

DEFAMATION AND MEDIA LAW

PAPER 3.2

10 Years after Barrick Gold: Tips and Trends for Determining Defamation Damages for Corporations

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I. Introduction

Historically, corporations received only minimal awards of damages when they were unable or unwilling to prove specific injury resulting from defamation. In the absence of evidence establishing an economic loss, a favourable judgment was thought to be sufficient vindication of a company's reputation. In 2004, the Ontario Court of Appeal moved away from this traditional approach and awarded the plaintiff company \$75,000 in general damages and \$25,000 in punitive damages in the landmark case of *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.) (see in particular, para. 52).

In the decade following *Barrick Gold*, Canadian courts have continued to demonstrate a willingness to award more significant damages to defamed corporations; however, there remains significant volatility in what is considered to be an appropriate amount. Despite the growing trend to recognize the importance of compensating companies for damage to their reputations, the general rule remains that, absent proof of specific economic loss (including harm done to corporate goodwill), large damages awards remain unusual, and the cost of litigation may well exceed the eventual award (*Farallon Mining Ltd v. Arnold*, 2011 BCSC 1532 at para. 81).

The Supreme Court of Canada has cautioned against cherry-picking from the authorities when claiming for damages since each case turns on its own unique factual matrix. While attempts to extract analogous facts may be of limited utility, the jurisprudence is nonetheless a source of several hidden gems for counsel and companies looking for a principled approach to defamation claims. This paper reflects on lessons learned and trends in the law to draw out key considerations for lawyers and litigants alike.

II. Overview of Defamation Damages

Once a plaintiff proves the three essential elements of defamation (i.e., the words were published, they referred to the plaintiff, and they tended to lower the plaintiff's reputation), the court will presume that the plaintiff was harmed as a result of the defamation subject to proof to the contrary. While this presumption equally applies to companies and individuals, the availability of certain types of damages differs in the corporate context. Therefore, although businesses often seek the full ambit of general damages, aggravated damages, special damages, and punitive damages, some of these claims are bound to fail, and the success of others is heavily dependent on the evidence tendered. Whether your goal is to build a case or poke holes in the evidence, this analysis should serve as a springboard for ideas of matters to address.

Fundamentally, defamation damages for corporations are intended to compensate for economic losses suffered and any deterioration in goodwill, where the libel was calculated to injure the company's reputation with the public and affect its trade or business (*Lee v. Lee*, 2000 BCSC 1770 at para. 20). While the calculation of damages is far from an exact science, courts strive to "sensibly and rationally [...] arrive at a monetary sum that will compensate the plaintiff appropriately" (*Best v. Weatherall*, 2010 BCCA 202 at para. 46). This process is often driven by the evidence and the manner in which it is presented.

III. General Damages

In defamation, an award of general damages seeks to remedy both personal and public injuries. The purpose of general damages is four-fold: (1) to compensate the plaintiff for "insult offered and pain given"; (2) to facilitate vindication of reputation; (3) to compensate for injury to pride and self-confidence; and (4) to compensate for social damage and possible economic damage that may result, but which cannot be expressly proven (*Ager v. Canjex Publishing d.b.a. Canada Stockwatch*, 2005 BCCA 467 at para. 62).

Given the presumption of harm, corporations are entitled to damages "at-large" even without proving specific loss. The loss is not constrained to pure financial loss, and can include damage to goodwill. Businesses, like individuals, are susceptible to having their reputation tarnished and may suffer adverse consequences when public confidence in them erodes. A corporation may therefore sue based on injury to reputation without other proof of loss. As recently noted in *122614 Canada Ltd. (c.o.b. New York Fries) v. O.M. Takacs Holding Corp. et al*, 2012 ONSC 6338 at para. 15 ["*New York Fries*"], "it takes little to damage the corporate reputation, and much more to restore it."

However, whether a claim for general damages succeeds and the magnitude of the award will depend on how the court weighs the following factors:

- (1) the position and standing of the plaintiff;
- (2) the nature and seriousness of the defamatory statements;

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- (3) the mode and extent of publication;
- (4) the absence or refusal of any retraction or apology
- (5) the whole conduct and motive of the defendant from publication through judgment; and
- (6) any evidence of aggravating or mitigating circumstances.

Each of these considerations is discussed in more detail below. The questions that are posed are intended to probe how evidence may be used or attacked to steer the court in a certain direction:

A. Position and Standing of the Plaintiff

Because general damages are intended to compensate for injury to reputation, the analysis starts by assessing the plaintiff's reputation both before and after the publication of the defamatory statements. As evidenced by the decision in *Farallon*, the fact that *actual* damage cannot be proven may not preclude recovery in cases where the *potential* for damage is large.

At this stage of the analysis, a plaintiff should strive to demonstrate (1) the strength of its reputation pre-defamation, or (2) the vulnerability of its reputation to defamatory remarks. In contrast, a defendant should focus its efforts on establishing (1) the prior bad reputation of the plaintiff, (2) other factors causing the harm to the plaintiff's reputation, or (3) indicators that the plaintiff's reputation was not actually damaged. Ask yourself the following questions to get a handle on the evidence you are working with:

- How important is the company's reputation to its business model? Consider the success franchise organizations have had in defamation suits, as courts have accepted that the "reputation of the franchisor and its franchisees is not only paramount, but its very lifeblood" (*Second Cup Ltd. v. Eftoda*, [2006] O.T.C. 721 at para. 37). Similarly, companies operating solely through online platforms are highly dependent on positive reviews to generate business income, and thus may be deserving of higher damage awards (see, for example, *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245).
- Is there anything unique about the plaintiff company that would make it particularly vulnerable to defamation? Companies in their infancy stages have been recognized as being particularly vulnerable to defamation (*Inform Cycle Ltd. v. Rebound Inc. (c.o.b. Rebound Cycle)*, 2008 ABQB 369 at para. 31). Similarly, bad publicity can cause significant harm to companies attempting to restructure or re-finance their operations (*Vaquero Energy Ltd. v. Weir*, 2004 ABQB 68 at para. 15). Other examples include foreign companies reaching out to new markets, or companies who rely on a key individual, particularly where that individual is heavily involved in or responsible for the defamation (*Transpacific Petroleum Corp. v. Dover Investments Ltd.*, 2009 BCSC 1620 at para. 7, aff'd 2010 BCCA 114; leave to appeal dismissed [2010] S.C.C.A. No. 171 [*Transpacific v. Dover 1*]).
- What can be deduced from changes in the value of the company following the publication of the defamation? Has there been any fluctuation in the stock price of a publicly traded company claiming defamation? In *Farallon*, the plaintiff company's stock price continued to rise even after the publication of the defamatory statements and the company was ultimately acquired at a purchase price above market value. Whether the stock price would have grown at an even higher rate was mere speculation, so ultimately these factors militated in favour of a smaller damages award.

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- Are the changes in the plaintiffs' reputation attributable to any other factors? Has the company brought any other defamation claims against other parties? Defendants should be particularly interested in running this matter to ground as the court is likely to award more substantial damages to a plaintiff where there are no other identifiable factors to explain the alleged impact of the defamation. In effect, a 'reverse onus' is imposed on defendants to introduce evidence suggesting the plaintiffs did not otherwise possess a high position or standing (*Hunter Dickinson Inc. v. Butler*, 2010 BCSC 939 at para 43; *WeGo Kayaking Ltd. v. Sewid*, 2007 BCSC 49 at para. 117). When the court is unable to distinguish between the harm caused by the defendant and other potential factors (including other defendants in other defamation actions) it may consider a reduction in general damages (*Farallon*, at para. 107).
- Is there any independent or objective evidence to establish the plaintiff's reputation "pre-defamation"? While defendants may have to contend with a 'reverse-onus,' sophisticated plaintiffs will tend to introduce their own evidence to confirm their former position and standing. The type of evidence submitted may vary. In *Hunter Dickinson*, the court seemed to accept a broad scope of evidence in light of its finding that "Farallon is a public company that has successfully developed its mining property and is now earning significant revenues. The plaintiffs have a good reputation in the mining industry and in the community in general" (*Hunter Dickinson* at para. 43). Implicit in this reasoning, is the idea that the company would *not* have succeeded financially if it had a poor reputation. A more detailed approach was adopted by the plaintiffs in *Trout Point Lodge* who submitted evidence of reviews, ratings and recommendations their company had received from a number of different businesses and publications (*Trout Point Lodge* at paras. 83-84).
- Does the company still have a "public face"? Although the court in *Farallon* didn't fully delve into this issue, it opened the door for the argument that a company without a "public face" does not need to have its reputation vindicated in the eyes of the world. Creative arguments along these lines may be made in situations involving acquisitions, amalgamations, name changes, dissolutions, and possibly even bankruptcy.

B. Nature and Seriousness of the Defamatory Statements

Next, the court will consider "the tone, language, content and gravity of the false statement, and the extent to which the defendant has sensationalized the statement" (*Farallon*, at para. 84). Plaintiffs are often prone to exaggerate the seriousness of the allegations, while defendants typically trivialize the impact of the statements. Therefore, if possible, parties should introduce evidence indicating what readers of the defamatory statements actually thought in the circumstances. The following questions highlight kinds of evidence that you may want to explore:

- How serious are the allegations? What is the plaintiff being accused of? Does the context impact how the allegations may be perceived? Greater damages may be imposed where the plaintiff is wrongly accused of criminal conduct, manipulating the court or breaching court orders. The weight of the alleged wrongdoing must be considered in light of the industry the plaintiff operates in (see *Hunter Dickinson* at para. 44; and *Transpacific v. Dover 1* at para. 9).
- What do the words specifically say, as opposed to their generic meaning? Careful attention must be paid to the specific words used in the allegedly defamatory remarks. For example, in both *Farallon* and *Hunter Dickinson*, the defamatory statements generally accused the company, its president, and associated entities of misleading investors, engaging in fraud and bribery, and participating in a conspiracy to steal a certain project site. Despite these similarities, the court in *Farallon* nevertheless imposed a smaller award of damages noting that the impugned statements were not nearly as egregious as those in *Hunter Dickinson* (*Farallon* at paras. 101-2).

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- What kind of impact could the words reasonably have on the plaintiff's business? Even if there is no supporting evidence, consider the impact the words could likely have on key parties dealing with the plaintiff (customers, investors, suppliers etc.). In *Trout Point Lodge*, the court accepted that defamatory comments stating the company was (1) funded through illegal and dishonest means, and (2) on the verge of bankruptcy, could cause potential guests to decide not to come to the lodge, which factored into its assessment of appropriate damages.
- Is there another non-defamatory conclusion that the reasonable reader might reach? Relatedly, is there any evidence about what people actually thought? The lower court's decision in *Barrick Gold* suggests that some allegedly defamatory comments might clearly come across as personal rants not to be taken seriously. In *Inform Cycle*, the defamation arose when the defendant purchased a related domain name (InformCycle.com as opposed to InformCycle.ca) and forwarded users accessing the ".com" site to a pornographic website. The plaintiff (and operator of the ".ca" website) claimed defamation arguing the re-routing suggested to users that the company was involved in illegal or immoral activity. Although the court found the defendant's conduct was defamatory, only minimal damages were awarded. In issuing the award, the court noted that there was no evidence of how many people, if any, thought that the plaintiff had some involvement with the pornographic site instead of putting the error down to a mere 'technical glitch' (*Inform Cycle* at para. 31).
- Did the defamatory publication prompt any queries, responses, investigations or other concerns from parties dealing with plaintiff? This evidence proved to be crucial in *Barrick Gold*. The trial judge initially dismissed the action on the basis that the alleged defamatory remarks posted on the online message board would "come across as a diatribe or a rant and were unlikely to be taken seriously by a reasonable reader" (*Barrick Gold* at para. 18). The Ontario Court of Appeal overturned this decision finding it was inconsistent with the evidence (para. 35). In fact, the evidence demonstrated that the defendant's numerous postings were not only read by users of the Internet, but that the postings had prompted enquiries from the company's shareholders, financial analysts, and regulatory agencies including the Toronto Stock Exchange (paras. 17, 40-43). The statements also elicited further comment and support, perpetuating the defamatory exchange (para. 17). Interestingly, the dissenting opinion of Doherty J.A. found the trial judge's decision to be reasonable given the "nonspecific evidence concerning the impact of the statements" so there is clearly room for debate regarding the scope of evidence that should be tendered (para. 93).
- Did the plaintiff lose any business opportunities or advantages as a result of the defamation? Alternatively, did it incur unanticipated obligations and expenses as a result of the defamation? If a plaintiff demonstrates actual harm suffered as a result of the defamation (even if the harm cannot be measured monetarily), it is much more difficult for defendants to contend that the statements were not sufficiently serious. Examples of harm suffered include lost clients and lost opportunities for new clients, new indemnity obligations triggered by the defamation, or delays in approval processes or licensing regimes that have been stalled in connection with the defamation (see, for example, *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172 at para. 6 and *Transpacific v. Dover 1* at para. 21).

C. Mode and Extent of Publication

The court also gauges the manner and extent of the defamatory publication, including the size of the target audience. Typically, the more widespread and frequent the publication, the larger the damage award will be (*Farallon* at para. 88). Key questions to consider include the following:

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- Is the likelihood of dissemination increased by publication via the Internet? Many recent cases illustrate how publication via the Internet results in higher damage awards, given the magnitude of the distribution and the potential for republication. As confirmed by the court in *Barrick Gold*, the court should “take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature” and the general “ubiquity, universality, and utility of that medium” (*Barrick Gold* at paras. 30 & 44). Defamatory emails raise similar concerns regarding republication and the uncertainty of authorship may limit a reader’s ability to discount the comments off-hand as a personal rant (*Vaquero* at para. 17; and *2964376 Canada Inc. (c.o.b. Ameublement Prestige Furniture) v. Bisailon*, 2012 ONSC 3113 at para. 63).
- Can evidence be gathered to establish the number of viewers accessing the material? As technology continues to improve, courts may expect more detailed evidence indicating the number of visitors to a particular site, so this is a trend to look out for in the future. One of the evidentiary deficiencies noted in *Inform Cycle* was that there was no evidence regarding the number of people who were forwarded to the pornographic website (*Inform Cycle* at para. 13). The case law suggests that more sophisticated parties are attempting to introduce evidence of this kind, but even then, the court’s desire for information is not always satisfied. For example, in *Farallon*, the plaintiff submitted evidence that the overarching “Stockhouse” website had an average of 661,000 monthly visitors, but the court nevertheless noted there was no evidence as to how many people saw the defamatory comments on the particular online bulletin board hosted on that website (*Farallon* at para. 89). In contrast, in *Hunter Dickinson*, the description of the site and its users appeared to be a persuasive element supporting the damage award rendered (*Hunter Dickinson* at para. 46).
- How long did the defamatory comments persist? Parties should consider (1) the span of time over which the defendant actively (and/or repeatedly) published defamatory comments, and (2) the length of time that the statements remained accessible by the target audience or the public at large (see, for example, *Trout Point Lodge* at para. 86). The defendant in *Trout Point Lodge* persisted in making defamatory remarks about the company and its principals even after liability was determined and an injunction and significant damages were awarded against it. Therefore, the plaintiffs applied for an assessment of damages hearing, and the corporate plaintiff was successful in obtaining a further \$35,000 in damages in addition to the \$75,000 previously awarded (*Trout Point Lodge Ltd. v. Handshoe*, 2014 NSSC 62 at paras. 9, 10 and 13).

D. Absence or Refusal of any Retraction or Apology

Remorse on the part of the defendant can go a long way to reduce the damage award. The failure or refusal to retract or apologize becomes particularly significant in cases where the plaintiff is otherwise unable to prove that it has suffered some form of economic loss. In such circumstances, the jurisprudence recognizes that a “really substantial award of damages” may be the only way to vindicate the company in the eyes of the world (*Second Cup* at para 40; *Barrick Gold* at para. 49). Ultimately, courts will look for sincerity and effectiveness when assessing the impact of any apology and the following questions will help determine if these threshold tests are satisfied:

- Was the apology or retraction conditional or qualified? An issue arose in *Farallon* regarding the admissibility of the apology since it was contained in “without prejudice” correspondence pertaining to settlement discussions. In the circumstances, the court found it appropriate to consider the defendant’s attempt to apologize, but the analysis suggests that conditional or qualified apologies may not significantly reduce damages, and in fact, may not even be admissible (*Farallon* at paras. 90-92).

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- Was the apology or retraction issued in the same manner as the original publication? In *Farallon*, only minimal weight was placed on the defendant's attempt to apologize, because the apology was not "written on the same website where the original defamatory statements were posted" (*Farallon* at para. 92). Similarly, in *Inform Cycle*, the court was not overly moved by the defendant's private verbal apology, noting instead that no written apology or retraction had been provided to anyone when it should have been posted on the ".com" website that the defendant continued to own for many months (*Inform Cycle* at paras. 11 & 33).
- Do subsequent communications (or other evidence) indicate that any apologies made were not sincere? In *Inform Cycle*, the court described the defendant's verbal apology as "suspect" given a later email he had sent to his girlfriend (*Inform Cycle* at para 33).
- Was the defendant not only unapologetic, but did it persist in making defamatory remarks? Significant damages are imposed for conduct of this kind. Damages may be increased if the defendants have categorically refused to stop posting defamatory remarks even after being alerted to the nature of their actions by counsel (*Hunter Dickinson* at paras. 26-27 & 47-48). Similarly, increased damages may be awarded where the defendants continue to publish defamatory remarks after becoming aware that the original premise for their comments is unfounded (*Trout Point Lodge* at para. 85). Finally, larger damages awards may be appropriate where the defendants not only refuse to apologize, but threaten to heighten their defamatory campaign if certain demands are not met (*New York Fries* at para. 22).

E. The Whole Conduct and Motive of the Defendant from Publication through Judgment

Much of the preceding analysis regarding the failure to apologize and the continued publication of defamatory comments equally applies to this heading. In addition, whether the defendant has been motivated by malice or some other improper motive is relevant to the question of general damages, but also to the question of punitive damages, which is discussed in Part VI of this paper. Sometimes the duration of the defamation is also considered in connection with the conduct of the defendant, but that issue has also been addressed in Part III, section (c) on the Mode and Extent of the Publication.

F. Evidence of any Aggravating or Mitigating Circumstances

Although, as will be discussed, companies cannot receive "aggravated damages" *per se*, certain aggravating factors might contribute to a larger damage award. Defendants, in turn, will point to mitigating circumstances to militate towards a lower damage award. The following questions explore how some of these factors may be addressed:

- Did the defendant deliberately choose a target audience that would maximize the economic damages inflicted on the plaintiff? Higher damages are likely to be awarded if the defendant was deliberate in choosing the target audience and publication forum with a view to damaging the plaintiff's reputation or business interests. Examples of key targets include actual or potential customers, investors, government officials, regulatory agencies, employees and/or business associates. Numerous cases deal with this issue including *Farallon* (at paras. 96 & 106); *Transpacific v. Dover 1* (at para. 8); *Hunter Dickinson* (at para. 49); and *New York Fries* (at para. 21).
- Were the defamatory statements intentionally "cloaked with an aura of credibility" to deceive the target audience? Referencing other court proceedings in a misleading manner and threatening other parties to take action to bolster the impact of the defamatory remarks

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usually justifies imposing a higher damage award (see, for example, *New York Fries* at para. 21 and *Transpacific v. Dover 1* at para. 9). Sometimes, this element may also support an award of punitive damages. For example, in *Barrick Gold*, that the defendant held himself out to be a person of substance, knowledgeable in matters relating to the mining industry worldwide and in the specific location where the plaintiff operated was considered to be a factor justifying punitive damages (*Barrick Gold* at para 61).

- What kind of action did the plaintiff need to take to repair its reputation? Is it even possible to repair the plaintiff's reputation? Large expenditures by a plaintiff (such as writing corrections, hiring 'public relations' personnel and retaining legal counsel) even if not particularized, may be compensated by an increase in the general damages awarded (*New York Fries* at para. 23). An increased award may also be appropriate for companies who cannot fully repair or save their reputation (*Trout Point Lodge* at para. 87).
- Is the defendant judgment-proof or is there some other impediment making it unlikely that the plaintiff can collect on the damages awarded? In such cases, courts may be more comfortable awarding higher damages awards as the judgment itself may be the only form of vindication the company receives (*New York Fries* at para. 25).
- Who or what did the defamatory statements specifically 'attack'? Attacks on directors, officers and employees of the company, are relevant to the injury sustained by the corporate entity and should be considered when assessing general damages (*Barrick Gold* at paras. 35, 46-48). In fact, in *Farallon*, the court found the defamation to be less egregious than the *Hunter Dickinson* situation because it hadn't entailed any defamatory remarks regarding any natural person (*Farallon* at para. 102).
- Did the defendant attempt to apologize or cease publication upon request? While such actions may stem from the defendant's own self-interests rather than sincere remorse, usually some credit is given to defendants for backing away from their original mistaken position (*Farallon* at paras. 97-98). As previously discussed, an apology or lack thereof can be a significant consideration, even on its own.

For better or for worse the calculation of general damages is complex. It is not always easy to determine the degree of damage a corporation's reputation has suffered, or what is required to restore it. *Farallon* illustrates how the court grapples with the juxtaposition of various factual considerations (see paras. 83, 106-7) and the decision is a recommended read for any party involved in a corporate defamation case.

IV. Aggravated Damages

Although some companies still claim for aggravated damages in their pleadings, such compensation is not open to corporate plaintiffs. Aggravated damages are intended to compensate for mental distress and hurt feelings and companies are not capable of suffering such harms. Corporate plaintiffs can only claim damages for injury to their business reputation or for economic losses suffered (*WeGo Kayaking* at paras. 88-89).

V. Special Damages

Special damages are rarely awarded in defamation cases, because it is very difficult to ascertain the extent of damages to a company's reputation. Unlike general damages, special damages are not presumed. Rather, they must be pled and proved by the plaintiff at trial. To succeed, a plaintiff must

show that the damages are (1) the “natural and proximate result” of the defamatory publication; (2) capable of monetary measurement; (3) established with “reasonable certainty”; and (4) are more than mere “speculation and surmise” (*WeGo Kayaking* at paras. 93-94).

A. Types of Claims that Succeed: Related Travel Expenditures

In all of the authorities canvassed for this paper, only one involved a successful claim for special damages in the corporate defamation context, namely *Transpacific Petroleum Corp. v. Dover Investments Ltd.*, 2009 BCSC 918 [*“Transpacific v. Dover 2”*]. Among other matters, the decision dealt with Dover’s claim for damages for libel, slander and intentional interference with economic relations as a result of certain letters written by the defendant to the Chairman of the Egyptian General Petroleum Corporation.

The plaintiffs incurred a number of travel costs (both for their representatives and their counsel) in their attempts to deal with the consequences of the letters. Although the court acknowledged that the corporate plaintiff’s representative also dealt with unrelated business matters during these trips, it accepted (1) his estimates regarding the amount of time spent tending to the consequences of the defamatory letters, and (2) that he would not have travelled to Egypt but for the letters. As a result, the plaintiffs succeeded in claiming special damages of \$21,992.39 for transportation, accommodation, taxes, meals and legal fees.

B. Types of Claims that Don’t Succeed: Anything Based on Imprecise Accounting Data

A lack of precision in the calculation of special damages can limit recovery. In *WeGo Kayaking*, the court declined to award special damages to either plaintiff finding the evidence tendered was not sufficiently complete or reliable (*WeGo Kayaking* at paras. 103, 111-15). The decision serves as a caution against blind reliance on accounting data or even expert testimony. The plaintiffs each operated eco-tourism companies offering kayaking tours around some of the coastal islands and claimed that they had suffered specific economic loss as a result of defamatory reviews posted by the defendant in addition to general damages for injury to their reputation.

In support of its claim for special damages, WeGo introduced evidence of its financial statements showing the net losses suffered in the year following the publication of the defamatory remarks. It also introduced testimony regarding reductions in its client base. The business had been put up for sale and the company contended that it would not be able to recover any significant amount for goodwill as a result of the defamation.

While this evidence satisfied the court that WeGo sustained economic losses as a result of the defamation, the evidence was not particularized enough to support its claim for special damages. The following problems precluded WeGo from recovering more than the \$100,000 it was awarded in general damages:

- Lack of certainty regarding the amount of the loss: In argument, counsel for WeGo submitted that the company had suffered a revenue loss of \$259,000 as a direct result of the defamation. However, \$189,000 was the estimated financial loss advanced during the testimony of WeGo’s principal. The court apparently was not provided with an explanation of how either number was arrived at (*WeGo Kayaking* at paras. 101 & 111).

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- Over-claiming by failing to consider related costs: The court deduced that the \$189,000 figure was an estimate of the gross sales lost as a result of the defamation. By claiming for lost gross revenue WeGo failed to factor in the costs it had saved. At best, it should have limited the claim to the loss of net sales. (*WeGo Kayaking* at para. 111).
- Lack of certainty regarding causation: Because the company was a relatively new company, the court noted that inherent difficulties remained in attributing the economic loss associated with the defamation when the company even otherwise was a “fledgling business” (*WeGo Kayaking* at para. 105).
- Incomplete financial documents: The defamatory statements were published in February 2005 and WeGo claimed for consequential economic losses suffered in 2005 and 2006, but it did not produce any financial statements for 2006. Given the testimony regarding decreases in client numbers, the court accepted that the losses likely flowed through to 2006, but it could not award a specific sum for this loss.

The court had different difficulties with the evidence introduced by Northern Lights, the other plaintiff in *WeGo Kayaking*. Northern Lights relied on (1) a summarized profit and loss comparison for 2004 to 2006 and (2) a summary showing the number of kayaking guests and total income earned by the company. While the court was satisfied that Northern Lights suffered greater economic losses than WeGo Kayaking, it nevertheless could not make an award of special damages. The court was unable to determine the net loss attributable to the kayak operation because of the following deficiencies in Northern Lights’ evidence:

- Failure to segregate different income streams: Northern Lights had two major lines of business, and only one line would have been affected by the defamatory remarks. Unfortunately, the profit and loss statements did not distinguish between the income and expenses of the different activities (*WeGo Kayaking* at para. 113).
- Failure to apply Generally Accepted Accounting Principles: The profit and loss summary did not apply traditional “matching” and “revenue recognition” accounting principles as it failed to attribute commission income to the year it was earned rather than when it was received (*WeGo Kayaking* at para. 113).
- Insufficient details regarding the pattern of earnings: Although Northern Lights sought to attribute all of its business losses to the defamation; the financial summaries indicated that the company had also performed poorly in the year preceding the publication. The claim for special damages was not sufficiently reliable in light of this pattern of earnings (*WeGo Kayaking* at para. 114).

To be fair, the plaintiffs in *WeGo Kayaking* and their counsel were in a difficult position to prove special damages as it may not have been possible to address all of the identified deficiencies. In fact, the court itself doubted whether the loss of potential bookings and consequential economic losses could be calculated with any reliable precision. The court was not satisfied that the process advanced by the plaintiffs produced a reliable result. However, even though the court denied the claims for special damages, it did award a larger sum of general damages to each of the plaintiffs.

C. Using Special Damages Evidence to Bolster a General Damages Claim

The foregoing discussion should not dissuade parties from attempting to calculate or prove the specific losses they have suffered. In the course of attempting to prove special damages, parties often gather sufficient evidence to support a larger award of general damages. In fact, this approach may be preferable if a claim for special damages would expose a company’s sensitive financial records and documents to be sent to a hostile or competing defendant.

Because general economic loss is an independent head of general damages (in addition to injury to the plaintiff's reputation, etc.), this tactic has proved successful in corporate defamation cases. As stated by the court in *WeGo Kayaking*, “[t]his is important when a plaintiff establishes economic loss without sufficient precision to support a claim for special damages. The claim for special damages, on the other hand requires more specific proof” (*WeGo Kayaking* at paras. 92-93).

An example of this approach is seen in the following quote from *Second Cup* (at para. 39):

A fair calculation of the costs incurred [...] is approximately \$350,000 in addition to a further \$231,982.51 incurred in prosecuting this action, Second Cup took Mr. Eftoda's attacks seriously and expended considerable corporate resources in defending its good name. A detailed analysis of the propriety or the extent of the expenditures has not been carried out. Suffice it to say that substantial amount of corporate executive, franchisee and legal time and effort were expended in dealing with the Eftoda campaign.

While the plaintiffs in *Second Cup* did not receive any award of special damages, they were successful in obtaining \$425,000 in general damages, one of the larger defamation awards in Canadian jurisprudence.

VI. Punitive Damages

Typically punitive damages are saved for exceptional cases involving “malicious, oppressive or high-handed misconduct that offends the court's sense of decency” (*WeGo Kayaking*, para. 99). Corporate plaintiffs are not precluded from claiming punitive damages.

The primary goals of punitive damages are deterrence, denunciation, and retribution; but all such damage awards must pass the threshold tests of rationality and proportionality. When making awards of this kind, courts must weigh the following:

- The blameworthiness of the defendant's conduct: This involves considering (1) whether the misconduct was planned and deliberate, (2) the intended motive of the defendants, and (3) whether the defendants persisted in their outrageous conduct. The selection of the target audience, the seriousness of the statements, and the apparent knowledge or authority of the party making the defamatory remarks are all relevant to this analysis.
- The plaintiff's degree of vulnerability: As previously discussed, there are certain elements which make some plaintiffs more vulnerable than others. However, in the era of the Internet, it is important to remember that corporations generally have become more vulnerable to defamatory attacks. (*Barrick Gold* at para. 62).
- The harm or potential harm directed at the plaintiff: This analysis may build on the motives of the defendant. Damages will likely escalate where the plaintiff is driven by malice, spite, or other improper motives such as wanting to eliminate the plaintiffs as competitors, or forcing them to negotiate or do business with the defendant (see, for example, *WeGo Kayaking* at para. 120; and *Inform Cycle* at paras. 15 & 44).
- The need for deterrence: Repeated publications throughout the conduct of litigation and any finding that the defendant is likely to continue making the defamatory remarks will likely result in an award of punitive damages (*Barrick Gold* at para. 63). Moreover, punitive damages may also be imposed on defendants who embark on defamatory campaigns as a means of resolving their disputes outside of ongoing court proceedings (*New York Fries* at para. 28).

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- Other penalties already imposed on the defendants: Punitive damages must be considered in light of the other heads of damages awarded. In *Farallon*, the court concluded that the award for general damages would seriously affect the defendant's already dire financial situation and that further punitive damages were not warranted in the circumstances (*Farallon* at para. 112).
- Any advantage wrongfully gained by the defendants: This element may be a factor in business defamation cases which also allege breaches of fiduciary duty. Even otherwise, the defendant's interests in a competing organization might suggest an improper motive to justify an award of punitive damages (*Second Cup* at paras. 50-51, citing *Whiten v. Pilot Insurance*, 2002 SCC 18 at paras. 100-26; see also *New York Fries* at para. 27).

The need to denounce conduct that is malicious, high-handed, unremitting, tenacious, spiteful and perhaps even vicious can lead to substantial punitive damage awards. In making such awards, courts do not intend to stifle the free exchange of information and ideas on the Internet, but they do want to ensure that the medium is not used to embark upon defamatory campaigns (*Barrick Gold* at para. 64).

VII. Conclusion

Recent years have shown an increase in the number of defamation cases brought by corporations. Companies are also often seeking higher damages awards—with recent claims literally seeking millions of dollars in compensation. Courts in Saskatchewan and Alberta have recently recognized that at least as against individual plaintiffs, awards for libel have generally been increasing (*Gouin v. White*, 2013 ABQB 332, citing *Rubin v. Ross*, 2013 SKCA 21 at para. 69), so awards to corporations may follow suit.

At the same time, courts appear to be more exacting about the evidence that must be tendered in support of a claim for damages. In fact, England's new *Defamation Act* provides that companies trading for profit cannot sue for defamation unless they show that the publication of the statement has caused or is likely to cause serious financial loss. While the legal landscape in Canada has not yet followed this path, commercial parties would be wise to pay increased attention to their quantification of damages. With that goal in mind, hopefully this paper will alert you to some nuances in evidence that should be considered by parties involved in corporate defamation cases.