

CAUT LEGAL ADVISORY

Ratemyprofessor.ca: What can be done?

April 2006



**Canadian Association of University Teachers
Association canadienne des professeurs
et professeurs d'université**

**2675 promenade Queensview Drive
Ottawa, Ontario
K2B 8K2**

**☎ 613.820.2270
📠 613.820.7244
💻 www.caut.ca**

Ratemyprofessor.ca: What can be done?

The comments below are not intended to be legal advice for any individual who is contemplating action of any kind against ratemyprofessor.ca or those who are or may be legally responsible for the site. Rather the purpose of these comments is to highlight some of the issues that arise from the publications on ratemyprofessor.ca.

Introduction

The site ratemyprofessor.com is a well-known website on the internet that allows anyone anonymously to rate professors at American colleges and post comments in that regard. The site is linked to the Canadian version at ratemyprofessor.ca. The Canadian site has all the same information as the American site, such as FAQs under the “Help” section, and the only difference is its listing of Canadian universities.

The comments are a mixed assortment that vary from positive to negative. Many Canadian academics have expressed their anger about the existence of some potentially defamatory comments. There is also the concern about abuse of the system, namely that anyone can pose as a student and post anything they want about a Canadian professor.

Are the Comments Defamatory?

Defamatory statements are those statements that are false or derogatory to the extent that they discredit a person, impugn that person’s honesty or integrity, or generally lower others’ estimation of them, or expose that person to hatred, contempt or ridicule.

Under the FAQs, the website’s host has attached two flyers that anyone can print and disseminate on campus. One of the flyers states:

“... Don’t get slammed taking an incompetent teacher ever again.” ...

“ See other students’ funny and harsh comments”

Despite the guidelines prohibiting offensive material and the host’s assertions that it will not publish defamatory material, the aforementioned reference to “funny and harsh comments” does include potentially defamatory statements. Under the “Funniest Ratings” section, comments such as “space cadet of a teacher, isn’t quite attached to earth” and “miserable professor” would arguably discredit the teaching reputation of the professor in question. A

random survey of some other ratings, while yielding some very good comments, also reveals such statements as “worst prof ever” and “mean and miserable prof.”

While some of the comments are likely harmful to the reputations of some professors, there are some available defences against action for defamation.

The defence of **justification** simply requires establishing that the defamatory expression is true. Thus, the single statement “he doesn’t care about his students” would require the defendant to prove that the statement itself is true on a balance of probabilities. While this may be a very difficult task for the defendant, it sometimes leads to an embarrassing experience for the plaintiff in the process.

The defence of **fair comment** is premised on one’s fundamental right to express one’s opinion. In order to rely on this defence, the defamatory expression must be made honestly and fairly, without malice, on true facts expressed or implied in the defamatory expression and on a matter of public interest. The true facts must either be stated or be notorious.

In the case of comments where there are no expressly stated underlying facts to support the opinion, it would be difficult for the host to argue that the comments are based on true underlying facts; such facts are not generally known to the broad audience of recipients who are not familiar with the professor in question.

Therefore, in order to succeed on the defence of fair comment, the posting must expressly state the facts (which must be true) upon which the comment is based. For example, it will be very difficult for the publisher to prove truth of the statement “he doesn’t care about his students”. However, if the posting states “he is routinely 20 minutes late for his classes and he doesn’t care about his students,” the defence of fair comment may be available so long as the publisher can prove that the professor is routinely 20 minutes late for his classes.

The theory is that by publishing the substratum of the comment (i.e. the factual basis for the comment) the reader can him or herself decide whether the comment is justified. In democratic jurisdictions where free speech is valued the courts will generally accept the defence of fair comment where the true facts are merely capable of supporting the comment.

Qualified privilege is a less applicable defence as it requires the defendant to have a legal, moral or social duty to communicate the defamatory expression to persons who have a corresponding duty or interest in that communication. Courts have generally held that publications to the general public cannot raise the defence of qualified privilege at common law because “publication to the world” is overly broad. In this case, the recipients of the postings are not necessarily students interested in screening their professors – given the nature of the internet and the accessibility of this particular site, these postings are freely available to anyone, anywhere, and thus, the corresponding duty or interest by the recipients to receive the communication is tenuous.

It is worthwhile to note that malice will destroy a defence of qualified privilege or fair comment. But, to prove malice, a person must prove on a balance of probabilities that the writer or publisher published the words for an ulterior motive that was designed to harm the plaintiff. Malice is often difficult to prove and will require a substantial factual basis.

Who is Responsible for the Publication?

The responsible parties appear to be based in the United States. According to our information the website began in 1999, by John Swapceinski of California's Silicone Valley. There is a contact address in Towson, Maryland for advertising purposes. The server is traced to Atlanta, Georgia. The website's host, in its FAQs, cites an American decision, *Zeran v. America Online*¹ that allegedly immunizes it from liability for the site's contents. In that case, the U.S. Court of Appeals, Fourth Circuit, applied federal legislation that protects "interactive computer service providers and users" from comments made by others, in order to immunize AOL for liability for defamatory statements posted on an AOL bulletin board by an unknown AOL subscriber.² Interactive computer service in the U.S. Federal Code is defined as:

*"Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."*³

There is no such similar legislation in Canada and in one case, *Carter v. B.C. Federation of Foster Parents Assn.*⁴, the defendant, the host of an internet chat room set up to provide foster parents with an opportunity to discuss foster parenting issues, was found open to liability for the posting of an allegedly defamatory statement in its chat room.

There are also many distinguishing factors from the cited *Zeran* case. The host of ratemyprofessor.ca may not be an "interactive service provider", as it does not appear to provide or enable internet access. It is an *active* host, given its encouragement and promotion and editing of the website, which distinguishes it from an internet service provider or the passive host of a bulletin or chat room, in the manner of Rogers Cable or AOL.

Furthermore, it is certainly arguable that the host of ratemyprofessor.ca is not an "interactive computer service provider" given the high degree of control and knowledge of the defamation that the host has, which can be likened to that of an editor of a newspaper. In the FAQs, the host brags about its immunity due to the *Zeran* decision and submits that any editing of

¹ 129 F 3d 327, 330 (4th Circuit 1997); U.S. Supreme Court, Cert. Pet. 97-1488 denied.

² 47 U.S.C. 230 (c)(1): No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

³ 47 U.S.C. 230 (f)(2)

⁴ [2005] B.C.J. (No. 1720) (C.A.).

comments falls within its statutory right as an interactive service provider to restrict access or availability of objectionable material.⁵ However, not only is the host arguably not an interactive service provider, there is a lot more editing being done than simply removing potentially defamatory material. For instance, there is the conscious decision to create a section entitled the “Funniest Ratings” – as discussed above, many of the comments may be found to be defamatory.

Jurisdictional Issues

Jurisdiction was recently discussed in the Ontario Court of Appeal decision of *Bangoura v. Washington Post*.⁶ The appellant tried to bring an action against the *Washington Post* in Toronto, as that was his place of residency at the time the action was commenced, more than six years after the publication of the articles. The Appeal Court overturned the motions judge’s decision to deny the defendant’s motion to stay the within action on the basis of improper jurisdiction. The connection to Ontario was considered minimal, no damages were suffered in Ontario and there was no significant connection between the *Post* and Ontario. Only seven copies of the impugned articles were delivered to Ontario and only one person, counsel for the plaintiff, had accessed the online archival copy.

In contrast, there likely is a relatively good case to meet the test for a “real and substantial” connection to the province of residency of an individual professor that chooses to initiate a lawsuit. The factors supporting a real and substantial connection to Canada is the location of the plaintiff(s) and the fact that even though the site is available on the world wide web, it is geared towards and presumably mainly accessed by students, professors and other interested parties in Canada. Obviously any professor contemplating such action should obtain independent legal advice on this issue.

The benefits of initiating a suit in Canada would be lower legal costs, easier enforcement and the absence of any statutory provisions immunizing liability. However, it is not guaranteed that a Canadian court will assume jurisdiction. Finally, the issue of remedy and enforcement must be kept in mind – a Canadian court will be even more reluctant than usual to issue an injunction against an American website host and/or internet server to remove portions of or shut down a website.

⁵ 47 U.S.C. 230 (c)(2): No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

⁶ [2005] O.J. No. 3849; leave to the Supreme Court dismissed on February 16, 2006 [2005] S.C.C.A. No. 497 (S.C.C.).

Practical Implications of Action and Recommendations

Damages in defamation suits are typically not very high and vary from case to case. Furthermore, the costs of a lawsuit may be disproportionately high compared to any available award.

In terms of the availability of a court ordered injunction, one must note that the courts are reluctant to order an interlocutory or permanent injunction but for the most exceptional cases. This reluctance is exacerbated by the jurisdictional issues of the internet.

Although an academic staff association, the CAUT, or an individual professor could consider writing a letter to the website's host, the effectiveness of this tactic is fairly weak. The website has bourgeoned from its grassroots and is unlikely to go away – a professor at the University of Waterloo has written that the site has grown exponentially from 11,000 ratings for 3,500 professors in 2001, to two million ratings for 400,000 professors in mid-2004.⁷ Westhues also notes that the website's founder states that the website is threatened with a lawsuit by a professor at least once a week. Nevertheless, this is a mechanism for complaining about one's treatment on the website of which a professor may wish to avail him/herself.

Therefore, from a practical standpoint, requesting the removal of some of the website's comments and threatening or initiating a lawsuit will unlikely deter the website's host from its' actions. If anything, it might generate unwanted attention to the academic staff association, CAUT, or a specific professor who voices protest. Legal action may invoke the ire of students who value not only the entertainment aspect but the free speech right inherent to this forum. The website's host seems unfazed and rather proud of the controversial nature of the site, and therefore, any actions employed to take on the website may do more harm than good.

It should also be noted that the cost of retaining counsel and proceeding with legal action is both very expensive and time-consuming, not to mention the emotional toll that inevitably ensues. In addition, if one brings an action and is not successful there is always the possibility of being ordered to pay the other side's costs.

If after giving the matter considerable thought a person decides the matter is serious enough and that litigation is the alternative he/she wants to pursue, counsel with defamation experience should be engaged to do a careful review of the individual circumstances of the case.

⁷ Professor Kenneth Westhues, "Anonymous Ratings of Every Professor in the Country Are On Display For the Whole World to See", *Kitchener-Waterloo Record*, Sept. 7, 2004 at A11.