the post was removed.

In a case management hearing on 23 April 2020, Federal Court Justice Bernard Murphy said he was "inclined" to make the preliminary discovery orders sought on the basis that Garde-Wilson submitted further evidence to support her defamation and misleading and deceptive conduct claims against the reviewer. Justice Murphy's inclination toward a grant of preliminary discovery to support potential defamation claims continues the pattern of Federal Court intervention in cases involving anonymous online authors.

4. Boardroom Brothel brings Google to the table: *Boardroom of Melbourne v Google*

On 2 March 2020, the eminent Boardroom of Melbourne brothel in South Melbourne brought a similar action before the Federal Court to compel Google to provide the IP address of a hostile reviewer. The reviews of the brothel are peppered with creative licence (including in their use of grammar): "The place is cheap and dirty ... after meeting 3 ladies only I asked is there any more?" The reviews also direct customers to a nearby competitor. Upon the request of the Boardroom of Melbourne, Google declined to reveal the identity of the reviewer and refused to remove the reviews.

The business owner of Boardroom of Melbourne gave evidence to the Federal Court that a pattern of one-star reviews posted over several months, often immediately after a positive review, contained false information and significantly lowered the business' Google rating. The matter awaits hearing, but if successful it will continue the line of Federal Court orders to assist with identifying potential respondents to defamation proceedings.

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Key Takeaways

The increasing incidence of Google reviews entering the courts in recent times suggests the virtual shield of anonymity may no longer protect spiteful reviewers. The findings in *Cheng* propound the potential for onerous damages awards where reviews have been proven to seriously damage a business' reputation, when those reviews have no basis. Moreover, the increasing number of successful applications to the court for preliminary discovery to identify Google reviewers suggests an empowered position for defamed persons who find themselves without any remedies beyond the courtroom. In each of the above preliminary discovery cases, the applicants may also use the identification evidence beyond the scope of defamation action. For example, the tort of injurious falsehood may be claimed where the business owner can prove financial loss resulting from false or malicious statements intended to damage a business.

The Court's ruling for preliminary discovery in *Kabbabe* marks an important counterattack for slandered businesses attempting to track down the source of allegedly defamatory Facebook or Google reviews. Yet, legal victory does not come without great cost and highlights a greater tension between data-armed tech platforms protecting user privacy and users who commit foul play hiding behind those protections. The reluctance of tech-giants to handover user information without being legally compelled wrings out court resources. Persisting information imbalances between search engines and business owners remains a key challenge to reputation management online. Once a review has remained online for the amount of time that it takes for the matter to play out in court, the damage to a business' reputation is well and truly cemented. For small business owners, the importance of a good online rating is unavoidable. Online review platforms would be best served to keep matters out of the court by updating policies to remove unequivocally defamatory reviews from anonymous authors. As the balance of power shifts to small businesses to retaliate in the digital battlefield, Google should act quickly before it is beheaded.

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