

FIRST, DO NO HARM: The Serious Harm Threshold in Defamation Cases Involving Physician-Review Websites

Nadine Mattini, University of Sydney, in her piece that won the second prize is CAMLA's Essay Competition, writes about defamation cases involving physician-review websites and the harm that a negative review can have on a physician's reputation in light of the serious harm threshold.

In the summer of 2004, Jeremy Stoppelman was sick. He had caught the flu, and was having difficulty locating a suitable physician for treatment. Unsatisfied and increasingly frustrated, Stoppelman began thinking about ways consumers could share recommendations for local services. A few short months later, Yelp was born.¹

Stoppelman was one of the first to recognise the power of electronic word-of-mouth – or e-WOM, as it has been called² – in the search for physicians. In the 17 years since its conception, Yelp has grown to become one of the most commonly used sources of reviews for physicians in Australia, alongside such websites as Google Reviews, RateMDs, Vitals, HealthGrades, RealSelf, and Whitecoat.³ The success of these websites, which can collectively be referred to as physician-review websites ('**PRWs**') suggests that online expression of opinion is experiencing a shift. This revolution in user-generated content has been given a name: Web 2.0.⁴ Web 2.0 represents a break from static and traditional forms of internet use. In Web 2.0, users are given the opportunity to share their opinions in a way that is both highly visible and highly impactful. By participating in this dynamic and continuous information exchange,⁵ users go from being passive receivers of information to the source of information themselves.

Despite its undoubted benefits, Web 2.0 poses new challenges for the tort of defamation. Specifically, the rise of PRW defamation claims in Australia, particularly in the Federal Court, has illuminated the preliminary difficulties that claimants face in their pursuit of a suitable respondent. The exact nature of these hurdles will depend on whether an applicant chooses to pursue the original author of a review or the PRW that hosted it: if the former; the applicant may need to navigate a range of preliminary discovery

technicalities; if the latter, the applicant will need to accept the costs and risks of litigating against a foreign entity. Recognising the expense and delay created by such hurdles, legislatures have sought to encourage the early resolution of disputes and prevent trivial claims from reaching the courts. In Australia, this has meant that applicants will now need to overcome an additional set of statutory hurdles before bringing a claim.

The *Model Defamation Amendment Provisions 2020* introduce two new threshold mechanisms by which early dispute resolution may be achieved.⁶ The first is that the applicant provide the respondent with a concerns notice that allows the publisher 28 days to make an offer of amends.⁷ This requirement, however, is presently being re-evaluated as part of the second stage of reforms, and falls beyond the scope of this article.⁸ The other requirement introduced by the *Model Defamation Amendment Provisions* is that the applicant demonstrate that the publication of defamatory matter has caused, or is likely to cause, serious harm to their reputation.⁹ Guided by existing UK jurisprudence, this article will present a forward-looking assessment of how this new requirement may operate in the Australian legal landscape with respect to PRW defamation claims. It concludes that the threshold is not unduly restrictive for aggrieved physicians, and that this position is consistent with the aims of defamation law.

I The Development and Interpretation of Serious Harm

The need to consider the relationship between the level of harm caused and the success of a claim is not a novel concept in defamation law. Alongside the recently-repealed statutory defence of triviality, Australian case

- 1 Laura Hutton, 'AIB Featured Business Leader – Jeremy Stoppelman' *AIB Blog* (Blog Post, 11 April 2017) < <https://www.aib.edu.au/blog/business-leaders/featured-business-leader-jeremy-stoppelman/>>; Angus Loten, 'Search for Doctor Leads to Yelp', *Wall Street Journal* (online, 14 November 2012) < <https://www.wsj.com/articles/SB10001424127887324595904578117512589717352>>.
- 2 Thorsten Henning-Thurau et al, 'Electronic Word-of-Mouth via Consumer-Opinion Platforms: What Motivates Consumers to Articulate Themselves on the Internet?' (2004) 18(1) *Journal of Interactive Marketing* 38. For an overview of existing definitions of eWOM, see Elvira Ismagilova et al, 'Electronic Word-of-Mouth (eWOM)' in Elvira Ismagilova et al (eds) *Electronic Word of Mouth (eWOM) in the Marketing Context: A State of the Art Analysis and Future Directions* (Springer International Publishing, 2017) 17.
- 3 Heather J Furnas et al, 'Patient Reviews: Yelp, Google, Healthgrades, Vitals, and RealSelf' (2020) 146(6) *Plastic and Reconstructive Surgery* 1419.
- 4 Tim O'Reilly and John Battelle, 'Opening Welcome' (Speech, State of the Internet Industry Forum, 5 October 2004).
- 5 Jiyao Xun and Jonathan Reynolds, 'Applying Netnography to Market Research: The Case of the Online Forum', (2010) 18(1) *Journal of Targeting, Measurement and Analysis for Marketing* 17, 21.
- 6 Explanatory Note, Defamation Amendment Bill 2020 (NSW) 4, 5.
- 7 Australasian Parliamentary Counsel's Committee, *Consolidated Model Defamation Amendment Provisions 2020* (27 July 2020) ('*Model Defamation Amendment Provisions 2020*') < https://pcc.gov.au/uniform/2020/Consolidated_Model_Defamation_Provisions.pdf>.
- 8 The current concerns notice and offer to amends process were designed with traditional publishers in mind. The Council of Attorneys General is currently evaluating whether and how these procedures could be amended to apply to internet intermediaries: Council of Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (Discussion Paper, March 2021) ('*MDP Stage 2 Review*') 45, 64–72.
- 9 *Model Defamation Amendment Provisions 2020* (n 7) s 10A. Additional limitations are imposed on defamation claims made by excluded corporations: at sub-s (2); s

law has flirted with the notion of a minimum threshold of seriousness and principle of proportionality.¹⁰ Moreover, Australian courts benefit from UK jurisprudence concerning the interpretation of its own serious harm requirement.¹¹ A brief distillation of the themes that have emerged from these decisions allows us to anticipate what Australian courts are likely to consider when assessing serious harm.¹²

Two of the most important common law developments in the area of trivial defamation claims are the cases of *Jameel v Dow Jones & Co Inc* ('*Jameel*')¹³ and *Thornton v Telegraph*.¹⁴ While space constraints prevent a detailed consideration of these cases,¹⁵ it is from their 'twin-track approach' that *Defamation Act 2013* (UK) s 1(1) evolved.¹⁶ Both cases represent independent mechanisms by which trivial claims can be eliminated from the courts: following *Jameel*, pointless claims that would be a disproportionate drain on judicial resources may be dismissed as an abuse of process;¹⁷ following *Thornton*, claims that fail to meet a minimum threshold of seriousness will not be considered defamatory.¹⁸ While the serious harm requirement 'builds on' *Thornton* and *Jameel*, it should be emphasised that s 1(1) significantly raises the bar for bringing a claim.¹⁹

One of the most significant changes effected by s 1(1) *Defamation Act 2013* (UK) relates to its interaction with common law. At common law, defamation has long been actionable *per se*.²⁰ This raises questions about whether statute now abrogates, by necessary implication, the presumption of damage.²¹ Following a period of inconsistency in the law, the UK Supreme Court resolved this issue in *Lachaux v Independent Print Limited* (*Lachaux*).²² Unanimously rejecting the Court of Appeal's prior finding that serious harm could be established merely

on the words' inherent tendency,²³ the Court returned to the interpretation favoured by Warby J at first instance: that claimants must demonstrate, on the balance of probabilities, the *actual or likely* impact of publication.²⁴ This is to be determined by reference to a combination of the inherent tendency of the words and actual evidence about their impact.²⁵

Consequently, *Lachaux* confirms that s 1(1) is to be read as intending a factual investigation of the circumstances surrounding publication.²⁶ No longer is the court confined, as it was in *Thornton*, to the objective seriousness of the words: a wide range of contextual matters, ranging from the credibility of the publisher²⁷ to the breadth of publication,²⁸ may now be considered as part of the court's assessment of serious harm.²⁹ In the likely event that Australian courts will take guidance from UK jurisprudence on this point,³⁰ we can expect to see courts engaging in thorough circumstantial investigation as part of their assessment.

II Proving serious harm in PRW defamation cases

Given the forensic demands created by the new threshold, it has been suggested that it may be difficult for single private individuals to establish that they have suffered serious harm to reputation.³¹ However, PRW defamation cases have unique features that may increase a court's willingness to find the threshold satisfied, at least in the case of competent and honest physicians.

A Nature and meaning of reviews

Web 2.0 has transformed not only the way that people communicate, but the language they use to do so. As was put by one judge, online communication no longer has 'the formality and the careful consideration that was once

9(1). However, considering the trend that doctors sue individually rather than on behalf of their clinical practice, this section will not be addressed.

10 See generally Kim Gould, 'Locating a Threshold of Seriousness in the Australian Tests of Defamation' (2017) 39(3) *Sydney Law Review* 333; David Rolph, 'Triviality, Proportionality and the Minimum Threshold of Seriousness in Defamation Law' (2019) 23(3) *Media and Arts Law Review* 280.

11 *Defamation Act 2013* (UK) s 1(1).

12 For a detailed consideration of the historical development of the serious harm requirement in the UK, see Phoebe J Galbally, 'A "Serious" Response To Trivial Defamation Claims: An Examination of s 1(1) of the *Defamation Act 2013* (UK) From An Australian Perspective' (2015) 20(3) *Media and Arts Law Review* 213; Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) *Modern Law Review* 87.

13 [2005] QB 946 ('*Jameel*').

14 [2010] EWHC 1414 (QB) ('*Thornton*').

15 See n 12.

16 *Lachaux v Independent Print Ltd* [2016] QB 402, [50] (Warby J).

17 *Jameel* (n 13).

18 *Thornton* (n 14).

19 Explanatory Notes, *Defamation Act 2013* (UK) [11].

20 *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 150 (Windeyer J); *Bristow v Adams* [2012] NSWCA 166.

21 David Rolph, 'A Critique of the Defamation Act 2013: Lessons for and from Australian Defamation Law Reform' 2016 21(4) *Communications Law* 116, 119.

22 [2019] UKSC 27 ('*Lachaux*').

23 *Ibid* [14]–[17] (Lord Sumption for the Court). See also *Thornton* (n 14) [95].

24 *Lachaux* (n 22) [20] (Lord Sumption for the Court); *Lachaux v Independent Print Ltd* [2016] QB 402, [45]–[47] (Warby J).

25 *Lachaux* (n 22) [12], [14] (Lord Sumption for the Court). However, proof will not be required in circumstances where the words are so obviously serious that harm can be inferred: *Cooke & Anor v MGN Ltd & Anor* [2014] EWHC 2831 (QB) [43] (Bean J).

26 See also *Cooke & Anor v MGN Ltd* (n 279); *Theedom v Nourish Training* [2015] EWHC 3769 (QB) [28] (Moloney J).

27 See, eg, *Monroe v Hopkins* [2017] EWHC 433 (QB), [71] (Warby J).

28 See, eg, *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409, 3428–3429 [70] (Warby J); *Lachaux v Independent Print Ltd* [2016] QB 402, [139] (Warby J).

29 For an empirical analysis of the themes discussed in UK serious harm cases, see Charlie Sewell, 'More Serious Harm than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in Section 1(1) of the Defamation Act 2013' (2020) 12(1) *Journal of Media Law* 47.

30 As Gould notes, English decisions may not be binding, but may remain persuasive: Kim Gould, 'Locating a Threshold of Seriousness in the Australian Tests of Defamation' (n 10) 335.

31 David Rolph quoted in Josh Taylor, 'Negative Criticism: Can the Surge in Google Review Defamation Cases be Stopped?', *The Guardian* (online, 25 July 2021) <<https://www.theguardian.com/law/2021/jul/25/negative-criticism-can-the-surge-in-google-review-defamation-cases-be-stopped>>.

thought to mark the difference between the written and the spoken word'.³² Instead, it has gained notoriety for being 'uninhibited, casual and ill-thought out'.³³ These characteristics increase the potential for trivial defamatory content that falls short of the serious harm threshold.

This risk presents itself clearly in the case of PRWs. Empirical research has shown that online physician reviews have an alarming tendency to focus on clinical practice issues such as wait time, interactions with staff, billing, the quality of the practice environment, and even parking availability.³⁴ But even where such reviews disproportionately affect a physician's aggregate score, they are likely to be subsumed under the general umbrella of 'matter not to be taken seriously'.³⁵ Physician applicants appear to understand this. Indeed the PRW defamation cases that have come before the courts in recent years have not been concerned with the trivial remarks of a few disgruntled patients, but reviews of a more malicious variety. The adverse imputations raised by these reviews range from the critical to the downright ludicrous: otherwise capable and reputable doctors have been attacked for their incompetent,³⁶ unprofessional³⁷ and negligent³⁸ service; labelled 'butchers'³⁹ who perform 'botched' or 'bad' surgery;⁴⁰ accused of engaging in

'unethical',⁴¹ 'inhumane'⁴² or 'illegal'⁴³ behaviour; cast as 'fraudsters',⁴⁴ 'stealers',⁴⁵ 'cheaters',⁴⁶ 'bullies'⁴⁷ and 'compulsive liars',⁴⁸ and, most extreme of all, accused of mutilation⁴⁹ or named 'the devil himself'.⁵⁰ One can appreciate how even one of these imputations could cause serious harm to a doctor's reputation, let alone reviews which carry multiple imputations.⁵¹

For this reason, even PRW reviews using amaterurish or hyperbolic language have been found to be highly serious. In *Dean v Puleio*, Clayton J observed that the 'rambling and at times incoherent' content of the reviews that had been left about a periodontist made it unlikely that many people would take them seriously.⁵² However, her Honour went on to acknowledge that to some readers – particularly those who have had unpleasant experiences with medical professionals – the 'unreasonableness' of such reviews would not affect the extent to which they are given credence.⁵³ Such readers would, upon reading such allegations contained within, prefer to 'steer clear' of any doctor with such a review.⁵⁴ The decision demonstrates that while the linguistic style of a review is a relevant consideration, it will not always defeat a review's believability.

32 *Prefumo v Bradley* [2011] WASC 251, [43] (Corboy J), cited in *Rana v Google Australia Pty Ltd* [2013] FCA 60, [78] (Mansfield J).

33 *Smith v ADVFN Plc* [2008] EWHC 1797 (QB), [13]–[14] (Eady J).

34 See, eg, Chester J Donnelly, 'How Social Media, Training, and Demographics Influence Online Reviews Across Three Leading Review Websites for Spine Surgeons' (2018) 18(11) *Spine Journal* 2081; Jesse E Bible et al, 'Are Low Patient Satisfaction Scores Always Due to the Provider? Determinants of Patient Satisfaction Scores During Spine Clinic Visits' (2017) 43(1) *Spine Surgery* 58, 61; Fabia Rothenfluh and Peter J Schulz, 'Content, Quality, and Assessment Tools of Physician-Rating Websites in 12 Countries: Quantitative Analysis' (2018) 20(6) *Journal of Medical Internet Research* e212: 1–14, 7; Martin Emmert et al, 'What Do Patients Say About Their Physicians? An Analysis of 3000 Narrative Comments Posted on a German Physician Rating Website' (2014) 118(1) *Health Policy* 66; Andrea Lopez et al, 'What Patients Say About Their Doctors Online: a Qualitative Content Analysis' (2012) 27(6) *Journal of General Internal Medicine* 685; Guodong Gordon Gao et al, 'A Changing Landscape of Physician Quality Reporting: Analysis of Patients' Online Ratings of Their Physicians Over a 5-Year Period' (2012) 14(1) *Journal of Medical Internet Research* 38.

35 See Kim Gould, 'The Statutory Triviality Defence and the Challenge of Discouraging Trivial Defamation Claims on Facebook' 2014 19(2) *Media and Arts Law Review* 113, 121, citing *Clift v Clarke* [2011] EWHC 1164 (QB), [32] (Sharp J); *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB), [17] (Parkes DJ); *Smith v ADVFN Plc* [2008] EWHC 1797 (QB), [17] (Eady J).

36 *Nettle v Cruse* [2021] FCA 935, [34] (Wigney J); *Tavakoli v Imisides (No 4)* [2019] NSWSC 717, [3] (Rothman J); *Kabbabe v Google LLC* [2020] FCA 126, [15] (Murphy J); *Yuanjun Holdings Pty Ltd and Ors v Min Luo (Civil)* [2018] VMC 7, [53] (Magistrate Ginnane) ('*Yuanjun Holdings v Min Luo*'); *Callan v Chawk* [2021] FCA 1182, [21] (Halley J); *KT v Google LLC* [2019] NSWSC 1015 (Fagan J).

37 *Dean v Puleio* [2021] VCCA 848, [10] (Clayton J), *Yuanjun Holdings v Min Luo* (n 36) [12]–[13] (Magistrate Ginnane).

38 *Yuanjun Holdings v Min Luo* (n 36) [12]–[13] (Magistrate Ginnane).

39 See Jaime McKinnel, 'Doctor Sues Google Over Negative Reviews, But Tech Giant Claims It Is 'Subordinate Distributor'', *ABC News* (online, 17 September 2019) <<https://www.abc.net.au/news/2019-09-16/google-defamation-case-sydney-doctor-sues/11516182>> (discussing the statement of claim in *KT v Google* (n 36)); Leo Shanahan, 'Doctor Sues Over Google Reviews', *The Australian* (online, 3 November 2019) <<https://www.theaustralian.com.au/business/media/doctor-sues-over-google-reviews/news-story/737ead4ffb503378b8485f5756bf21e0>> (discussing the statement of claim in *Kalus v Google LLC* (Federal Court of Australia, NSD1724/2019, commenced 17 October 2019)). See also *Al Muderis v Duncan* (No 3) [2017] NSWSC 726, [5] (Rothman J) ('*Al Muderis v Duncan*') (concerning defamatory statements made on a website rather than in a review).

40 *Callan v Chawk* (n 36) [21] (Halley J), *Nettle v Cruse* (n 36) [32].

41 *Dean v Puleio* (n 37) [18] (Clayton J), *Nettle v Cruse* (n 36) [20], [26], [38] (Wigney J).

42 *Nettle v Cruse* (n 36) [32] (Wigney J).

43 *Ibid* [26], [40] (Wigney J); see n 39.

44 *Nettle v Cruse* (n 36) [38], [40]; see n 39.

45 See n 39.

46 *Nettle v Cruse* (n 36) [38] (Wigney J).

47 *Dean v Puleio* (n 37) [10] (Clayton J). See *Al Muderis v Duncan* (n 293) [6] (Rothman J).

48 *Nettle v Cruse* (n 36) [26], [32] (Wigney J).

49 *Al Muderis v Duncan* (n 39) [11] (Rothman J).

50 *Nettle v Cruse* (n 36) [32] (Wigney J).

51 Indeed the trend that emerges from the case law is that when reviewers write with malicious intent, they tend to adopt a 'no holds barred' approach, with some reviews carrying over nine imputations from the same matter: see *Dean v Puleio* (n 37) [18] (Clayton J); *Nettle v Cruse* (n 36) [34] (Wigney J).

52 *Dean v Puleio* (n 37) [26] (Clayton J).

53 *Ibid*.

54 *Ibid*.

B Actual impact of reviews

As established earlier, that the words of a review carry an ‘inherent tendency’ to cause harm will be insufficient, in and of itself, to meet the serious harm threshold.⁵⁵ The applicant will also need to establish on the balance of probabilities that those words have caused, or will cause, reputational harm.⁵⁶ Corinna Coors has argued that this new threshold will in principle ‘allow negative reviews to be swamped by positive reviews if they are sufficient to eradicate or at least minimise any unfavourable impression created by the original review’.⁵⁷ For reasons that shall become apparent, positive reviews are unlikely to have this effect.

Research suggests that negative reviews, however few, have a greater impact than many positive reviews.⁵⁸ The impact of this so-called negativity bias in the context of PRWs is apparent, with studies showing that of patients who have used reviews to choose a physician, between 37%⁵⁹ and 52%⁶⁰ report that negative reviews have led them to seek care elsewhere. This is corroborated by the facts of recent cases. In the case of *Nettle v Cruse*, for example, evidence indicated that prior to the impugned publications the online reviews of Dr Nettle were overwhelmingly positive: he had a 5-star Google review rating.⁶¹ Notwithstanding the ‘exceptional’ online reputation the Bondi surgeon had built,⁶² one of Dr Nettle’s patients testified that upon reading the reviews, she ‘started to have doubts and think twice about continuing to see Dr Nettle’, and that ‘she felt she could no longer trust [him]’.⁶³ As the Court itself recognised, it is reasonable to infer that other patients – existing or prospective – would have had a similar reaction to such reviews.⁶⁴ Dr Nettle himself also testified that that his workload declined significantly following the publication of the defamatory reviews.⁶⁵

Applicants in comparable cases have raised similar examples of actual harm. In *Dean v Puleio*, evidence was given of the distinct downturn in average weekly page views of the applicant’s website and in new-patient referrals.⁶⁶ Data review in *Tavakoli v Imisides* revealed that the rate of visitors to the applicant’s website had dropped by nearly a quarter in less than one week after the review had been posted. In *Yuanjun Holdings v Min Luo*, the applicant observed that ‘all of a sudden the phone stopped ringing’.⁶⁷ These are highly significant pieces of evidence. Recent systematic review indicates that more than half of physicians listed on PRWs have no ratings or reviews at all, and that even where physicians were rated, most had only one to three reviews.⁶⁸ This skewing effect therefore not only limits the credibility of PRWs, but can have a disproportionate impact: given the low prevalence of ratings, a single unfavorable rating can decrease a physician’s average score and ‘make an otherwise high-performing physician appear mediocre’.⁶⁹ Considering that so many physicians now rely on the internet to attract patients,⁷⁰ the harm caused will often be significant and immediate.

In order to understand why a single disparaging review can have such a dramatic effect, regard must be had to the special quality of a physician’s reputation. In *Crampton v Nugawela*, it was observed that ‘in some cases, a person’s reputation is, in a relevant sense, his whole life’.⁷¹ The reputation of doctors can be said to be of this character: as was put plainly by the Court in both *Tavakoli and Imisides*⁷² and *Nettle v Cruse*,⁷³ their ‘whole life depends upon [their] honesty and [their] competence’. Reviews that cast aspersions over a doctor’s integrity or judgment therefore go to the very heart of their life’s work.⁷⁴

55 *Lachaux* (n 22) [14], [16] (Lord Sumption for the Court).

56 Gould, ‘Locating a Threshold of Seriousness in the Australian Tests of Defamation’ (n 10) 344, citing *Lachaux* [2016] QB 402, 419–20, 424.

57 Corinna Coors, ‘Opinion or defamation? Limits of free speech in online customer reviews in the digital era’ (2015) 20(3) *Communications Law* 72, 73.

58 Krishn Khanna and Mohammad Diab, ‘Physician Ratings: Determinants, Accuracy, and Impact’ (2021) 103(7) *Journal of Bone and Joint Surgery* e27, e27(4); Siyue Li and Austin Hubner, ‘The Impact of Web-Based Ratings on Patient Choice of a Primary Care Physician Versus a Specialist: Randomized Controlled Experiment’ (2019) 21(6) *Journal of Medical Internet Research* e11888: 1–12, 9; Nima Kordzadeh, ‘Investigating Bias in the Online Physician Reviews Published on Healthcare Organizations’ Websites’ (2019) (118) *Decision Support Systems* 70, 79. For the effect of negativity bias in the context of review sites generally, see Dezhi Yin, Sabyasachi Mitra and Han Zhang, ‘When Do Consumers Value Positive vs. Negative Reviews? An Empirical Investigation of Confirmation Bias in Online Word of Mouth’ (2016) 27(1) *Information Systems Research* 131.

59 David A Hanauer, ‘Public Awareness, Perception, and Use of Online Physician Rating Sites’ (2014) 311(7) *Journal of the American Medical Association* 734.

60 Martin Emmert et al, ‘Physician Choice-Making and Characteristics Associated with Using Physician-Rating websites: Cross-Sectional Study’ (2013) 15(8) *Journal of Medical Internet Research* e187.

61 *Nettle v Cruse* (n 36) [49] (Wigney J).

62 *Ibid.*

63 *Ibid* [50].

64 *Ibid.* See also *Dean v Puleio* (n 37), in which another physician gave evidence that reviews ‘would most certainly have had an impact on the referral base of dentists and any potential clients’: at [22] (Clayton J).

65 *Nettle v Cruse* (n 36) [53] (Wigney J).

66 *Dean v Puleio* (n 37) [27] (Clayton J).

67 *Yuanjun Holdings v Min Luo* (n 36) [26], [86]–[87] (Magistrate Ginnane).

68 Pavankumar Mulgund et al, ‘Data Quality Issues With Physician-Rating Websites: Systematic Review’ (2020) 22(9) *Journal of Medical Internet Research* e15916: 1–12, 6, citing Haijing Hao et al, ‘A Tale of Two Countries: International Comparison of Online Doctor Reviews between China and the United States’ (2017) (1) *International Journal of Medical Informatics* 37.

69 Chandu Ellimoottil, ‘Online Physician Reviews: The Good, the Bad, and the Ugly’ (2013) 98(9) *Bulletin of the American College of Surgeons* 34, 36; Samir K Trehan and Aaron Daluiski, ‘Online Patient Ratings: Why They Matter and What They Mean’ 2016 41(2) *Journal of Hand Surgery* 316.

70 See judicial comments made in *Kabbabe* (n 36) [1] (Murphy J) and *Dean v Puleio* (n 37) [22] (Clayton J).

71 [1996] NSWSC 651 (Mahoney ACJ).

72 *Tavakoli v Imisides* (No 4) (n 36) [62];

73 *Nettle v Cruse* (n 36) [54] (Wigney J).

74 *Ibid* [54]; *Tavakoli v Imisides* (No 4) (n 36) [77] (Rothman J). See also Sean D Lee, ‘“I Hate My Doctor”: Reputation, Defamation, and Physician-Review Websites’ (2013) 23(2) *Health Matrix* 573.

Australian PRW defamation cases that have progressed to full trial show sensitivity to this idea. In such cases, Courts have acknowledged that prior to the disparaging reviews, the physicians in question had been held in high regard.⁷⁵ Nowhere in these cases has it been suggested that having an illustrious reputation somehow negates the damage caused by negative reviews. To the contrary: courts have been very sympathetic to the plight of doctors who have worked for many years to establish a good standing in their professional circles and among patients.⁷⁶ Courts may therefore be quite prepared to find that a defamatory review results in demonstrable harm even where a physician typically enjoys a robust reputation.⁷⁷

However Australian courts go on to interpret the new serious harm requirement, the requirement that serious harm be dealt with as a threshold issue is a serious development in the law.⁷⁸ Certainly, it increases delays at the beginning of the trial and exposes the applicant to costs that may well be 'wholly disproportionate to the value of obtaining an answer'.⁷⁹ But ultimately, this 'frontloading'⁸⁰ is not likely to be an unduly cumbersome hurdle for claimants in PRW defamation claims. The law remains fundamentally plaintiff-friendly. Moreover, this position can be justified.

Competent physicians deserve protection from untrue slurs. With an increasing number of cases involving online reviews and physicians coming before the Federal Court, we are already seeing the legal consequences of the new and complex dynamic that PRWs represent. Less visible but even more insidious are the psychological consequences of unfair PRW usage: physicians are practicing more defensively⁸¹ and reporting higher job stress,⁸² behaviours which could jeopardise patient safety, increase physician turnover, and create other challenges to the delivery of high-quality care.⁸³

Given these unfair impacts, it can hardly be surprising that physicians are fighting back. Just as patients are moving away from paternalistic models of care, so too are physicians moving away from the historical reluctance to take legal action against their patients.⁸⁴ While this may appear to some to disturb foundational principles of beneficence and nonmaleficence,⁸⁵ the reality is that physicians cannot opt out of the internet. If patients – or competitors posing as patients – cannot be trusted to leave fair and honest reviews, defamation law will provide an absolutely essential mechanism by which physicians can safeguard their professional reputations. Without its protections, physicians may be left without a remedy in circumstances where a remedy is vital.

⁷⁵ See, eg, *Tavakoli v Imisides (No 4)* (n 36) [75] (Rothman J); *Nettle v Cruse* (n 36) [48] (Wigney J); *Dean v Puleio* (n 37) [23]–[26] (Clayton J).

⁷⁶ *Dean v Puleio* (n 37) [21]–[25] (Clayton J); *Nettle v Cruse* (n 36) [47]–[48] (Wigney J); *Tavakoli v Imisides (No 4)* (n 36) [75] (Rothman J). See also *Al Muderis v Duncan* (n 39) [44]–[64] (Rothman J).

⁷⁷ Cf Coors (n 57).

⁷⁸ Rolph, 'Triviality, Proportionality and the Minimum Threshold of Seriousness in Defamation Law' (n 10) 301.

⁷⁹ Evidence to Joint Committee on the Draft Defamation Bill, House of Lords Paper No 203, House of Commons Paper No 930–III (2011) vol III, 175 [6], 176 [10]–[11] (Mark Warby QC), quoted in James O'Hara, 'Defamation: Serious Harm and Contextual Truth' (2021) 95(5) *Australian Law Journal* 348, 366.

⁸⁰ Galbally (n 12) 223, citing Ministry of Justice, 'Draft Defamation Bill: Summary of Responses to Consultation' (Consultation Paper CP3/11, 24 November 2011).

⁸¹ Incorrectly incentivised by the promise of positive reviews or even better remuneration, PRWs may encourage what has been described as 'defensive medicine': the practice of ordering needless tests or treatments in order to maximise patient satisfaction: James E Sabin, 'Physician-Rating Websites' (2013) 15(11) *Virtual Mentor* 932, 935, cited in Trehan, Samir K and Aaron Daluiski, 'Online Patient Ratings: Why They Matter and What They Mean' 2016 41(2) *Journal of Hand Surgery* 316, 318.

⁸² Alison M Holliday et al, 'Physician and Patient Views on Public Physician Rating Websites: A Cross-Sectional Study' (2017) 32(6) *Journal of General Internal Medicine* 626, 630/

⁸³ Ibid citing Colin P West, 'Physician Well-Being: Expanding the Triple Aim' (2016) 31(5) *Journal of General Internal Medicine* 458.

⁸⁴ Ian Freckleton and Tina Popa, 'Doctors, Defamation and Damages' (2019) 27(1) *Journal of Law and Medicine* 20.

⁸⁵ Ian Freckleton, 'Vindication of Professional Reputation Arising from Defamatory Online Publications' (2020) 11(1) *Beijing Law Review* 382, 385.