CITATION: DeLuca v. Foodbenders, 2023 ONSC 6465
COURT FILE NO.: CV-20-00643746-0000
DATE: 20231222

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SHAI DELUCA	)	*David Elmaleh* and *Aaron Rosenberg*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
2404749 ONTARIO LIMITED operating as FOODBENDERS and KIMBERLY HAWKINS	)	*Stephen Ellis*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** September 11, 12 and 13, 2023

PAPAGEORGIOU J.

Overview

[1] There are many social and political issues that people feel passionately about. Public discourse about such issues is important.

[2] As noted by Nordheimer J. in *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211, at para. 44, "[F]air disagreements over policies and principles can be undertaken, indeed ought to be taken, through responsible discourse. Whatever disagreements there may be …views can be exchanged and debated without the need for personal attacks."

[3] This case illustrates what can happen when a person's passionate views and their discourse about social or political issues cross the line and become defamatory attacks against an individual.

[4] The Plaintiff Mr. Shai DeLuca has brought proceedings alleging that the Defendants have defamed him.

Decision

[5] For the reasons that follow, I find that the impugned statements were defamatory and award $75,000 in general and aggravated damages, and $10,000 in punitive damages.

Chronology

[6] The Defendant Ms. Kimberly Hawkins was the proprietor of the Defendant 2404749 Ontario Limited, operating as Foodbenders ("Foodbenders"). She was the owner, Executive Director, President and CEO. Foodbenders was an eatery.

[7] Ms. Hawkins used Foodbenders' Instagram account to make statements about social and political issues she supported, in particular in support of the Palestinian people and the Black Lives Matter ("BLM") movement. This Instagram account is public.

[8] Mr. DeLuca is an interior designer. He appears as a design expert on Cityline every other week. Cityline is the longest running lifestyle program in North America and airs on Citytv. From 1995 to 1998, Mr. DeLuca was a soldier with the Israeli Defence Forces (the "IDF"). He is proud of his service.

[9] Mr. DeLuca has a prominent social media presence and is a vocal advocate against antisemitism and in support of Zionism and the BLM movement.

[10] On June 6, 2020, the Defendants posted a statement on Foodbenders' Instagram account which stated, "#zionistsnotwelcome". This post garnered significant attention.

[11] On the one hand, Foodbenders' Instagram followers increased from 3,000 to 15,000 almost "overnight". On the other hand, Foodbenders was also vandalized and received significant adverse media attention.

[12] On July 2, 2020, Foodbenders made an Instagram post titled "ANTI-ZIONISM ≠ ANTI-SEMITISM". It explained that Ms. Hawkins loved Jewish people who were welcome in her restaurant and that what she meant was that she disagrees with Zionist political ideology.

[13] This did not stop the firestorm of attention that the Defendants' post had started.

[14] The media continued to write articles about the post "#zionistsnotwelcome." For example, the Toronto Sun published the article, "Bloor St. shop dishes out vitriolic anti-Zionist Tropes".

[15] On July 2, 3, and 4, 2020, Mr. DeLuca shared articles and other people's posts about the Defendants' post "#zionistsnotwelcome" on his Facebook. There were four posts in total. Three posted articles and/or another person's comments. There was only one with his own commentary accompanying the post.

[16] On July 4, 2020, Mr. DeLuca went for a haircut to his barber with his husband when his husband pointed out Foodbenders across the street. He asked whether this was the same restaurant that had made the post "#zionistsnotwelcome". Ms. Hawkins saw them standing across the street from her store taking pictures. She exited and began recording them. Mr. DeLuca and his husband walked away. Ms. Hawkins followed them and yelled profanities at them. People gathered and they continued to walk away, at which point Ms. Hawkins went back to her store.

[17] Ms. Hawkins testified that when she saw Mr. DeLuca across the street taking pictures, she thought he was a member of the Jewish Defence League coming to her store to vandalize it. She was in her store with her daughter and said she felt threatened. After this incident, she realized that it was Mr. DeLuca, with whom she said she had had online arguments about her post "#zionistsnotwelcome". Ms. Hawkins said that in online discussions, Mr. DeLuca had been "pestering" Palestinian supporters of her store. She says that he said their ancestry was fake and that their discussion turned into an argument.

[18] Mr. DeLuca was not asked about this alleged conversation when he testified and I did not see any evidence of this in the Joint Book of Documents. Mr. DeLuca posted on his own Facebook about these issues and there is no evidence that he posted anything on Foodbenders' Instagram account, spoke to or "pestered" any Foodbenders customers. I reject Ms. Hawkins' testimony that he had any such online conversations with any of Foodbenders' customers. If he did, they would have been produced, and there is no explanation as to why they were not.

[19] Ms. Hawkins also said that other Palestinian people had told her about Mr. DeLuca and his support of Zionism. She said that he promotes the IDF on school campuses and on television.

[20] Up until this point, the parties were posting their political and non-defamatory positions on each of their own Facebook and Instagram pages.

[21] What follows is the point in time when the Defendants' political speech became a defamatory attack on Mr. DeLuca.

[22] On July 6, 2020, the Defendants reposted an Instagram post made by someone with the Instagram handle "@doonz___" that stated that Mr. DeLuca was gathering other "whining Zionist friends to attack Palestinians and others in support of @foodbenders" and "this guy is one of the people who was attacking @foodbenders. He's an IDF SOLDIER (aka terrorist) yet he's using BLM movement for likes. How can you sit here and post about BLM when you have your sniper rifle aimed at Palestinian children?" (the "July 6 Post"). Ms. Hawkins says she simply received a notification of the July 6 Post which asked if she wanted to repost it and she clicked "yes". However, as will be seen, she stands by this Post to this day as well as her decision to republish it.

[23] The July 6 Post was up for approximately 24 hours.

[24] On July 7, 2020, Mr. DeLuca sent a demand letter requesting that the Defendants post an agreed-upon apology on their social media pages, failing which legal steps would be taken.

[25] On July 6, 7, 8, and 9, 2020, Premier Doug Ford, Mayor John Tory, MP Michael Levitt and Prime Minister Justin Trudeau, respectively, issued their own posts condemning posts made by Foodbenders as antisemitic.

[26] On July 16, 2020, Ms. Hawkins posted a media release on Foodbenders' Instagram where she explained she was not antisemitic, that she loved Jewish people, that Jewish customers were welcome. As part of this apology she indicated that she was "working with members of the Jewish community to learn more about anti-Jewish stereotyping so my messaging is more respectful and does not distract from the goal, which is equal rights and justice for all."

[27] However, she did not apologize for the July 6 Post about Mr. DeLuca or print any retraction of the Post.

[28] Also on July 16, 2020, the Chairman of the Arab Palestinian Association of Ontario posted an open letter to then-Toronto Police Chief Mark Saunders, writing that it had come to his attention that Foodbenders was "under a vicious and hostile attack". The letter acknowledged that Foodbenders had taken some missteps in their criticism of Israel but indicated its view that most of what Foodbenders was saying should be protected speech.

[29] Criticism of Foodbenders' posts continued on social media.

[30] On July 29, 2020, Mr. DeLuca appeared on Breakfast Television ("BT"), the sister news program to Cityline, to discuss antisemitism and the July 6 Post in general terms as being antisemitic. His interview did not mention the Defendants by name.

[31] On July 30, 2020, the Defendants made additional posts to Foodbenders' Instagram page that referenced Mr. DeLuca. They called him a "racist", a "vicious" hater of Palestinians and a "killer" who was trying to "cancel" her (the "July 30 Posts"; together with the July 6 Post, the "Posts" and each, a "Post").

[32] It is uncontradicted that Ms. Hawkins removed the July 30 Posts within two hours after her lawyer told her they were defamatory.

Issues

[33] I have considered the following issues in arriving at my decision above:

- Issue 1: Are the Posts defamatory in law?
- Issue 2: If the Posts are defamatory, have the Defendants established the defence of fair comment?
- Issue 3: If the Posts are defamatory, what are the damages?

Analysis

[34] Prior to addressing the issues, I will say a few things about the trial, credibility and reliability.

[35] The parties filed a Joint Documents Brief which contained a variety of social media posts and other documents. The parties agreed that the documents were authentic in the sense that they were true copies of social media posts, and the documents were what they purported to be.

[36] The only two witnesses who testified were Mr. DeLuca and Ms. Hawkins. They both presented as highly intelligent and articulate. Mr. DeLuca has an undergraduate university degree and a certificate in interior and residential design. Ms. Hawkins has a Master's degree in human rights and worked in the human rights field for a time.

[37] There were no significant facts in dispute in terms of the chronology of events summarized above, except with respect to Ms. Hawkins' evidence that Mr. DeLuca was having online conversations pestering her customers which I reject. There were also facts in dispute concerning whether the Posts could be justified on the basis of being substantially true, but Ms. Hawkins abandoned that defence during her closing submissions.

[38] I do not have credibility or reliability concerns about Mr. DeLuca. His evidence was consistent with the documents and he testified in a clear and consistent manner. I have some concerns about Ms. Hawkins because her evidence did not accord with the documentary record in some instances, although in my view this was more a matter of her perceptions having been inaccurate rather than deliberate falsehoods.

Issue 1: Are the Posts defamatory in law?

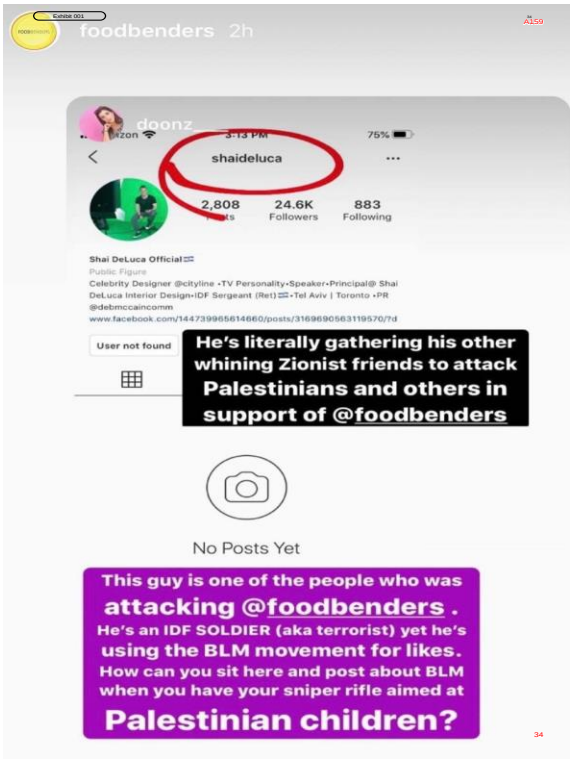
[39] In order to establish that statements are defamatory, a plaintiff must prove: i) that the words referred to the plaintiff; ii) that the words were published, meaning they were communicated to at least one person other than the plaintiff; and iii) that the impugned words were defamatory, in the sense that they would tend to lower a plaintiff's reputation in the eyes of a reasonable person: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28; *Warman v. Grosvenor* (2008), 92 O.R. (3d) 663 (S.C.), at paras. 52-57; *Mantini v. Smith Lyons LLP (No. 2)* (2003), 64 O.R. (3d) 516 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 344; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; and *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3.

[40] In considering whether the statements are defamatory, all of the circumstances of the case may be considered, including: (a) any reasonable implications the words may bear; (b) the context in which the words were used; (c) the audience to whom the words were published; and (d) the manner in which the words were presented: *Skafco Ltd. v. Abdalla*, 2020 ONSC 136, 62 C.C.L.T. (4th) 14, at para. 29; *Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Inc.*, 2018 ONCA 383, 424 D.L.R. (4th) 514, at para. 19; and *Botiuk*, at para. 62.

[41] There is no issue that all the Posts refer to Mr. DeLuca and were published to more than one person.

The July 6 Post

[42] This is the July 6 Post.



[43] The July 6 Post satisfies the test for defamation.

[44] Mr. DeLuca says that the statements above, in their natural and ordinary meaning and/or through implication have the following meanings or innuendo: a) that he is a terrorist; b) that he is engaged in, gives material support to and/or is affiliated with terrorists and terrorist activities and criminal activities; c) that he has murdered or is planning to murder Palestinian children and threatens or intends to threaten Palestinian children; d) that he was involved in planning an attack at the Foodbenders establishment on Palestinians and on supporters of Foodbenders; e) that he is not a law-abiding citizen; f) that he is a criminal; g) that he is a threat to the national security of Canada; h) that he is a violent, dishonest person who is not of high moral character; and i) that his advocacy regarding BLM is for nefarious, untruthful and/or violent purposes.

[45] I agree that the Post would have most of these meanings, when placed in context.

[46] To begin, the statements appear within the body of a post that includes Mr. DeLuca's credentials. His image is set out and is unaltered but there are different colours used and bolding which attracts attention to the defamatory statements.

[47] It says that he is an IDF soldier "(aka terrorist)" which means "also known as". I accept that the natural and ordinary meaning of this statement is that Mr. DeLuca is a terrorist because of his association with the IDF, and that as such, he gives support to terrorists or is involved with them.

[48] As noted by the Ontario Court of Appeal, allegations of terrorism are "about as serious and damaging an allegation as can be made": *Lascaris*, at para. 40. See also *Soliman v. Bordman*, 2021 ONSC 7023, 79 C.C.L.T. (4th) 273, at para. 150, citing *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529, 460 D.L.R. (4th) 245; *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, at para. 40; and *Cooke v. MGN Limited*, [2015] 2 All E.R. 622 (C.A.), at para. 43.

[49] The question, "How can you sit here and post about BLM when you have your sniper rifle aimed at Palestinian children?" implies that he does or has pointed a sniper rifle at Palestinian children and that he is a hypocrite or dishonest in his advocacy in support of BLM as a result. It also implies that he has threatened Palestinian children in the past and may do so again.

[50] The statements alleging that he was one of the individuals that had attacked Foodbenders and that he was planning a future attack, in their natural and ordinary meaning, would mean that he physically attacked Foodbenders and was planning to do so again. Foodbenders had been vandalized and I infer that many Foodbenders' followers would be aware of this. Vandalism is a criminal offence; therefore, I accept the implicit meaning alleged by Mr. DeLuca that he is not a law-abiding citizen, and that he is a criminal.

[51] In considering whether the July 6 Post could and would tend to diminish Mr. DeLuca's reputation in the mind of reasonable person, it must be kept in mind that the primary audience for Foodbenders' posts are the people who follow Foodbenders and people who may know Ms. Hawkins. As I said, she is highly intelligent and presents well. Additionally, as noted above, after the post "#zionistsnotwelcome", Foodbenders' followers went from 3,000 to 15,000 almost "overnight", which shows that the followers were very interested in Foodbenders' perspective on matters related to Israel and Palestine, a highly charged political issue.

[52] I also infer that, generally, people follow particular social media because they like or are interested in what those sites say. Thus, the reference to Mr. DeLuca being a terrorist in his role as an IDF soldier, the implication that he points or has pointed a sniper rifle at Palestinian children in this role, as well as all the other pleaded meanings that I have accepted, could and would tend to lower Mr. DeLuca's reputation in the mind of a reasonable person.

[53] I also find that at the time the Post was made, it could and would have tended to reduce Mr. DeLuca's reputation more generally beyond the followers of Foodbenders' Instagram to others who could access the site publicly. Although he has some celebrity status, there is no reason to think, or evidence to suggest, that the average person knew enough about him so as to be able to form the conclusion that these allegations about him were not true or not from a credible source.

The First July 30 Post

[54] This Post also satisfies the test for defamation.

[55] Mr. DeLuca says that this Post in its natural and ordinary meaning and/or through implication has the following meanings or innuendo: a) he is a killer; b) he has killed Palestinians in the past and is planning on killing them or is threatening to do so; c) that he has harmed children in the past and currently harms them or is planning to or threatens to harm children; d) that he viciously hates Palestinians; e) that he is a racist and a terrorist; f) that he is not law-abiding and is a criminal, violent and dangerous.

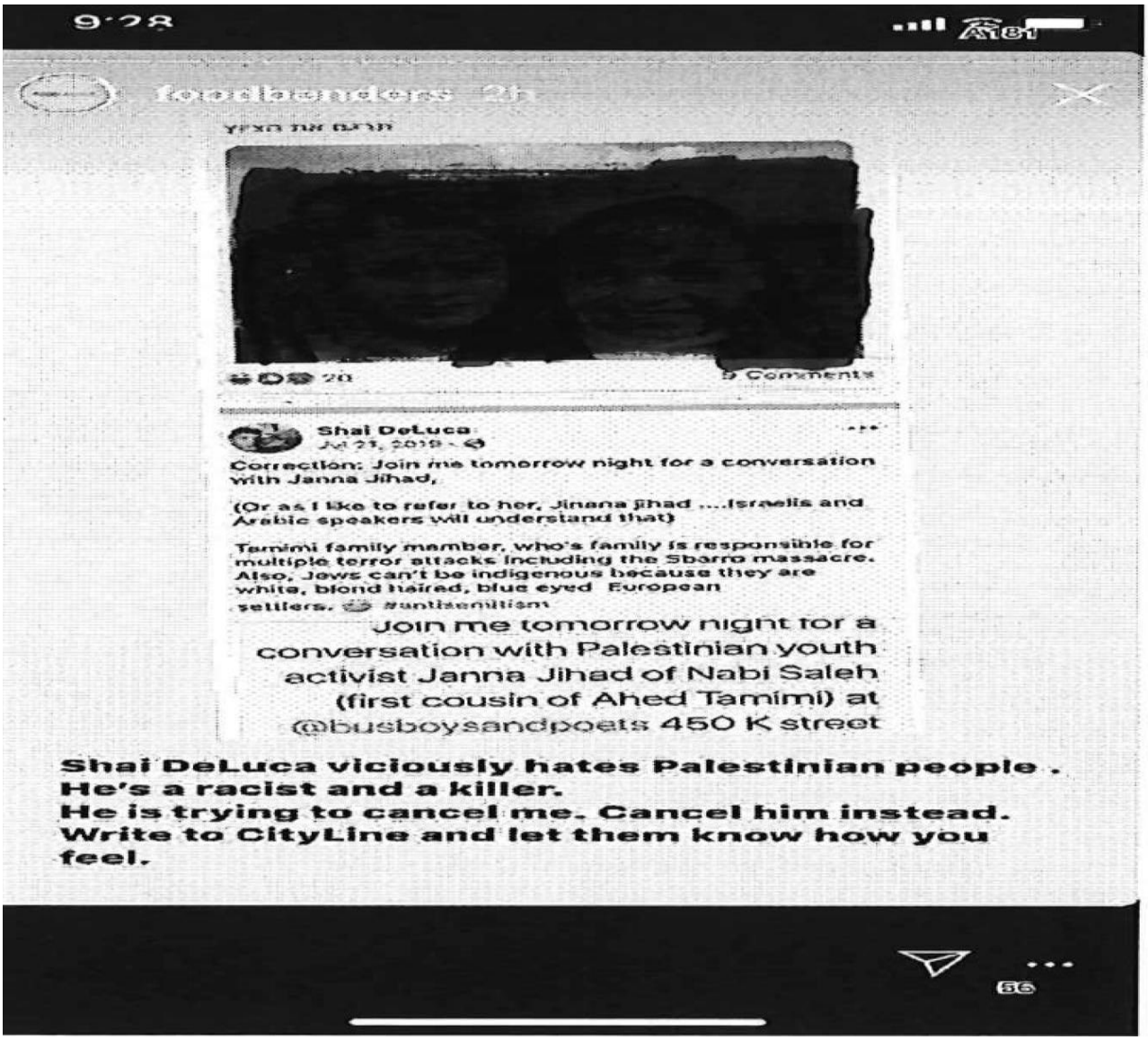
[56] I agree that the First July 30 Post would have some, but not all of the pleaded meanings.

[57] The context includes the prior July 6 Post which Mr. DeLuca discussed in general terms in the BT interview, which is posted in full for the reader to watch. In context, the words imply that Mr. DeLuca's failure to deny having killed Palestinians or harming children during the BT interview means that he has actually done so. They also imply that he is a killer, a criminal, violent and dangerous.

[58] Taking into account the primary audience, and the fact that potential readers beyond the primary audience would not necessarily know Mr. DeLuca so as to be able to dismiss these

allegations, this Post could and would tend to reduce Mr. DeLuca's reputation in the mind of a reasonable reader.

The Second July 30 Post [1]



[1] I have blocked out the faces of the girls in this post as they are not parties.

[59] This Post also satisfies the test for defamation.

[60] Mr. DeLuca says that this Post in its natural and ordinary meaning and/or through implication have the following meanings or innuendo: a) he is a killer; b) he has killed Palestinians in the past and is planning on killing them or is threatening to do so; c) that he has harmed children in the past and currently harms them or is planning to or threatens to harm children; d) that he viciously hates Palestinians; e) that he is a racist and a terrorist; f) that he is not law-abiding and is a criminal, violent and dangerous.

[61] I agree that the words used would have some, but not all of the pleaded meanings.

[62] The statements in the Second July 30 Post are that Mr. DeLuca is a "racist", "viciously hates Palestinians", is trying to "cancel Foodbenders", and is a "killer". These speak for themselves and are serious allegations. Calling him a "killer" also implies that he is not law-abiding and is a criminal, violent and dangerous.

[63] Again, taking into account the primary audience, as well as the fact that most people outside Foodbenders' readers would not necessarily know Mr. DeLuca so as to be able to dismiss these allegations, the Second July 30 Post could and would tend to reduce Mr. DeLuca's reputation in the mind of reasonable person.

Issue 2: Would these statements constitute fair comment?

The requirements for fair comment

[64] Where defamatory statements are made, there is a presumption of malice which may be displaced by the existence of the defence of fair comment: *Hill*, at para. 170.

[65] The defence of fair comment requires a defendant to prove that the impugned statements were: (a) about a matter of public interest; (b) comments or opinions and not statements of fact, although the comments or opinions could include inferences of fact; (c) comments or opinions based upon true facts; and (d) objectively fair in the sense that any person could honestly express the comments or opinions based upon the proved facts: *Torstar*, at para. 31. There is also a subjective aspect to the test which is whether the defendant who made the comment was subjectively actuated by express malice; if so, the defence of fair comment fails: *Torstar*, at para. 31.

[66] With respect to whether the statements are comment or statements of fact, the Supreme Court has indicated that comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof": *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 26. The Supreme Court also indicated that statements may look like statements of fact but could be construed as comment.

[67] Further, in determining whether a statement is comment, the court must examine the totality of the circumstances in which the remark was made, including the language, the medium, any cautionary terms and the audience. Presentation of the statement is critical: even words that appear as statements of fact may in pith and substance be comment, particularly where loose, figurative or hyperbolic language is used in the context of commentary: Raymond E. Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd ed. (October 2023), at § 15:5, online: (Proview) Thomson Reuters Canada. Further, fair comment is "generously interpreted": *WIC Radio*, at para. 26.

[68] The comments must "explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made": *WIC Radio*, at para. 31. In that regard, all that is required is that there is enough information to identify the factual basis of the comment: *Foulidis v. Baker*, 2012 ONSC 7295 ("*Foulidis (S.C.)*"), at para. 30, aff'd 2014 ONCA 529, 323 O.A.C. 258 ("*Foulidis (ONCA)*"). A reader should be able to recognize the facts so that they can then "make up their own minds" about the comment being made. Further, the foundation for underlying facts must actually be true; if they are not, then the defence fails.

[69] As noted in *WIC Radio*, at para. 39, although the comment must have a "basis" in the facts, there is no requirement that the comment be "supported by the facts".

Analysis of each Post as to whether the defence of fair comment is made out

[70] Mr. DeLuca accepts that the Posts could be considered about a matter of public interest since he is a public figure.

The July 6 Post

[71] None of the statements in the July 6 Post would be considered fair comment.

[72] Mr. DeLuca argues that the Defendants had admitted that the statements in the Posts were statements of fact based upon questions in the Request to Admit which the Defendants admitted, including the following: "Ms. Hawkins' entire basis for believing in the statement of fact that Mr. DeLuca is a terrorist is that he was a Sergeant of the Israeli Defence Forces and brags about his army service in the media."

[73] I disagree that this court must conclude that this is a statement of fact in law because of the Defendants' response to the Request to Admit. First, if Mr. DeLuca had wanted some legal agreement from the Defendants as to the manner in which this court should interpret the Post, the question asked should have been clearer. Second, whether or not something is considered fact or

comment does not depend upon the intention of the person who made the statement or what they meant; it is determined by the court based upon how a reasonable reader would understand the statement: *WIC Radio*, at para. 27.

[74] In my view, the bulk of the statements in the July 6 Post would be seen by the reasonable reader to be commentary and not statements of fact.

[75] The statements are essentially opinions, judgments and conclusions about Mr. DeLuca based upon his service in the IDF, including the statement "aka terrorist", and the implication that he does or has pointed a sniper rifle at Palestinian children during his service. A reasonable reader would recognize this. See *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401, at paras. 82-83, leave to appeal refused [2017] S.C.C.A. No. 71, where the court agreed that statements in a blog that referred to a plaintiff as an antisemite based upon his association with others would be recognizable as comment. The references in this Post are specifically related to Mr. DeLuca's association with the IDF.

[76] In *Soliman*, Perell J. held that that the allegations that the plaintiff was a terrorist or supports terrorist organizations were statements of fact because the defendant presented himself as having investigated candidates for leadership of federal and provincial conservative parties. Perell J. found that the statements were presented as investigative reporting: at paras. 159-160. This is not the case here. The Defendants here are an eatery and its proprietor. There was nothing to indicate that the Defendants represented themselves as having investigated anything.

[77] Further, the Joint Book of Documents shows that the Foodbenders Instagram account would have been known for extreme opinions. There were many provocative, offensive (and some would argue antisemitic) examples of this shortly before the Posts in question, all apparently based upon Ms. Hawkins' opinions, and not based upon any investigation. For example:

- There is a post with a photo of Jeffery Epstein and Ghislaine Maxwell with the words, "Timing is such an interesting thing. Just wait until I tell you about these two and their connections with [Z]ionist Mossad."

- There is a post stating, "[Z]ionists like to appear bigger than they are. The Israeli flag is white for supremacy and blue for cop."

[78] The question "How can you sit here and post about BLM when you have your sniper rifle aimed at Palestinian children?" would easily be recognized as hyperbole by a reasonable reader. It is again a judgment or conclusion based upon Mr. DeLuca's association with the IDF. It would not be taken to mean that he was literally pointing a sniper rifle while he posts about BLM. However, it would be taken to mean that in his role as an IDF soldier, that is what he does or what he must have done or what he will or would do because of his association with the IDF.

[79] However, the fair comment defence fails with respect to this Post because the only fact stated in support of the opinions was that Mr. DeLuca "is" an IDF soldier.

[80] This fact is incorrect. Mr. DeLuca is not currently an IDF soldier. There was not even evidence that he is in the reserves. Rather, he "was" an IDF soldier 30 years ago for three years as a combat engineer where he did things like disable mines. He was discharged and did not sign up to continue. Implying that he was a sniper is also incorrect.

[81] The Post misstates the status of his service. Therefore, with no true facts stated within the Post, the reader is not in a position to make up their own mind about the comments expressed. Therefore, the defence fails at this stage.

[82] I also find that no person could honestly express these comments because this kind of commentary exceeds the bounds of what the fair comment defence is designed for. It should not be used to protect this kind of social media commentary.

[83] As set out in *WIC Radio,* at para. 49, "The test represents a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements."

[84] This kind of extreme defamatory commentary exceeds what is required to fulfill freedom of expression requirements. Finding that this kind of commentary is fair comment, based on nothing more than a soldier's service in an army, would not be in the public interest either. It would discourage people from serving in the military.

[85] Incidentally, because the defence of justification was a live issue during the trial, Mr. DeLuca testified and I accept that he was never involved in live combat, never pointed a rifle, let alone a sniper rifle, at anyone, and never killed anyone.

[86] The defence of fair comment also fails with respect to the statement that Mr. DeLuca had been one of the individuals who had attacked Foodbenders or that he was planning to do so in the future, because these are in pith and substance statements of fact. Therefore, the defence of fair comment cannot apply. If either of these statements could be considered comment, the defence of fair comment would still fail because there are no true facts stated in support of such comments.

The First July 30 Post

[87] The First July 30 Post also does not meet the test of fair comment.

[88] The statement in the First July 30 Post implies that Mr. DeLuca's failure to deny that he killed Palestinian children in his BT interview, was an acknowledgement that he did. This would also be recognizable by a reasonable reader as a judgment or opinion about Mr. DeLuca because of his association with the IDF. The reader can watch the imbedded BT interview where Mr. DeLuca discusses the July 6 Post.

[89] However, there are no facts at all contained in this Post apart from the fact that he gave this BT interview. The interview was thoughtful, talked about antisemitism and did not display any animosity towards Palestinians or children.

[90] No person could honestly express the innuendo in this Post based upon the fact that Mr. DeLuca gave this BT interview. The commentary is not even remotely connected to the fact that Mr. DeLuca gave this interview or to anything he said in the interview.

The Second July 30 Post

[91] Some of the content of the Second July 30 Post meets the test of fair comment.

[92] The statement that Mr. DeLuca is a "killer" is in pith and substance a statement of fact. Thus the defence of fair comment cannot apply.

[93] These statements that Mr. DeLuca is a "racist" who "viciously hates Palestinian people" is a judgment or opinion related to Mr. DeLuca's imbedded Facebook postdated 2019, where he reposted a picture of a Palestinian youth activist together with an advertisement for a talk being given by this activist, who looks about 13 years old.

[94] Mr. DeLuca's 2019 post is specifically set out for the reader to see. A reasonable reader would recognize the comments as judgments or conclusions about him based upon his Facebook post. See also *Awan v. Levant*, at para. 84, where the court indicates that "[c]alling someone prejudiced will normally be a conclusion or opinion based upon the person's conduct or statements."

[95] In his imbedded post, Mr. DeLuca made negative comments about the upcoming talk to be given by this Palestinian youth. He appeared to be mocking her name and suggested that her family were terrorists or had participated in massacres. Readers can look at Mr. DeLuca's 2019 post and make up their own minds as to whether they agree with the comment that the Facebook post makes Mr. DeLuca a "racist" who "viciously hates Palestinian people".

[96] In *WIC Radio*, at para. 49, the Supreme Court cited with approval the Australian High Court in *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468, [2007] HCA 60, at para. 3, where it stated:

> The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inferences, or judgment, provided certain conditions are satisfied. The word "fair" refers to the limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts. [Emphasis added.]

[97] The commentary that Mr. DeLuca is "racist" who "viciously hates Palestinian people" is something that could have honestly been expressed by someone. This is not because that is this court's opinion, but because of the broad latitude given for fair comment. As expressed by the

majority of the Supreme Court in *WIC Radio,* at para. 62, fair comment protects an "opinion that could honestly have been expressed on the proved facts by a person 'prejudiced…exaggerated or obstinate [in] his views'. That is all the law requires."

[98] The statement that Mr. DeLuca was trying to "cancel" Ms. Hawkins would also be recognized by a reasonable reader as a judgment or opinion about Mr. DeLuca's motivations. See *Awan v. Levant,* at para. 75, where the court indicated that "a statement on a matter of public interest that suggests a motive will likely be a comment rather than a fact".

[99] The Second July 30 Post does not expressly cite any facts in support. While Mr. DeLuca had been making negative posts about Foodbenders' post "#zionistsnotwelcome" on his own Facebook page, the Defendants did not argue, nor did they lead evidence to show that these negative posts would otherwise be known to those reading the Defendants' Instagram posts. However, because the post about the BT interview was at the exact same time as the Second July 30 Post, this interview would otherwise be known to readers of Foodbenders' Instagram. See *WIC Radio,* at para. 31, where the Supreme Court indicated that the facts upon which a comment is based may constitute fair comment where such facts are "otherwise… known to" the reader.

[100] Therefore, the statement that Mr. DeLuca was trying to "cancel" Foodbenders was fair comment. An honest person could express the opinion that he was trying to "cancel" her because although the BT interview did not mention Foodbenders, the readers of Foodbenders' Instagram would know that the BT interview referred to Foodbenders because of the context and the placement of the two July 30 Posts. As well, what was going on was public enough that I infer anyone could have done a simple Google search and figured out which entity the BT interview was referencing.

[101] Again, my conclusion that this constituted fair comment is not because this court has concluded that Mr. DeLuca was trying to "cancel" the Defendants, but because of the broad latitude given to fair comment.

[102] Because the Defendants abandoned the defence of justification, there is no defence in respect of the incorrect statements of fact in the above Posts which included that Mr. DeLuca had been one of the people who attacked Foodbenders in the July 6 Post, that he was planning a future attack, and that he is a killer as stated in the Second July 30 Post.

Were the Defendants subjectively actuated by malice?

[103] The defence of fair comment is defeated where the plaintiff can show the subjective dominant motive of the communication is actual or express malice: *Foulidis (S.C.),* at paras. 72-74.

[104] Malice is generally considered to mean ill will or spite: *WIC Radio*, at para. 28.

[105] Malice can also be established when a defendant spoke dishonestly when making the statement or where the defendant spoke with reckless disregard for the truth: *Bent v. Platnick,* 2020

SCC 23, [2020] 2 S.C.R. 64, at para. 136; *Hill*, at para. 145; and *Botiuk*, at para. 34. The plaintiff must prove that the defendant "knew he was not telling the truth or that he was at least reckless about the truth": *Foulidis (ONCA)*, at para. 51. The more serious an allegation, the more weight the court will give to evidence of the defendant's failure to verify it before publication: *Bent*, at para. 136.

[106] In the context of the fair comment defence it can also be established where the statements were made with the dominant motive which is "not connected with the purpose for which the defence exists": *WIC Radio*, at para. 1. The purpose of the fair comment defence is to "hold the balance in the law of defamation between two fundamental values, namely the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the 'very life blood of our freedom and free institutions'": *WIC Radio*, at para. 1. Thus, the purpose is to ensure robust and open debate about matters of public interest.

[107] Malice can be proven through inference from the language of the impugned statement or with extrinsic evidence: *Foulidis (ONCA)*, at paras. 49, 58.

[108] Care must be had and the burden of proving malice is not easy: *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241, at para. 136, rev'd on other grounds, 2009 SCC 62, [2009] 3 S.C.R. 712; *Cimolai v. Hall*, 2007 BCCA 225, 240 B.C.A.C. 53. In *Creative Salmon Co. v. Staniford*, 2009 BCCA 61, 307 D.L.R. (4th) 518, at para. 34, the BC Court of Appeal cautioned that "there may be circumstances where malice is not the dominant motive of the defendant."

[109] All of the above different ways that malice can be shown were present in this case.

[110] The language of the July 6 Post which Ms. Hawkins republished demonstrates malice. The words "whining Zionists" demonstrate spite and ill will towards individuals who support Zionism. Although the Defendants did not create this Post, Ms. Hawkins gave evidence that that she did not think that the person who wrote the July 6 Post was wrong in her assessment of Mr. DeLuca and that, as such, she would not retract this person's words. She also gave evidence that the statement that Mr. DeLuca was gathering his "whining Zionists friends" to attack Foodbenders was 100 percent true but that he had deleted the evidence. Thus, even though she did not create the Post, she supported the way it was written, which shows malice. As noted above, there was no evidence supporting Mr. DeLuca's involvement in any attack and I conclude that Mr. DeLuca was not involved in any way.

[111] As well, Ms. Hawkins testified that the "primary motive for sharing that particular story was that Shai DeLuca was harassing me online and harassing my business, and I wanted it to stop, and so I exposed him with [the original poster's] post". This is a significant admission as to her dominant purpose. This dominant purpose is not connected with the purpose for which the defence of fair comment exists, which is robust and open debate about matters of public interest.

[112] Ms. Hawkins did not refer me to any posts made by Mr. DeLuca which she said constituted harassment of her or Foodbenders. None of the documents in the Joint Book of Documents showed that Mr. DeLuca even communicated directly with her or Foodbenders, or that he tagged the Foodbenders' Instagram account in any of his Facebook posts.

[113] Mr. DeLuca was exercising his right to freedom of expression in a non-defamatory way. The Defendants had started this discussion in public and they cannot complain that there was public discussion about it.

[114] As explained by Lebel J. in his partially concurring reasons in *WIC Radio*, at para. 75:

> People who voluntarily take part in debates on matters of public interest must expect a reaction from the public. Indeed, public response will often be one of the goals of self-expression. In the context of such debates (and at the risk of mixing metaphors), public figures are expected to have a thick skin and not to be too quick to cry foul when the discussion becomes heated.

[115] Even if Ms. Hawkins did feel harassed, the appropriate way to address that was not reposting a defamatory post about someone who may have expressed his views, but who was not responsible for the harassment and vandalism the Defendants said they experienced. For reasons which are not apparent, the Defendants appear to hold Mr. DeLuca responsible for everything that had happened.

[116] The July 30 Posts followed immediately after Mr. DeLuca's interview on BT on July 29. Ms. Hawkins testified that his BT interview "triggered" her. In the circumstances, she felt these Posts were "fair play."

[117] Although Ms. Hawkins complained that Mr. DeLuca had called her an antisemite in the interview, as noted above, he did not refer to her or Foodbenders by name during this interview. Mr. DeLuca's interview was positive, thoughtful, and sought to constructively discuss matters of public interest in a non-defamatory manner. He also sought to get out ahead of the allegations that had been made about him so as to mitigate any reputational damage. He was entitled to do so. Indeed, this was not only to his benefit, but also to the Defendants'. It was also to the Defendants' benefit that Mr. DeLuca reposted the July 6 Post to his 26,000 Facebook followers to dispute the allegations. As will be seen, this mitigation has ultimately reduced the damages for which the Defendants are liable.

[118] As well, as noted above, one of the July 30 Posts asked readers to write to Citytv to "cancel" him, which was essentially instructing her followers to write letters of complaint to his employer.

[119] These words also demonstrate ill will and intent.

[120] Ms. Hawkins denied that when she instructed her followers to write to Citytv it was to get Mr. DeLuca fired or removed from the show. She said that she was trying to have her supporters

have the video of his interview posted on Citytv cancelled or removed. I find that explanation disingenuous because that is not what the words said. In any event, if her goal was to have the video of the BT interview removed, this was also an improper motive unconnected with the purpose for which the defence of fair comment exists. In that case, Ms. Hawkins was seeking to suppress public expression on matters of public interest, the exact opposite purpose of the fair comment defence.

[121] As well, the way that Ms. Hawkins testified at times conveyed anger or ill will towards Mr. DeLuca.

[122] Ms. Hawkins testified repeatedly about Mr. DeLuca's "bragging" at serving with the IDF and about his "pride". There was nothing in the record to support this and even if he did brag, or was proud, that would not be a reason to post the kinds of things the Defendants did. Additionally, Ms. Hawkins' testimony showed considerable animosity towards the IDF, Zionism and those who support Zionism, like Mr. DeLuca. She stated her belief that Mr. DeLuca stood for the ideology of terrorism, as such.

[123] Ms. Hawkins was also reckless as to the Posts. She admitted that she did not undertake any attempts to investigate. As noted above, she based her Posts solely on Mr. DeLuca's association with the IDF and his being proud of his service. She could have checked the facts related to Mr. DeLuca's actual service in the IDF. If she had looked closely she would have seen that the reference to his association with the IDF in his credentials stated "Ret", which I infer means retired. She could have made inquiries as to whether he had been a sniper, whether he had ever pointed a sniper rifle at anyone, and whether he had ever killed anyone. She could have made inquiries as to whether there was any evidence that he had any responsibility for the vandalism of Foodbenders. These were serious allegations that she should have sought to verify; as noted above, the more serious an allegation, the more weight a court will give to a defendant's failure to verify it: *Bent*, at para. 136; *Sabaratnam v. Mooka*, 2022 ONSC 4779, at para. 81.

[124] Thus, I find on a balance of probabilities that the Posts were made with the dominant purpose of malice, defeating the defence of fair comment.

Issue 3: If the Posts are defamatory, what are the damages to which Mr. DeLuca is entitled?

[125] Mr. DeLuca argues that the appropriate range of a damage award of general and aggravated damages in this case is between $375,000 to $500,000.

[126] When addressing the request for this significant quantum, it is important to keep in mind that a defamation proceeding is not a mechanism to discipline or punish people who display hate or say things that may be considered vile. It is not meant to be a tool to fight racism, antisemitism or other kinds of prejudice. Rather, defamation is a tort whose purpose is to "vindicate reputation": *WIC Radio*, at para. 15.

[127] Damages for defamation are assessed as the amount necessary under all the circumstances to restore the plaintiff's reputation in the community, to address his or her injured feelings and to

provide consolation and public vindication: *Soliman*, at para. 197; *Lascaris*, at paras. 42-44; *Botiuk*, at paras. 91-92; and *Hill*, at para. 107.

[128] Relevant factors include: (a) the plaintiff's position and standing; (b) the nature and seriousness of the defamatory statements; (c) the mode and extent of publication; (d) the absence or refusal of any retraction or apology; (e) the whole conduct and motive of the defendant from publication through judgment including trial; and (f) any evidence of aggravating or mitigating circumstances: see *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 29; *Hill*, at para. 182.

[129] As well, where there is malice, there is a basis for aggravated damages: *Hill*, at para. 190. I note here that not all of the malice that I have found is relevant to damages. As I read the cases, the malice that is relevant to damages is that involving spite or ill will, dishonesty or recklessness. It would make no sense to also include, as part of the malice relevant to damages, a dominant motive that is inconsistent with the purpose for which the defence of fair comment is made. That definition of malice is specifically relevant to defeating the defence of fair comment. In any event, I have found malice which is specifically related to damages, which is spite or ill will and recklessness.

[130] Even though general damages are presumed from the very publication of the false statements and there is no obligation to prove actual loss or injury (see *Torstar*, at para. 28), this does not mean that they are presumed to be whatever quantum the plaintiff requests.

[131] Where the plaintiff requests substantial general damages, the context, the audience and the impact of the defamatory messages must be calculated to arrive at a just result: *Skafco*, at para. 20.

[132] Mr. DeLuca points to the following factors as supporting a significant award:

- A professional's reputation is considered essential to the professional's livelihood; thus, statements which attribute villainy or immorality are considered to cause serious harm to the professional's reputation and livelihood: *Soliman*, at para. 198; *Lascaris*, at paras. 42-44; *Botiuk*, at paras. 91-92; and *Hill*, at para. 118.

- Mr. DeLuca is a professional with a public profile. He relies upon his reputation, word of mouth and his social media presence to obtain clients. Instagram has always been his biggest social media platform.

- He goes into people's homes as part of his job. Allegations of this nature would have an impact on some people's willingness to invite him into their homes.

- The Defendants admitted in their answers to undertakings that as of July 6, Foodbenders had 16,000 followers and this increased by the time of the July 30 Posts.

- Mr. DeLuca's image was in the Posts.

- Ms. Hawkins expressly agreed that she knew the Posts would be shared and that this is what she wanted. Indeed, she wanted the whole world to see them.

- There was a snowball effect for a limited time where multiple friends and family members saw these Posts and contacted Mr. DeLuca about them.

- He suffered embarrassment and difficulty at work and had to explain what this was all about.

- Mr. DeLuca testified that he received death threats. In one instance someone told him they knew where his studio was and that they could put a sniper on a building across the street. He explained he did not have documentary proof because he closed his Facebook account which had been hacked twice and some of these threats were disappearing messages which could not be saved.

- He also received multiple commentaries in his social media feed where people attacked him. He started to have to block people.

- Mr. DeLuca suffered emotional distress including anxiety and losing twenty pounds. He stated, "This horrible, horrible lie about me, it ruined me inside and [I] read it now and the emotion and hurt and the anger and the upset is just as real now as it was then."

- As well, courts have accepted that internet communications intensify harm because of the interactive, worldwide reach: *Barrick Gold Corp*., at paras. 31-34: *Soliman*, at para. 199; and *Sommer v. Goldi*, 2022 ONSC 3830, at para. 35,

[133] The following facts militate against a significant award.

[134] Although the case law has held that internet communications exacerbate harm, in my view, social media posts of individuals or entities expressing comments would not have the same impact on reputation that investigative journalism by a credible source would. As noted by LeBel J.'s concurring reasons in *WIC Radio*, at para. 71, a comment, because it is subjective, is less likely to damage a person's reputation.

[135] LeBel J. also stated that the public is better able to evaluate comments about public figures, thus they may be able to influence their own reputations "for the better": at para. 74. He continues, at para. 75:

> This is not to say that harm to one's reputation is the necessary price of being a public figure. Rather, it means that what may harm a private individual's reputation may not damage that of a figure about whom more is known and who may have had ample opportunity to express his or her own contrary views.

[136] Mr. DeLuca had a prominent platform which allowed him to quickly address the Posts with in particular through his BT interview. Mr. DeLuca has not lost his high-profile job with Citytv; indeed, they celebrated his advocacy about these issues on BT.

[137] There is no evidence that anyone has been having any conversations about these Posts with Mr. DeLuca since July 2020. Mr. DeLuca remains a high-profile individual. Although he had to close his Facebook account at the time, there is no evidence that hacking of his account has remained a problem.

[138] I recognize that courts have held that a serious libel will not always manifest itself in financial losses. See *Montour*, at para. 31, regarding the difficulty of plaintiffs being able to link reputational harm to financial losses or lead testimonial evidence of the impact of a particular defamation. Nevertheless, it is relevant that Mr. DeLuca did not reference any statements from anyone who indicated they were no longer prepared to hire him. There was no evidence on any loss of clients, or lost earnings. He gave general evidence that he may not have grown his business as much as he could have, but he did not indicate how much he earned, or what he expected his business growth to be compared to what it has been.

[139] Further, although it was in evidence that Foodbenders had 16,000 followers as of July 6, 2020, the July 6 Post was only up for 24 hours, and the July 30 Posts were only up for 2 hours. I note here that the Plaintiff requested the analytics which would have shown how many people actually saw these Posts, but the Defendants indicated that they could not produce them. Thus, there is no evidence on this.

[140] However, there was a great deal of social media commentary about Mr. DeLuca in the Joint Documents Brief. It shows that, at least for most people who posted, the impugned Posts did not actually lead to anyone talking about Mr. DeLuca being a terrorist who pointed guns at children or being a killer, which are the worst statements and which would have the most adverse effect on his reputation.

[141] The conversations were about antisemitism, Mr. DeLuca's association with Zionism, those who were both for and against it, and those who advocated for Palestinians. Although Mr. DeLuca complained that his inbox was deluged with "Free Palestine" messages, he was already publicly associated with Zionism before any of this happened.

[142] As well, much of the commentary in the Joint Documents Brief was complimentary of Mr. DeLuca. Many praised him for his advocacy.

[143] There was one conversation between Mr. DeLuca and another on July 8, 2020 where someone referenced his sniping at children. The person stated: "Well you are Israeli did you not serve your obligatory 2 years?" and "Were you a sniper? Or did she just pull that out of thin air?" This shows some of Foodbenders' followers would find Foodbenders and Ms. Hawkins to be a credible source and did believe this allegation.

[144] However, by July 30, when people wrote to Citytv no one made any reference to him being a terrorist, pointing a sniper rifle at children, or killing anyone. These messages suggested that Citytv should also give a platform to a Palestinian person, criticized Citytv for not supporting the human rights of Palestinians, criticized it for being pro-Zionist and criticized it for allowing Mr. DeLuca to spread what those individuals considered to be hate on the BT show.

[145] I acknowledge that the above evidence does not necessarily reflect the full impact on Mr. DeLuca's reputation in the minds of people who may have seen the Posts and who chose not to publicly post or communicate with Mr. DeLuca or Citytv. Nevertheless, there are enough of them to support the conclusion that he was able to significantly mitigate the impact of the Posts on his reputation through his BT interview.

[146] This also may be in part because Foodbenders was discredited by prominent political figures almost immediately after the July 6 Post. Mr. DeLuca does business in Ontario; the condemnation of Foodbenders by these high-profile individuals would also have contributed to the mitigation of any reputational harm.

[147] As well, Mr. DeLuca admitted that he did not require any counselling as he relies on his friends, family and community for support. He did not have to see his family doctor because of his distress and there is no evidence that he had to take any time off work.

[148] Mr. DeLuca testified that he understands that these images will be on the internet forever, but he did not provide any evidence of any searches that he has done since July 2020 which showed that they could be found easily or even found. Ms. Hawkins testified that she has searched for these Posts using a variety of different search terms and she could not find them. I believe her, but in any event, it is the only evidence before me on this issue, other than the general knowledge this Court has that with enough effort, deleted things can be recovered on the internet. (It does not appear to me that these Posts would be the kind of thing that anyone would expend great effort recovering.)

[149] Because of the publicity surrounding Foodbenders, I also infer that members of the public doing a simple Google search would find the condemnation of Foodbenders as well as Mr. DeLuca's continued prominent status on Citytv. This would influence how people would consider these Posts and any continued impact on his reputation, which I find is not significant in all the circumstances.

[150] There is also a problem with causation, at least with respect to the July 6 Post which was up for the longest amount of time and contained one of the worst statements. It was created and posted by someone else, with the Instagram handle "@doonz___". There is no evidence as to how long the original post was up or if it still is. Ms. Hawkins received a request to repost it and she clicked yes. Many others may have also. There is no way to know whether republication, if any, is because of the original post or Foodbenders' reposting of the July 6 Post. As well, it has not been established that anyone who communicated with Mr. DeLuca and made threats did so because they saw the Defendants' repost, the original post, or someone else's reposting of the original post.

[151] Although I acknowledge that a damages assessment in defamation cases is fact specific, it is still useful to consider some of the cases presented to me by Mr. DeLuca.

[152] In *Soliman*, where Perell J. awarded a total of $500,000 for both general and aggravated damages, the defendant operated a YouTube channel where he uploaded videos and had a weekly "news" program. He linked his YouTube channel to his Twitter and Facebook account. He had an online following of 3,000 YouTube subscribers, 1,500 Twitter followers and 20,000 Facebook followers.

[153] Some of the defamatory statements in that case were broadcast on his weekly show on TAG TV, an Ontario-based online television and news network that can reach millions of viewers. TAG TV operated a YouTube channel with 184,000 subscribers as well as a Facebook account. There were multiple defamatory statements about the plaintiff on more than one of the defendant's weekly programs as well as on his Facebook account. After the libel notice, TAG TV removed the offending content but some of it was available for more than a year. Further, the defendant continued to broadcast defamatory statements on his own through video broadcasts from his parents' home after the libel notice.

[154] The case of *Paramount v. Kevin J. Johnson*, 2019 ONSC 2910, where over one million dollars in damages were awarded, similarly involved a defendant who owned and operated numerous YouTube channels, Twitter accounts, Facebook accounts and other platforms used to broadcast hate against Muslims. He published a series of eight videos posted widely on many websites where he made numerous defamatory statements about the individual plaintiff, such as him being a terrorist, linking him to jihadism and rape, and his restaurant being a front for a terrorist organization. The images of the plaintiff were altered to depict blood on his hands. After the libel notice there were more false and malicious statements placed on various online platforms and the defendants showed repeated disregard for the proceedings, including broadcasting numerous statements about that proceeding. The plaintiff was repeatedly confronted at public events by strangers commenting on the statements linking him and his restaurant to jihad, terrorism and rape.

[155] In *Sommer v. Goldi*, where general damages were assessed at $300,000 and aggravated at $100,000, there was a prolonged campaign of defamation that lasted six years designed to malign the plaintiff, a lawyer, in his chosen area of specialization. This drove him out of one of his chosen fields of work.

[156] The evidence here is simply not comparable or comprehensive, even if damages may be presumed.

[157] With respect to any mitigating circumstances, I can appreciate that Ms. Hawkins was under stress because of the vandalism of her restaurant and intense media attention which may have affected her judgment. If she had simply made a careless error by clicking "yes" when asked if she wanted to repost the July 6 Post which started this, all she had to do was make a statement on Foodbenders' Instagram immediately retracting that Post and/or apologizing. It has been three years during which she has had time to reflect and make amends. Instead, she came to trial and

attempted to establish the defence of justification, which amounts to republication: *Hill*, at para. 185; *Nazerali v. Mitchell*, 2016 BCSC 810, at para. 132, adopting the views of Brown.

[158] And then Ms. Hawkins testified that she stood by the Posts as well as her decision to share them. During her discovery when asked whether she had ever apologized to Mr. DeLuca she confirmed that she had not and that "at no point would [she]."

[159] Indeed, the only thing that Ms. Hawkins was sorry about was the impact that all of this has had on her. She said if she could go back in time she would not have posted it because of the consequences that it has brought to her life, but there was only so much she could offer in terms of a retraction from a moral standpoint because she would see a retraction as her denial of the Palestinian experience.

[160] All the Defendants had to do was immediately apologize and retract the Posts in accordance with Mr. DeLuca's July 7 demand letter; had they done so, they may never have been sued and even if they were, this decision would have been different. The Defendants have been in receipt of legal advice from their current counsel beginning August 2020 with respect to this matter. Therefore, the defendants would have understood the impact of their failure to apologize, as well as their pursuit of a justification defence at trial. Their choices have not been uninformed; they have been deliberate.

[161] As such I find there are no mitigating circumstances.

[162] I assess Mr. DeLuca's general and aggravated damages in all the circumstances to be $75,000. Although there were not many posts and they were up for only a limited time, the contents of the Posts were abhorrent, there was no apology, the impugned statements were republished right through trial, Mr. DeLuca was cross-examined at trial in an attempt to establish justification, and I accept that Mr. DeLuca's personal suffering was real. This award is primarily to address Mr. DeLuca's injured feelings and to provide consolation and public vindication, which are necessary because of the Defendants' failure to apologize and retract.

[163] There is also a basis to grant punitive damages.

[164] Punitive damages are not compensatory. Punitive damages are awarded when the defendant's misconduct is so oppressive and high handed that it offends the court's sense of decency: *Hill*, at para. 196.

[165] They are awarded so that the court can express its outrage and so as to deter a defendant and others from engaging in similar conduct. They should only be awarded when the combination of general and aggravated damages would not sufficiently "achieve the goal of punishment and deterrence": *Hill*, at para. 196.

[166] Here, the combination of general and aggravated damages would not adequately punish the Defendants or deter others.

[167] The Supreme Court has repeatedly recognized that the harm of hateful comments is "of a pressing and substantial concern*": Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 73. It leads to "grave psychological and social consequences… from the humiliation and degradation caused by hate propaganda" of the targets of the speech as well as other members of the targeted group: at para. 73. This kind of speech is at its core an attempt to marginalize and delegitimize people based on their membership in a group, which makes it is easier to justify discriminatory treatment: at paras. 71, 74.

[168] Despite the many cases referred to me involving allegations like the ones here, the Defendants in this case were not deterred. These kinds of statements not only affect people's reputations, but they also contribute to prejudice, antisemitism and intolerance and have the potential to incite violence.

[169] While the Defendants had the right to passionately and responsibly engage with political issues about which they were concerned, they had no right to target Mr. DeLuca personally by making these defamatory statements.

[170] An award of $10,000 is required to deter the Defendants and others from the kinds of irresponsible and defamatory posts made by the Defendants.

[171] Finally, I also grant a permanent injunction as requested.

[172] Ms. Hawkins did take the July 30 Posts down when instructed by her counsel. However, she also testified that a judgment could bankrupt her and stood by these Posts. I do see a real risk that she could do this again: *Paramount*, at para. 84; *Astley v. Verdun*, 2011 ONSC 3651, 106 O.R. (3d) 792, at para. 21; and *Barrick Gold Corp.*, at para. 78.

Conclusion

[173] In summary, I find that the Posts were defamatory and award general and aggravated damages in the amount of $75,000 and punitive damages in the amount of $10,000 on a joint and several basis against both Defendants. Although it was Foodbenders' Instagram account, Ms. Hawkins admitted that she was the only one who had access to this account. No issue was raised as to whether is personally liable.

[174] I encourage the parties to resolve costs. If they cannot, the plaintiff may make submissions no longer than ten pages by January 4, 2024 followed by the defendant on January 15, 2014 also no longer than ten pages.

PAPAGEORGIOU J.

Released: December 22, 2023

CITATION: DeLuca v. Foodbenders, 2023 ONSC 6465

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHAI DELUCA

Plaintiff

– and –

2404749 ONTARIO LIMITED operating as
FOODBENDERS and KIMBERLY HAWKINS

Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

Released: December 22, 2023