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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MICHAEL SKWARK,	)	Counsel:
	)	
plaintiff,	)	ROBERT L. TAPPER, K.C. and
	)	SARAH R. McEACHERN
- and -	)	for the plaintiff,
	)	
TESSA VALLITTU,	)	
	)	
defendant.	)	KAREN R. WITTMAN and
	)	SHARNA NELKO
	)	for the defendant.
	)	
	)	JUDGMENT DELIVERED:
	)	November 8, 2022

PERLMUTTER A.C.J.K.B.

INTRODUCTION

[1] The plaintiff moves for an interlocutory injunction restraining the defendant from (a) publishing defamatory or disparaging statements about the plaintiff, (b) interfering with the plaintiff's economic interests and business relations, and (c) harassing and communicating with the plaintiff, his family, friends, and business associates. The plaintiff and defendant were in a romantic relationship.

After their relationship ended, the defendant sent multiple distressing text messages to the plaintiff and his mother. As well, the defendant made statements on social media platforms and to others such as the plaintiff's business associates which include that the plaintiff was sexually, emotionally and physically abusive of her, repeatedly sexually assaulted her, and did similarly to other women (hereinafter the "impugned statements"). The plaintiff's claim is grounded in defamation, intentional interference with economic relations, and the "developing" tort of online harassment. The plaintiff also moves for an order that two additional affidavits be admitted as evidence, for an order requiring the defendant to answer an interrogatory, and for the defendant to be sanctioned for violation of an undertaking given at a previous court appearance.

[2] The defendant says she felt compelled to speak about the abuse she experienced and that these proceedings are simply an attempt to silence and intimidate her from doing so. The defendant seeks an order striking out the whole or parts of the statement of claim or for further particulars. The defendant also opposes the injunctive relief and other orders sought by the plaintiff.

FACTUAL BACKGROUND

[3] From about 2013 to November 2018, the plaintiff and defendant were in a romantic relationship. In about January 2019, the plaintiff began dating MM. Beginning around this same timeframe until around June 2019, the defendant sent text messages to the plaintiff and his mother. The messages to the plaintiff were of the following kind:

- omg yea u fucked the girl [MM] i'm telling u about that u reassured me that u wouldn't fuck cuz she was lame and easy
- Seriously kill yourself
- Go die lol
- I hate ur guts
- Go fuckin die
- Go bang that Hannah montana [MM] fuckin basic bitch again
- Legit I wanna killu
- I WANT U TO DIE
- GET FUCKIN LOST AND DIE
- I HOPE UR BOTH UNHAPPY TOGETHER LOL

[4] The defendant's messages to the plaintiff's mother were of the following kind:

- I'm just saying I was happy and I am happy until he did things with montana [MM] that were not something you do after a 5 year relationship lol esp with someone he's known for like two months but like love is in the air I guess
- I sincerely hope mike [the plaintiff] overdoses :)
- Fuck your whole family. Mike made fun of montana forever and said she slept with everyone that wanted to get where she's at…she's twenty
- Ur all fucked and I hate you all

[5] Around June 2019, the defendant made a series of statements on social media platforms that the plaintiff was sexually and emotionally abusive and the plaintiff repeatedly sexually assaulted her.

[6] On June 26, 2019, the defendant posted on social media "WANT ME TO GO PUBLIC I FUCKING WILL AND THEN HOPE HIS 'CAREER' GETS RUINED. U STILL GONNA WANT HIM THEN? HOPE SO BECAUSE YALL DESERVE EACH OTHER".

[7] On January 23, 2020, the plaintiff, who is a musical artist, executed a recording contract with Epitaph Records. In November 2020, his first album was released.

[8] On December 25, 2020, the defendant stated on social media "…just received more messages regarding the person who i said was sexually and emotionally abusive towards me for the 5+ years we were dating had exhibited the same behaviour towards other women".

[9] On December 26, 2020, the defendant stated on social media "clearly my ex holding himself accountable for repeated sexual assault and emotional abuse isn't going to ever happen".

[10] On December 27, 2020, the defendant sent an email to Epitaph Records, which included:

- during the time of her five year relationship with the plaintiff, she was "sexually, physically, and emotionally abused"
- during the latter part of their relationship, the plaintiff repeatedly sexually assaulted her

- the defendant "received more and more messages regarding how [the plaintiff] has treated other females similarly to how he did when he and [she] were in [their] relationship"
- "I would expect nothing less than the articles promoting [the plaintiff's] music to be taken down as I assume that Epitaph Records does not adhere to supporting musicians who are accused and known for sexual misconduct and/or assault"

[11] In late December 2020 or early January 2021, the defendant stated on social media "CONTACTED EPITAPH RECORDS CBC WPG FREE PRESS IF U KNO ANYONE ELSE THAT PROMOTES THIS ASSHOLE LMK".

[12] On January 7, 2021, the defendant stated on social media "lol epitaph records be like 'you were r*ped by one of our artists?"

[13] On January 12, 2021, the defendant sent an email to Epitaph Records, portions of which she also posted on social media, that included:

> "Quite simply, by being affiliated with [the plaintiff], Epitaph Records is passively enabling his behaviour to continue. Giving a platform to someone who is accused of multiple cases of rape and sexual assault should not be 'beyond the scope of the label/distributor', but should be taken quite seriously.
>
> I've received yet another message from a woman who [the plaintiff] has assaulted, with this situation occurring only a few weeks ago. [The

plaintiff's] behaviour clearly has not changed – he is continuing to harm women…"

[14] On January 20, 2021, the defendant sent an email to Epitaph Records that included:

- I have yet to receive an adequate response [to her previous emails].
- During the time of her relationship with the plaintiff, she had been sexually assaulted several times as well as being both mentally and physically abused.
- "…I simply wanted to encourage Epitaph in considering the artists they bolster a platform to – the artists accused of sexual assault and causing harm to women, who have been promoted and given space, both enabling their behaviour to continue and largely amplifying the desensitization to it."

[15] In September 2021, Epitaph Records began promoting the roll-out of the plaintiff's second album.

[16] On September 26, 2021, the defendant sent an email to Epitaph Records that included:

- "when i last contacted you i mentioned [the plaintiff] and how he has sexually assaulted myself and a number of women"
- "i can firmly say to you, upon epitaph records, has done nothing to very little as far as reducing his publicity reach. i am beyond disappointed. a punk label appreciated by so many supporting someone who lives off of

their parent's lawyer money sexually assaulting women without any repercussions"

- "it has been nearly a year since my last message expressing my discontent with your continued support for a wealthy rapist"
- "may this come to light. because epitaph would surely go under knowing this behaviour exhibited and told by many like myself"

[17] The defendant also publicly "tweeted" Epitaph Records, stating:

- "you continuing to support an abuser is 'bumming me out'"
- "reputation as a punk label is comical when you have a rapist that you're still promoting while he's being investigated for multiple accounts of abuse (that you've also been aware of for over 2yrs) way to show a lack of decency/empathy/values"

[18] Ultimately, Epitaph Records terminated its contract with the plaintiff.

[19] In the spring of 2022, the plaintiff was booked to tour with a band known as Hot Milk. On March 21, 2022, the defendant sent an email to the tour organizer that included:

> "Epitaph Records hired a private investigator to look into claims I have made over the past three years in regards to multiple counts of abuse, assault, and rape, over the course of my six+ year relationship with [the plaintiff]. This investigation took place at the beginning of October, 2021 and had objective findings that included statements not only from myself and

> witnesses, but other women he has caused harm to as well (in the exact same patterned behaviour)…
>
> I mention this to you, because I believe it is wrong to continue allowing this person a platform; especially when they continue to deny any form of accountability. Similarly, it looks poorly upon Hot Milk to make a debut in the US, playing shows with someone who is a known abuser. As I have continuously sought after proper recourse, I hope there is action taken and that this individual is no longer permitted to be part of this tour."

[20] The plaintiff was immediately dropped from the upcoming tour.

[21] On March 21, 2022, the plaintiff initiated this proceeding.

PARTIES' POSITIONS

[22] It is the plaintiff's position that the defendant's statements about him are defamatory, untrue, and designed to harm him and that the defendant is engaged in online harassment and is interfering with his economic relations with his business associates. The plaintiff asserts that the defendant is motivated by jealousy, anger and vengeance because the plaintiff began dating others. The plaintiff says that if the defendant is not restrained, she will continue to interfere with his livelihood, thereby continuing to cause him irreparable harm. The plaintiff also says that the balance of convenience favours him because if an injunction is granted, the defendant only loses time until a trial regarding her allegations. However, if the defendant is not restrained in her statements, the plaintiff's career is at further risk. The plaintiff seeks to admit into evidence the affidavits of

Mischa Decter and Lois Tessier, each of which he argues provides evidence regarding the defendant's credibility. The plaintiff also submits that the defendant ought to be required to provide by way of answer to an interrogatory a copy of her report to police in relation to the plaintiff and should be sanctioned for making this police report in light of statements made by her counsel at the appearance of this matter on May 3, 2022.

[23] It is the defendant's position that the plaintiff is attempting to silence her from speaking out about the abuse she experienced. On this basis, the defendant says that the statement of claim should be struck out as scandalous, frivolous or vexatious, and an abuse of process. The defendant also asserts that the statement of claim fails to disclose a reasonable cause of action. If not struck out, the defendant seeks better particulars. The defendant relies on the defences of justification and fair comment, and takes the position that the plaintiff fails to meet the stringent test required to restrain her guarantee of freedom of expression by way of interlocutory injunction. She also says that the tort of online harassment ought not to be recognized in Manitoba, and, in any event, denies this is a case of online harassment. The defendant opposes the admission of the affidavits of Mr. Decter and Ms Tessier on the basis that the applicable tests for admissibility are not met. The defendant also opposes production of the police report on the basis that it is not within her power to produce and denies that her reporting to police is to be sanctioned.

ISSUES

[24] The parties' positions give rise to the following issues:

1. Should the affidavits of Mr. Decter and Ms Tessier be admitted as evidence?
2. Should the defendant be required to provide by way of answer to an interrogatory a copy of her report to police in relation to the plaintiff and should she be sanctioned for making this police report in light of statements made by her counsel at the appearance of this matter on May 3, 2022?
3. Should the statement of claim or portions thereof be struck out as disclosing no reasonable cause of action, as scandalous, frivolous or vexatious, or as an abuse of process? If not, should further and better particulars be ordered?
4. Should the plaintiff be granted interlocutory injunctive relief?

ANALYSIS

1. Should the affidavits of Mr. Decter and Ms Tessier be admitted as evidence?

[25] Cross-examinations on the previously filed affidavits have already taken place. In considering whether the affidavits of Mr. Decter and Ms Tessier ought to be admitted as evidence, ***Court of King's Bench Rule*** 39.02(2) is relevant and provides as follows:

> 39.02(2) A party who has cross-examined on an affidavit filed by an adverse party shall not subsequently file an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to a matter raised on the

> cross-examination with evidence in the form of an affidavit or a transcript of an examination under rule 39.03.

[26] In order to allow the filing of a rebuttal affidavit, the applicant must satisfy the four following criteria:

1) Is this information relevant to the litigation?
2) Is the affidavit responsive to something raised in cross-examination?
3) Prejudice and terms.
4) Is there a satisfactory explanation for not having included this evidence at the outset?

[27] The discretion to allow the filing of a rebuttal affidavit under this Rule must be exercised sparingly, recognizing that the applicant has a very high threshold to meet.

> (***News Datacom Ltd. et al. v. Love et al.***, 2004 MBCA 98, paras. 13 and 20)

[28] In some of the previously filed affidavits and the cross-examinations on these affidavits is evidence that the defendant was upset and displayed animosity when the plaintiff began a new relationship with MM. In their affidavits, the plaintiff, the defendant, and MM all depose to a specific confrontation at a bar between the defendant and MM. In the course of the defendant's cross-examination on her affidavit, she testified [at p. 70], "I poured a drink on [MM]. I did not physically touch her, push her, shove her into a wall, or throw my glass at her." On this same cross-examination, the defendant referred to Mr. Decter as one of the owners of the bar. Thereafter, the plaintiff's counsel obtained an

affidavit from Mr. Decter (which the plaintiff seeks to admit as evidence), wherein Mr. Decter deposes that where, upon the plaintiff and MM entering the bar, the defendant started yelling at them and specifically at MM, poured a drink on her head and then shoved MM into a wall.

[29] In light of the question of malice as that term is used in the law of defamation and the claim of online harassment which includes the targeting of persons a plaintiff cares about so as to cause them fear, anxiety and misery, I find the information included in Mr. Decter's affidavit to be relevant. Given the defendant's cross-examination testimony on this specific issue, Mr. Decter's affidavit is responsive to something raised in cross-examination. No compelling evidence of prejudice was identified by the defendant's counsel in permitting the filing of Mr. Decter's affidavit.

[30] However, I am not persuaded that there is a satisfactory explanation for not having included Mr. Decter's evidence at the outset. From the time of the defendant's affidavit of May 24, 2022, the defendant denied that she pushed or shoved MM. On the defendant's cross-examination on her affidavit, she did not identify Mr. Decter as being a witness or present at the time of the incident. Rather, she testified that the owners of the bar, one of whom was Mr. Decter, had told her that they banned the plaintiff from the bar and she was not expecting to see either the plaintiff or MM. As such, there is no basis to conclude that it was her testimony that first identified Mr. Decter as a witness. Further, the plaintiff was also present at the time of the incident. Moreover, it was open to the plaintiff

at the outset to inquire of the owner of the bar (Mr. Decter) if he had any information about the incident. In sum, I am not satisfied with the explanation for not having included Mr. Decter's affidavit evidence at the outset.

[31] Recognizing that leave should be granted sparingly, in light of the very high threshold on the plaintiff as the moving party, I am not admitting Mr. Decter's affidavit as evidence.

[32] Turning to the issue of admitting as evidence the affidavit of Ms Tessier, Ms Tessier is the mother of the bride at a wedding that the defendant attended on July 3, 2022. Based largely on hearsay evidence, Ms Tessier deposes to the defendant falsely accusing a groomsman, who had been in a relationship with the defendant, of being involved in a relationship with another person and then the defendant assaulting this groomsman. The plaintiff's counsel argues that Ms Tessier's affidavit relates to jealous behaviour of the defendant and her capacity for harming individuals who stopped dating her. The plaintiff's counsel asserts that this is salient to demonstrate a lack of truth by the defendant and the accuracy and truth of MM. In turn, the defendant's counsel asserts that the plaintiff is seeking to admit this evidence as similar fact evidence, for which he has not met the test. As well, the defendant's counsel argues that the test to file an affidavit after cross examinations is also not met because the affidavit is not responsive to anything raised during cross-examination.

[33] In my view, this evidence is at best marginally relevant. Based on this evidence, the defendant's conduct at this wedding and thereafter was not directed

at the plaintiff. While recognizing hearsay evidence is admissible on a motion, when I weigh the hearsay nature of this evidence with its marginal relevance, I am not prepared to admit Ms Tessier's affidavit as evidence. It is to be understood that my conclusions about Ms Tessier's evidence are limited to the substantive matters presently before me and are not intended to bind any future proceedings, including for example the trial of this action.

2. **Should the defendant be required to provide by way of answer to an interrogatory a copy of her report to police in relation to the plaintiff and should she be sanctioned for making this police report in light of statements made by her counsel at the appearance of this matter on May 3, 2022?**

[34] It is undisputed that the defendant made a report to the police that the plaintiff assaulted her. The plaintiff's counsel asserts this reporting to police was a violation of an "undertaking" provided by the defendant's counsel to the court on May 3rd. He submits that justice requires that such a violation to the court must be taken seriously. It is on this basis that the plaintiff argues for an exception to the indication in Rule 31.04(2), that interrogatories may be served only after the defendant has filed and served a statement of defence[1]. The defendant's counsel disagrees that this reporting was a violation of what she said at the May 3rd appearance, and, in any event, says that the defendant reported the assaults to police on April 29, 2022 (prior to the May 3rd appearance). She also argues that the police report is not within her possession or power to produce, but in the

[1] Because of the defendant's motion to strike, the filing of a statement of defence has not occurred (see Rule 19.01.1(1)(a)).

possession of police. The plaintiff's counsel contests that the date of the police report was prior to the May 3rd appearance, which is why he argues the defendant should be compelled to produce it.

[35] At the time of the May 3rd appearance, the plaintiff's counsel raised as a concern potentially justifying immediate interim injunctive relief that the defendant's motion to strike out the statement of claim reflected an intention by her to increase Internet publication or communication with a record company like Epitaph Records regarding the plaintiff. In the course of oral submissions on May 3rd, the defendant's counsel indicated that the defendant had no intention of increasing her publication of her statements about the plaintiff. This indication by the defendant's counsel was made in the context of an exchange between the court and counsel largely focussed on posting on social media and communication with third parties such as Epitaph Records. There was no discussion about whether there would be a restriction on communicating with police. Given this context, in my view, it is not reasonable to interpret statements by the defendant's counsel on May 3rd as undertaking that the defendant would not make a police report. Indeed, in my view, in the circumstances, it would not be appropriate to limit the ability of the defendant, who considers herself a victim of crime, from reporting this crime to police. Accordingly, I am not persuaded that the defendant is required to answer the interrogatory that she provide a copy of her report to police and the defendant is not to be sanctioned for making a police report.

3. **Should the statement of claim or portions thereof be struck out as disclosing no reasonable cause of action, as scandalous, frivolous or vexatious, or as an abuse of process? If not, should further and better particulars be ordered?**

[36] It is the defendant's position that the statement of claim should be struck out in its entirety under Rule 25.11(1)(d), as not disclosing a reasonable cause of action because it is vague and non-specific in respect of the claims of defamation and intentional interference with economic relations. It is also the defendant's position that the references in the statement of claim to "harassment" and the statements attributed to the defendant as quoted in the statement of claim that are outside, what she asserts is, a two-year statutory limitation period should be struck out under Rule 25.11(1)(b) as scandalous, frivolous and vexatious. The defendant argues that there is no tort of harassment and as a whole these statements were included to embarrass the defendant. In reliance on Rule 25.11(1)(c), the defendant also seeks to strike out the statement of claim on the basis that it is an abuse of process brought in bad faith and/or for an improper purpose, specifically to prevent the defendant from speaking about her abuse. In the event the statement of claim is not struck out, the defendant seeks further particulars.

[37] The plaintiff denies that the statement of claim is an attempt to embarrass or silence the defendant. It is the plaintiff's position that the pleading of "harassment" is part of the material facts pled regarding the torts of online harassment and intentional interference with economic relations and is relevant to the considerations of the malice employed by the defendant in her publication of

defamatory statements. It is also the plaintiff's position that his claims in defamation and intentional interference with economic relations are adequately pled and the material facts the defendant argues are missing and the particulars sought by the defendant go well beyond those required be pled, amounting to evidence.

[38] Recently, in ***Sarrasin v. Sokal***, 2022 MBCA 67, the Manitoba Court of Appeal considered the principles governing pleadings in defamation actions including the bar for striking pleadings as not disclosing a reasonable cause of action in both defamation and other claims. Simonsen JA wrote as follows (with authority references omitted):

> The well-established test to be applied in determining whether a statement of claim should be struck out for disclosing no reasonable cause of action is whether, assuming the facts pled are true, it is "plain and obvious" that the action cannot succeed… (para. 25)
>
> Generally, the bar for striking out a pleading is very high and the remedy is to be used only sparingly; a pleading is to be read generously to accommodate drafting inadequacies... However, as I will explain, "[a]n additional dimension to these principles arises in defamation cases because pleadings in such actions have traditionally been held to a higher standard than is the case with other types of actions, in terms of the precision with which the material facts must be pleaded"… (para. 26)
>
> As with any pleading, a statement of claim in a defamation action must set out a concise statement of the material facts on which a plaintiff relies for a claim, but not the evidence by which those facts are to be proved… (para. 27)
>
> Material facts have been defined to mean "facts which must be proved in order to establish a cause of action"… (para. 28)
>
> …What the prohibition against pleading evidence is designed to do is to restrain the pleading of facts that are subordinate and that merely tend toward proving the truth of the material facts… (para. 31)
>
> More recently, many courts have permitted greater flexibility when assessing defamation pleadings, especially when a plaintiff may be unable to provide full

> particulars... Nonetheless, a prima facie case of defamation must be pled… and a pleading must set out with some particularity the material facts necessary to support a cause of action. A plaintiff must set out a "coherent body of fact" of which they have knowledge that gives rise to the basis for a claim... It remains that pleadings in defamation actions attract "a more critical evaluation than pleadings involving other causes of action"… and that "the need for as much precision as possible and for enhanced judicial scrutiny continues"... The material facts should enable a defendant to understand the nature of the claim, and be able to prepare their defence. (para. 34)
>
> …The material facts alleged should be sufficiently precise, clear, certain and specific that a defendant can be apprised of the nature of the claim. (para. 35)

[39] The remedy of striking out a pleading is to be used sparingly and reserved for only the "clearest of cases" (***Dennis v. The Attorney General of Canada et al.***, 2020 MBCA 118, para. 4).

[40] The defendant submits that paragraph 8 of the statement of claim which begins with "In the fall of 2020, the defendant further initiated an online campaign against the plaintiff whereby she published untrue and defamatory statements and innuendo about the plaintiff…" should be struck out as not disclosing a reasonable cause of action. The defendant argues that in affidavit evidence and on his cross-examination on his affidavit, the plaintiff admitted that these statements were made in January to June 2019, such that the alleged causes of action are barred by a two-year limitation date. It is unclear to me how a contradiction between this pleading and affidavit evidence grounds a motion to strike as disclosing no reasonable cause of action (where it is assumed the facts pled are true) or for better particulars. Indeed, this very submission by the defendant substantiates the plaintiff's position that the defendant confuses evidence with pleading. Paragraph 9 of the statement of claim pleads where the statements were published

and paragraph 10 of the statement of claim pleads the words verbatim. With the reference to the timeframe of "the fall of 2020" and the material facts pled in paragraphs 9 and 10, I am satisfied that the material facts alleged are sufficiently precise, clear, certain and specific that the defendant can be apprised of the nature of the claim. For this same reason, no further particulars need be provided with respect to this part of paragraph 8 of the statement of claim.

[41] Paragraph 19 of the statement of claim pleads that "…the defendant continues to wrongly publish untrue and defamatory statements about the plaintiff to third parties with which the plaintiff has business dealings…". In answer to the defendant's request for particulars as to the precise time and date when the statements were made, to whom, the precise words used and the format in which the statements were made, the plaintiff responded that sufficient particulars are pled to prepare a statement of defence, the request is a matter for discovery and is a request for evidence, and these facts are within the knowledge of the defendant as the author of the communications. I agree with the plaintiff's position. The statement of claim sets out a "coherent body of fact" in many of the paragraphs that precede paragraph 19, which, when considered in the context of the allegation of "…the defendant continues to wrongly publish untrue and defamatory statements…", is sufficient to enable the defendant to understand the nature of the claim and to prepare her defence. The information in the particulars sought is not necessary for the pleading and within the knowledge of the defendant as the author, presumably to be canvassed on discovery (see ***Her***

Majesty the Queen in Right of the Province of Manitoba v. Rothmans et al., 2014 MBQB 160, para. 65).

[42] Other than the foregoing, in her submissions, the defendant's counsel did not elaborate upon why the particulars in the statement of claim and in the plaintiff's particulars provided in reply to the defendant's request are inadequate based on the applicable legal principles. I agree with the plaintiff's counsel that to the extent the defendant requests particulars related to the time, date, and mode of communications, in the circumstances, these are not necessary for pleading and within the defendant's knowledge. As well, I expect these will be canvassed on discovery. In summary, the defendant has not presented any argument to persuade me that the further and better particulars she seeks in her request for particulars are required.

[43] The defendant submits that paragraphs 1(b), 5, 6, and 10 of the statement of claim should be struck out on the grounds that the allegations in them are scandalous, frivolous, or vexatious as the use of the word "harassment" and the statements attributed to the defendant in these paragraphs are not relevant as outside the statutory limitation period of two years and were only included for colour, to paint the defendant in a negative light and intended to embarrass her. In turn, the plaintiff argues these allegations are part of the material facts pled in support of an action for online harassment and are otherwise relevant to the question of malice. It is the defendant's position that the tort of online harassment should not be recognized in Manitoba.

[44] In ***Rebillard v. Manitoba (A.G.) et al.***, 2014 MBQB 181, Edmond J. considered the Manitoba authorities on the meaning of "scandalous", "frivolous", and "vexatious" in Rule 25.11, as follows (paras. 29-30, with some authority references omitted):

> A pleading is scandalous where it contains "anything which is unbecoming of the court to hear", including "any unnecessary allegation, bearing cruelly on the moral character of an individual". Pleadings made "without any probable justification at law, mala fide with a clear intent only to annoy or embarrass the opposing party" are frivolous and vexatious and ought to be struck…
>
> In ***Bellan v. Curtis et al.***,… at para. 37, the court considered the meaning of "scandalous", "frivolous" and "vexatious" in light of Queen's Bench Rule 25.11 as follows:
>
> > [37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious". Epstein, J., dealt with the meaning of "scandalous, frivolous or vexatious" in ***George Estate v. Harris et al.…***. At para. 20, he stated:
> >
> > > "The next step is to consider the meaning of 'scandalous', 'frivolous' or 'vexatious'. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety."

[45] The tort of online harassment has not been recognized in Manitoba. The plaintiff's counsel filed case law from Ontario, which discusses the development of this tort. For example, in ***Caplan v. Atas***, 2021 ONSC 670, D.L. Corbett J.

discussed the tort of internet (or online) harassment as follows (paras. 168 and 174):

> In my view, the tort of internet harassment should be recognized in these cases because Atas' online conduct and publications seek not so much to defame the victims but to harass them. Put another way, the intent is to go beyond character assassination: it is intended to harass, harry and molest by repeated and serial publications of defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear, anxiety and misery. The social science literature referenced above makes it clear that real harm is caused by serial stalkers such as Atas.
>
> …
>
> …It is only the most serious and persistent of harassing conduct that rises to a level where the law should respond to it.
>
> (See also, ***385277 Ontario Ltd. v. Gold***, 2021 ONSC 4717)

[46] As indicated by the Manitoba Court of Appeal in ***Dennis*** by reference to ***Grant v Winnipeg Regional Health Authority et al.***, 2015 MBCA 44 (para. 4):

> On a motion to strike, the claim or defence should be read generously notwithstanding any imprecision in the language used in it. **Factors such as the novelty of a claim** or defence, the length **or complexity of the issues raised by it**, **or the likelihood that the opposing party has a strong position that will likely defeat the claim** or defence **are not reasons alone to strike out the pleading**... If a claim or defence has a reasonable prospect of success, it should not be struck out…
>
> [Emphasis added]

[47] The tort of online harassment is a burgeoning area of the law, at least in Ontario. As is apparent by the plaintiff's allegations here, in light of modern realities, there may be good reason to recognize and provide redress relating to harassment online. In the circumstances at hand, the novelty of this cause of action is not a reason to strike out the related allegations in the statement of claim.

[48] The defendant argues that even if the tort of online harassment is recognized, the allegations in paragraphs 5, 6, and 10 of the statement of claim are barred by a limitation of actions defence such that they ought to be struck out. It is the plaintiff's position that the allegations of harassment dating back to 2018 are pled to demonstrate the extreme character and duration of the defendant's online campaign of harassment. Given the novelty of the tort of online harassment, I am not able to conclude that these allegations dating back to 2018 are irrelevant. Similarly, to the extent that the plaintiff argues these allegations are material to the issue of malice as applied in defamation actions to address the question of any fair comment, it is not clear to me that pleading malice and the related particulars in anticipation of a defence of fair comment is not material.

[49] The defendant submits that all paragraphs of the statement of claim which refer to the tort of intentional interference with economic relations should be struck out. It is undisputed that this tort has three elements:

i. The defendant must have intended to injure the plaintiff's economic interests;
ii. The interference must have been by illegal or unlawful means; and
iii. The plaintiff must have suffered economic harm or loss as a result.

(***Grand Financial Management Inc. v. Solemio Transportation Inc.***, 2016 ONCA 175, para. 62)

[50] For conduct to constitute "unlawful means", it must be conduct that "would be actionable by the third party or would have been actionable if the third party

had suffered loss as a result of it" (***Grand Financial Management Inc.***, para. 67).

[51] Paragraphs 18 to 20 of the statement of claim allege that based on the publication of the defamatory statements online and to representatives of Epitaph Records and by continuing to publish defamatory statements about the plaintiff to third parties with which the plaintiff has business dealings, the plaintiff has a claim for the tort of intentional interference with economic relations. The defendant argues that the "unlawful means" cannot be the alleged defamation because this conduct would not be actionable by Epitaph Records as it is not Epitaph Records that is allegedly defamed. To the extent that the plaintiff asserts that Epitaph Records would have an action based on the tort of online harassment, the defendant argues that her communications to Epitaph Records and the related publication on social media (as pled in paragraphs 12 and 13 of the statement of claim) do not meet the requirements for online harassment. Again, in light of the novelty of the claim of online harassment and recognizing that the likelihood that an opposing party has a strong position that will likely defeat the claim is not reason alone to strike a pleading, in my view in the circumstances of this case, the plaintiff's claim for intentional interference with economic relations should not be struck out (***Dennis***, para. 4).

[52] In ***Vitacea Company Ltd. et al. v. The Winning Combination Inc. et al.***, 2016 MBQB 180, Joyal C.J. discussed the circumstances when proceedings

constitute an abuse of process as follows (para. 87, with authority references omitted):

> …An abuse of process may arise when a legal process is used for an ulterior motive, other than that for which it was intended. When properly invoked, an allegation of abuse of process is meant to provide protection against harassment or the perversion of the legal process for the purposes of accomplishing an improper result… An abuse of process may be established where the proceedings are oppressive and vexatious and/or they violate the fundamental principles of justice underlying the community's sense of fair play and decency... A claim found to be frivolous and vexatious and/or embarrassing may nonetheless also constitute an abuse of process. A particular or unique emphasis and focus of an abuse of process claim is on the court's integrity and its interest in maintaining confidence in the administration of justice.

[53] As indicated, the defendant's submission that this proceeding is an abuse of process is grounded in her argument that it has been brought in an effort to silence her. As will be seen below, I have concluded that an interlocutory injunction should issue restraining the defendant from publishing the impugned statements and like words regarding the plaintiff. My reasons for arriving at this conclusion are the same reasons why I do not find that the statement of claim should be struck out as an abuse of process.

[54] In summary, for all of the foregoing reasons, I am not striking any part of the statement of claim and am not ordering further particulars.

4. Should the plaintiff be granted interlocutory injunctive relief?

[55] The well-known criteria to be weighed when considering whether to grant an interlocutory injunction are:

1. Whether there is a serious question to be tried;

2. Whether the moving party would suffer irreparable harm if the interlocutory injunction were refused; and
3. The balance of convenience.

[56] Each of these factors should not be employed as separate hurdles but as interrelated considerations.

> (***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311; ***Apotex Fermentation Inc. v. Novopharm Ltd.*** (1994), 95 Man. R. (2d) 241)

[57] In ***Bagwalla v. Ronin et al., and Ronin v. Ronin et al.***, 2017 ONSC 6693 (Div. Ct.), Gordon R.S.J. discussed the use of a different test (the "***Liberty Net*** test") when considering a motion for an interlocutory injunction restraining alleged defamation, as follows (para. 18):

> …in *Canada (Human Rights Commission) v. Canadian Liberty Net* [1998] 1 S.C.R. 626, the Supreme Court of Canada held that the test in *RJR MacDonald* does not apply to motions for injunctive relief restraining alleged defamation because the test would seldom, if ever, protect controversial speech. The court cited with approval, the following passage from *Injunctions and Specific Performance* 2nd ed. 1992 (loose-leaf)), Robert Sharpe:
>
> > There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded...
> >
> > The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
> >
> > ...it seems clear that the rule is unaffected by the *American Cyanamid* case [***RJR-MacDonald***] and that the balance of convenience is not a factor.

[58] Recently, in ***Gold***, F.L. Myers J. wrote about the "high bar" reflected in the ***Liberty Net*** test, as follows (para. 40):

> The court must refuse a request for an interlocutory injunction based on allegations of defamation where a defence of truth or fair comment is alleged unless it is clear on the face of the record that the defence must fail… This high bar properly represents the importance placed on freedom of expression in Canada. …

[59] In ***Romana v. The Canadian Broadcasting Corporation et al.***, 2017 MBQB 163 (paras. 8 to 23), Grammond J., after undertaking a review of several authorities, concluded that the ***Liberty Net*** test was not limited to allegations of defamation, observing that "…the driving factor underlying the *Liberty Net* principles is a reluctance to restrain expression in all but the clearest of cases" (para. 22).

[60] In ***Liberty Net***, the Canadian Human Rights Commission received complaints regarding hateful messages made available to the public on a telephonic service operated by the organization Liberty Net. These messages included denials of the existence or extent of the Holocaust and related bigoted statements. The Commission requested a Human Rights Tribunal be empanelled to decide whether these messages were in violation of the ***Canadian Human Rights Act***, R.S.C., 1985, c. H-6. The Commission then obtained an interlocutory injunction from the Federal Court prohibiting Liberty Net from communicating hate messages until a final order was rendered by the Tribunal. A Commission investigator later discovered that Liberty Net was operating a phone number in the United States which contained the same messages that were subject to the

injunction. Liberty Net was found guilty of contempt of court for violating the injunction.

[61] When the case came before the Supreme Court of Canada, the issues were whether the Federal Court had jurisdiction to issue the injunction and if it did, whether the issuance of an injunctive order was appropriate. As well, there was an appeal from the finding of contempt. After concluding that the Federal Court had the requisite jurisdiction to issue an injunction, the Supreme Court of Canada determined that the appeal of the injunction was moot because the Tribunal had made a final order on the issue of violation of the ***Canadian Human Rights Act***, supplanting the interlocutory injunction. However, to address the question of whether Liberty Net was in contempt, the Supreme Court of Canada discussed the ***American Cyanamid (RJR-MacDonald)*** test, and found this test inappropriate to the circumstances. In so doing, the Supreme Court of Canada cited the above referenced quotation from Justice Robert Sharpe in ***Injunctions and Specific Performance*** and similar principles to the effect that interlocutory injunctions should only be granted to restrain publication of words in the rarest and clearest of cases, namely where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed (paras. 47-49). The comment on the test was brief with no indication of how it would apply in a given case.

[62] As indicated, in ***Liberty Net***, the question of whether the interlocutory injunction was appropriately granted was moot and thus not actually adjudicated

by the Supreme Court of Canada. Nevertheless, in considering the Court's ***dicta*** regarding the test for an interlocutory injunction in the circumstances of ***Liberty Net***, it is my view that the ***Liberty Net*** test does not apply to the facts in the present case.

[63] Unlike the case at hand, ***Liberty Net*** did not involve an action grounded in defamatory statements by one individual against another individual. Rather, in ***Liberty Net***, the Supreme Court of Canada was addressing hate speech by an organization directed at a group with no indication of specific harm to any individual in the context of the ***Canadian Human Rights Act***. It is my view that this is a significant distinction because in ***Liberty Net***, there was no individual, like the plaintiff in the present case, who had a competing ***Charter*** protected interest. That is, in ***Liberty Net***, the issue of reputation did not substantially arise as the underlying action was not grounded in defamation. In ***Liberty Net***, the Supreme Court of Canada noted the importance of the right to freedom of expression contained in s. 2(b) of the ***Charter***. However, in the case at hand, the plaintiff clearly has a substantial competing interest in protecting his reputation. Reputation is intimately related to the right to privacy which has been accorded constitutional protection. In ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130, the Supreme Court of Canada provided as follows (para. 121):

> Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in R. v. Dyment, [1998] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a

> person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression....

[64] While the ***Charter*** is not engaged in an action between private individuals, ***Charter*** values infuse the development and application of the common law. As explained by Cory J. in ***Hill*** (at para. 107):

> The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

[65] In my view, the applicable test for interlocutory injunctive relief in the present case must reflect both the defendant's right to freedom of expression and the plaintiff's right to privacy and dignity. The ***Liberty Net*** test does not take into account the competing ***Charter*** protected rights of the plaintiff.

[66] In rejecting the ***American Cyanamid (RJR-MacDonald)*** principles in the circumstances of ***Liberty Net***, the Supreme Court of Canada cited the reasoning in ***Herbage v. Pressdram Ltd.***, [1984] 1 W.L.R. 1160 (Eng. C.A.) that to apply ***American Cyanamid (RJR-MacDonald)*** "…would I believe be that in very many cases the plaintiff would obtain an injunction…" which would "…be a very considerable incursion into the present rule which is based on freedom of speech" (para. 49). The flipside of that argument is that the application of the ***Liberty Net*** test would make it virtually impossible for a plaintiff to obtain interlocutory injunctive relief even in the face of serious harm caused by the defendant's speech.

The ***Liberty Net*** test would require the plaintiff to prove at the interlocutory stage that the impugned words are false. Here, the defendant is adamant that the abuse and assaults occurred while the plaintiff is adamant they did not. There is no reliable evidence corroborating either of their positions. The determination of the truth of the impugned statements (justification) will require credibility determinations at trial. Creating a near impossible bar for the plaintiff on a motion for an interlocutory injunction cannot be a proper balancing of competing ***Charter*** values. In my view, if it was the intention of the Supreme Court of Canada in ***Liberty Net*** to hold that an interlocutory injunction restraining inherently defamatory statements should in essence never be ordered in circumstances like the present, the Court would have clearly said so.

[67] As I said, to apply the ***Liberty Net*** test in the manner advocated by the defendant would fail to properly balance the ***Charter*** value of freedom of expression with the ***Charter*** value of protecting the plaintiff's reputation. When properly balancing these competing ***Charter*** values, in the circumstances of the case at bar, it is my view that the ***Liberty Net*** test becomes unworkable. In my view, in the particular circumstances of the present case, it is the ***RJR-MacDonald*** test which most sensibly, justly, and fairly balances these competing values.

[68] Separate and apart from the issue of reputation, it behooves me to note another important distinction and reason for departing from the test in ***Liberty Net***. A failure on my part to properly consider this additional reason could

inappropriately diminish and de-emphasize what must be this Court's attentiveness, awareness and sensitivity to the defendant's potential status as a witness and complainant in any eventual criminal trial for what is alleged to be a serious sexual assault.

[69] As I will explain below, if I were to slavishly apply the test in ***Liberty Net*** as a test of general application in the circumstances of the present case, other critically important areas of the law may be unintentionally affected and compromised — specifically, those designed to protect the reputation and dignity of complainants in sexual assault cases and those designed to prohibit a faulty reasoning based on irrelevant and inappropriately admitted evidence that serves only to perpetuate an offensive stereotype in cases of alleged sexual assault. In other words, the application of the ***Liberty Net*** test in circumstances like the present, could unintentionally invite courts and the participating parties (as can be seen in some of the submissions of the plaintiff's counsel in his attempts to impugn the defendant) to engage in inappropriately aggressive attacks on the credibility and integrity of the defendant/complainant. It could also encourage a reasoning that is clearly and properly prohibited elsewhere in the law. In doing so, the application of the ***Liberty Net*** test — with its uniquely high evidentiary threshold in the context of an interlocutory motion for injunctive relief — could in my view, have the paradoxical effect of perhaps placing, in the circumstances of a case like the present one, a defendant (who is potentially a complainant in an eventual sexual assault proceeding), in a particularly vulnerable and difficult position.

[70] Given the high threshold set out in ***Liberty Net***, the process and nature of the evidence that will have to be advanced by a moving plaintiff for the purposes of establishing whether "it is clear on the face of the record that the defence (truth) must fail", will be such that it risks encouraging in an interlocutory context, a *de facto* final hearing of a potential sexual assault allegation. Apart from potentially victimizing the complainant twice with an involved interim process and a later, possible criminal trial, it must also be noted that because of its interlocutory and civil nature, the more involved interlocutory adjudication for injunctive relief may occur (with the application of the ***Liberty Net*** threshold) without the adequate attention paid to safeguards and protections that now vigilantly attach to a complainant in the context of a criminal proceeding.

[71] Amongst other things, it should be a serious concern and reason for caution that in attempting to satisfy the high threshold set out in ***Liberty Net***, it is perhaps more likely than not that that threshold will produce evidence from a moving plaintiff that attempts to subtly perpetuate either of the twin myths so obviously protected against by the ***Criminal Code*** (see for example, section 276(1)) and by years of evolving jurisprudence in the area of sexual assault proceedings (see such cases as ***R. v. Barton***, 2019 SCC 33; ***R. v. Goldfinch***, 2019 SCC 38; and ***R. v. R.V.***, 2019 SCC 41). Even if that danger was in most cases properly policed by attentive judges hearing similar motions, the ***Liberty Net*** threshold would still put the adjudicating motions judge in a position where in many cases, that judge will be applying the test in a "he said – she said" scenario.

[72] Given the interlocutory nature of the hearing and the potential reputational damage to the plaintiff and given the hard-fought progress and legal evolution that led to what are now important and valued protections respecting the dignity and integrity of sexual assault complainants, the implications for both the plaintiff and the defendant in a case like this make the application of the ***Liberty Net*** test difficult to rationalize.

[73] Having decided for all of the above reasons that in the particular circumstances of this case, it is the ***RJR-MacDonald*** test which most sensibly, justly and fairly balances these competing values, I now turn to the application of that test.

[74] I will first address the impugned statements and then address the defendant's other statements described above (of the kind made to the plaintiff and his mother in 2019).

[75] It is clear to me that the impugned statements and like words tend to lower the plaintiff's reputation in the eyes of a reasonable person, such that these words are defamatory. In today's climate, it would be hard to imagine comments that are more disparaging. There is no dispute that these words in fact referred to the plaintiff and they were communicated to at least one person other than the plaintiff. (***Sarrasin***, para. 18; ***Grant v. Torstar Corp.***, 2009 SCC 61, para. 28).

[76] As mentioned, the defendant is adamant that the abuse and assaults occurred while the plaintiff is adamant they did not. There is no reliable evidence corroborating either of their positions and in fact there is conflicting third-party

evidence. For example, both the plaintiff and the defendant point to hearsay evidence of their communications with someone representing Epitaph Records who investigated the defendant's allegations about the plaintiff. The plaintiff deposed that he was informed that the investigation concluded the defendant's allegations were false and unfounded. The defendant deposed that she was assured by Epitaph Records that they had taken appropriate action on her complaint, subsequently noticing that a number of Epitaph Records' posts on Instagram promoting the plaintiff had been deleted and that his name was no longer on Epitaph Records' Instagram biography. Neither of the parties actually have the investigation report.

[77] The defendant also relies on messages she received from MM and two other woman (MW and another) to corroborate the impugned statements. When these messages from MM were put to her on the cross-examination on her affidavits, MM denied the defendant's characterization of them. The messages from MW and the other woman are in the form of Twitter messages. MW, who the defendant never met, did not file an affidavit. The defendant does not have a screenshot of her communications with the other woman. While hearsay evidence is admissible on a motion, given these circumstances, I have concerns about the reliability of these messages and thus accord them little weight.

[78] A defence of fair comment is not available if the plaintiff proves that the defendant at the time of publication was acting with malice (***John v. Kim***, 2007 BCSC 1224, para. 68). The defendant's statements in 2019 to the plaintiff and his

mother (as set out above) and the defendant pouring a drink on MM in 2019, are evidence that the defendant was acting with malice at the time that she later made the impugned statements on social media, to Epitaph Records and to Hot Milk. Indeed, there are several statements which go beyond defamation and are threatening.

[79] The threshold for a serious question to be tried is a low one. In these circumstances, given the conflicting evidence by each of the plaintiff and defendant with no compelling corroborative evidence and evidence of malice, I am satisfied there is a serious question to be tried.

[80] In examining the question of whether irreparable harm will result if an injunction is not granted, I am informed by the following description of irreparable harm as provided in ***RJR-MacDonald*** (para. 59, with authority references omitted):

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision…; where one party will suffer permanent market loss or irrevocable damage to its business reputation…

[81] In ***Crookes v. Newton***, 2011 SCC 47, the Supreme Court of Canada commented on defamation on the Internet, as follows (paras. 37-38):

> I do not for a moment wish to minimize the potentially harmful impacts of defamatory speech on the Internet. Nor do I resile from asserting that individuals' reputations are entitled to vigorous protection from defamatory comments. It is clear that "the right to free expression does not confer a licence to ruin reputations" (*Grant*, at para. 58). Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory. In *Barrick Gold Corp. v. Lopehandia* (2004, 71 O.R. (3d) 416 (C.A.), at para. 32, Blair J.A.

> recognized the Internet's "tremendous power" to harm reputation, citing with approval the following excerpt from Lyrissa Barnett Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace" (2000), 49 Duke L.J. 855, at pp. 863-64:
>
> > Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie". The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse. [Blair J.A.'s emphasis deleted.]
>
> New activities on the Internet and the greater potential for anonymity amplify even further the ease with which a reputation can be harmed online:
>
> > The rapid expansion of the Internet coupled with the surging popularity of social networking services like Facebook and Twitter has created a situation where everyone is a potential publisher, including those unfamiliar with defamation law. A reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet.
> >
> > (Bryan G. Baynham, Q.C., and Daniel J. Reid, "The Modern-Day Soapbox: Defamation in the Age of the Internet", in *Defamation Law: Materials prepared for the Continuing Legal Education seminar, Defamation Law 2010* (2010), at p. 3.1.1)

[82] The plaintiff deposed that the defendant is engaged in an effort to destroy his career and that he cannot work without fear that the defendant will attempt to further destroy his reputation by spreading lies about him. For the reasons discussed, a trial is required to determine the truth of the impugned statements. By publishing the impugned statements on social media and in communications with the plaintiff's business associates, it is apparent that the defendant is

deliberately and methodically attempting to destroy the plaintiff's reputation and career. In the defendant's social media post on June 26, 2019 (as set out above), she expressed the hope that his career gets ruined. To the extent that the defendant has posted her comments on social media platforms there is potentially wide and ongoing access by many. It is not difficult to accept the submission of the plaintiff's counsel that publicly accusing a musical artist of this kind of misconduct, on social media and otherwise, risks a permanent association between the artist and the conduct.

[83] In her social media post in late December 2020 or early January 2021 (described above), the defendant inquired if readers knew "ANYONE ELSE THAT PROMOTES THIS ASSHOLE". I infer that prior to the initiation of these proceedings, when the defendant became aware of the plaintiff having a significant business association, she communicated with this business associate with a view to ending this association. This inference is substantiated by the defendant's most recent communications with Epitaph Records and Hot Milk, with whom the plaintiff worked. Following receipt of the defendant's statements about the plaintiff, each of Epitaph Records and Hot Milk ended their commercial relationships with the plaintiff. The defendant's objective of ending the plaintiff's business relationships is reflected by her several follow-up communications with Epitaph Records, prior to it ending its relationship with the plaintiff, expressing her disappointment that they were not responding adequately.

[84] With the defendant publishing the impugned statements on social media and to two of the plaintiff's business associates (Epitaph Records and Hot Milk), both of whom ended their commercial relationships with the plaintiff, the plaintiff has suffered actual harm. I am satisfied that the harm being suffered by the plaintiff cannot be quantified in monetary terms or cured and risks putting the plaintiff "out of business" or suffering "irrevocable damage to [his] business reputation".

[85] The defendant submits that there are no ongoing communications and therefore, nothing to restrain. However, in the past, there have been time gaps in the defendant's publication of the impugned statements. As set out above, there were these kind of statements by the defendant around June 2019, December 2020, January 2021, September 2021, and spring 2022. Based on the evidence of malice, the history of the defendant's threatening statements, the defendant's social media post in late December 2020 or early January 2021 inquiring whether readers knew of anyone else that promoted the plaintiff, the defendant's past publication of the impugned statements about the plaintiff as recently as spring 2022 directed at his business associate Hot Milk[2], and with the plaintiff having secured a new recording agreement and on tour, I also accept the plaintiff's submission that if not restrained, there is a high degree of probability

[2] Noting that to address the concerns of the plaintiff's counsel potentially justifying immediate interim injunctive relief, at the May 3, 2022 court appearance, the defendant's counsel confirmed that the defendant had no intention of increasing her publication of statements about the plaintiff.

that the defendant will again soon publish the impugned statements or like words with a view to further harming the plaintiff's reputation and career.

[86] The balance of convenience is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. I acknowledge that with the granting of an interlocutory injunction, the defendant's freedom of expression is restricted. However, this restriction on the defendant's freedom of expression is only until trial. If ultimately the defendant is successful at trial, this restriction on her freedom of expression will be removed. In this sense, I agree with the plaintiff's counsel that with the granting of the interlocutory injunction, it is only time that the defendant loses. In contrast, if the interlocutory injunction is refused, the defendant will remain at liberty to continue publishing the impugned statements about the plaintiff that are clearly defamatory and, as discussed, are causing him irreparable harm. For these reasons, the balance of convenience favours granting the interlocutory injunction.

[87] In carefully weighing as interrelated considerations each of the factors to be considered on a motion for an interlocutory injunction, I am granting an interlocutory injunction. Recognizing that an injunction must not be broader than reasonably necessary, based on the evidence and balancing the importance of freedom of expression, the injunction will not be as broad as that sought by the plaintiff. The interlocutory injunction will restrain and prohibit the defendant from publishing, including on social media and to third parties such as the plaintiff's

business associates, the impugned statements or any other disparaging statements about the plaintiff. This injunction does not prevent the defendant from communicating with police or other justice officials regarding her allegations against the plaintiff.

[88] Turning to communications by the defendant of other statements (of the kind made to the plaintiff and his mother in 2019), these give rise to a serious question to be tried about online harassment[3]. However, there is no substantial evidence that these other kind of statements have been more recently made so as to conclude irreparable harm will result if an injunction is not granted or to find that the balance of convenience favours the granting of an injunction. Considering and weighing all of the relevant criteria, including my view that the injunction I have granted regarding the impugned statements and other disparaging statements about the plaintiff is adequate to address irreparable harm and further pending harm to the plaintiff's career, I am not satisfied that an injunction should be granted to restrain these other kind of statements.

CONCLUSION

[89] In summary, I have concluded as follows:

- The plaintiff's motion to admit additional affidavit evidence is dismissed.

[3] Applying the principles articulated recently in case law on online harassment, without actually determining whether the tort of online harassment exists in Manitoba or determining whether these communications would be statute barred as argued by the defendant.

- The plaintiff's motion that the defendant be required to produce a copy of her police report and that she be sanctioned for making this report is dismissed.
- The defendant's motion to strike the whole or parts of the statement of claim or for further particulars is dismissed.
- By way of interlocutory injunction, the defendant is restrained and prohibited from publishing statements, including on social media and to third parties such as the plaintiff's business associates, that the plaintiff was sexually, emotionally and physically abusive of her, repeatedly sexually assaulted her, and did similarly to other women, or any other disparaging statements about the plaintiff. This injunction does not in any manner prevent the defendant from communicating with police or other justice officials regarding her allegations against the plaintiff.

[90] If costs cannot be agreed upon, I will receive written submissions.

_____ A.C.J.